1957

• Volume 1 •

Volume 1

GR Mandavia v The Commissioner of Income Tax	[1957] 1 EA 1 (CAN)
Abdul Rehman and another v RH Gudka	[1957] 1 EA 4 (CAN)
Jagat Singh Bains v Halimabibi (Widow of Ismail Mohamed Chogley)	[1957] 1 EA 13 (CAN)
Gathuthi Hotel v Fazal Ilahi	[1957] 1 EA 17 (CAN)
Jadavji Shamji Pandya v The Oriental Fire and General Insurance Co Ltd	[1957] 1 EA 21 (CAM)
Siraj Din v Ali Mohamed Khan	[1957] 1 EA 25 (CAN)
GG Somaiya & Co Ltd and another v Govindji Popatlal	[1957] 1 EA 30 (CAN)
Yowana Settumba v R	[1957] 1 EA 35 (CAK)
Patrisi Ozia v R	[1957] 1 EA 36 (CAK)
Khatijabai Jiwa Hasham v Zenab d/o Chandu Nansi, widow of Haji Gulamhussein Harji deceased as legal representative	[1957] 1 EA 38 (CAN)
Sultan Sir Saleh Bin Ghaleb and others v Saif Bin Sultan Hussain Al Quaiti and others	[1957] 1 EA 55 (CAN)
Oriental General Stores Ltd v Bhailalbhai Rambhai Patel and others	[1957] 1 EA 77 (CAN)
Raichand Lakhamshi and another v Assanand & Sons	[1957] 1 EA 82 (CAN)
Sheikh Brothers Limited v Arnold Julius Ochsner and another	[1957] 1 EA 86 (PC)
Haji Mohamed Durvesh v Villain and Fassio	[1957] 1 EA 91 (CAN)
Terence John Image v R	[1957] 1 EA 94 (CAN)
Wladyslaw Bilous v Vera Bilous	[1957] 1 EA 96 (CAN)
Motibai Manji v Khursid Begum	[1957] 1 EA 101 (CAN)
Hassanali R Dedhar v The Special Commissioner and Acting Commissioner of Lands	[1957] 1 EA 104 (CAN)
Vishram Dhanji v Lalji Ruda	[1957] 1 EA 110 (CAN)
Geoffray De Souza v George Brothers Limited	[1957] 1 EA 115 (CAN)
MRV Churcher v The Landing & Shipping Company of East Africa Ltd	[1957] 1 EA 118 (CAD)
Hasham Jiwa v Popatlal Premchand Vora Trading as Supreme Traders	[1957] 1 EA 122 (CAN)
Puran Chand Many v The Collector under the Indian Land Acquisition Act, 1894	[1957] 1 EA 125 (CAN)
Ghulam Kadir v British Overseas Engineering Corporation (EA) Limited	[1957] 1 EA 131 (CAN)
Yusito Onguti s/o Oyoo v R	[1957] 1 EA 134 (CAK)
Robert Austin Mullery v R	[1957] 1 EA 138 (CAN)

Aboker Mohamed, HT Ahmed Farah, Rer Rageh and others v The Queen	[1957] 1 EA 146 (CAN)
Antonio Barugahare and others v R	[1957] 1 EA 149 (CAK)
Pascal Clement Braganza v R	[1957] 1 EA 152 (CAN)
Administrator-General, Zanzibar v Nassor Bin Fazil Bin Nassor and others	[1957] 1 EA 159 (SCZ)
Saleh Bin Mohamed v Suleman Bin Yusuf Bin Ahmed	[1957] 1 EA 163 (SCZ)
Asha Binti Musa and another v Ali Bin Musa Bin Ali Shirazi and The Wakf Commissioners	[1957] 1 EA 165 (SCZ)
MD Kermali and others v Mussa G Dhalla and others	[1957] 1 EA 168 (SCZ)
Valji Keshav Oza v CP Jani & Sons	[1957] 1 EA 184 (HCZ)
NA Patwa & Sons v The Hindoo Dispensary, Zanzibar	[1957] 1 EA 186 (HCZ)
Musa Bin Khamis Bin Juma El Nofli v Kaporo Bin Kasibu Mnyamwezi	[1957] 1 EA 189 (SCZ)
Saleh Bin Kombo Bin Faki v Administrator General, Zanzibar	[1957] 1 EA 191 (HCZ)
Hussein Bachoo v The Clove Growers Association of Zanzibar	[1957] 1 EA 193 (HCZ)
Silverio Peola v R	[1957] 1 EA 196 (HCZ)
Gokuldas Khimji Hindoo v R	[1957] 1 EA 203 (HCZ)
Abdulla Ali Nathoo v Walji Hirji	[1957] 1 EA 207 (HCZ)
Rashid Bin Salim Bin Mohamed v Mohamed Bin Said Bin Abeid	[1957] 1 EA 211 (HCZ)
PS Fernandes v R	[1957] 1 EA 212 (HCZ)
Tanitalia Ltd v Mawa Handels Anstalt	[1957] 1 EA 215 (HCZ)
Bakar Bin Ali v R	[1957] 1 EA 219 (HCZ)
Sureshbhai Dahyabhai Patel v The Principal Immigration Officer	[1957] 1 EA 221 (HCT)
Khimji Gordhandas and another v Chandrasen Narotam and others	[1957] 1 EA 223 (HCZ)
Edward Sargent v A Tisdale-Jones	[1957] 1 EA 226 (CAN)
Jenabai Sachoo and another v Shamsa Binti Humud Bin Shamis and another	[1957] 1 EA 227 (HCZ)
Panayotis Nicolaus Catravas v Khanubai Mohamed Ali Harji Bhanji	[1957] 1 EA 234 (HCT)
Re Katengera Estate Ltd	[1957] 1 EA 239 (HCT)
Re Tanganyika Produce Agency Limited	[1957] 1 EA 241 (HCT)
The Municipal Council of Dar-es-Salaam v AB De P Almeida and three others	[1957] 1 EA 244 (HCT)
TH Patel v R Lawrenson and Anders Matzen	[1957] 1 EA 249 (HCT)
Khatijabai Jiwa Hasham v Zanab d/o Chandu Nansi widow and executrix of Gulamhussein Harji, deceased	[1957] 1 EA 255 (CAN)
The Attorney General v Ally Kleist Sykes	[1957] 1 EA 257 (HCT)
Shamsudin s/o Issa Kassam Abji v R	[1957] 1 EA 260 (HCT)
Jimmy Fannceca v ES Amrolia	[1957] 1 EA 263 (HCT)
The Director Tanganyika National Parks v Ngutata s/o Lesila and Another	[1957] 1 EA 265 (HCT)

Re an Arbitration between Muljibhai Madhavani & Co Ltd and IH Lakhani & Co (EA) Ltd	[1957] 1 EA 268 (HCU)
VG Lakhani v RP Amin	[1957] 1 EA 270 (HCU)
JP Pandya v The Kampala Municipal Council	[1957] 1 EA 272 (HCU)
Re Pioneer Agencies Limited and the Advocates Remuneration and Taxation of Costs Rules	[1957] 1 EA 274 (HCU)
Muslim Sunni Jamat v Mafalda Barros	[1957] 1 EA 275 (HCU)
Re an Application by Mohamed Ahmed for an order of Prohibition	[1957] 1 EA 277 (HCU)
George Buwanika and another v R	[1957] 1 EA 279 (HCU)
R v Nyamitare s/o Kachumita	[1957] 1 EA 281 (HCU)
RB Sirdaw v the New Asiatic Insurance Co Ltd and another	[1957] 1 EA 282 (HCU)
Mahendra Maganlal Pandya v R	[1957] 1 EA 286 (HCT)
Re Sejpal Limited	[1957] 1 EA 289 (HCU)
Nanji Khodabhai v Sohan Singh and another	[1957] 1 EA 291 (HCU)
R (Ex parte Vere Chamberlain Harvey-Brain) v Robert Confait	[1957] 1 EA 296 (CAN)
Laurenti Busolo s/o Makumba v R	[1957] 1 EA 298 (CAN)
Purshottam Kurji v Opa Laboratories Limited	[1957] 1 EA 299 (HCU)
Venonah Margaret Bray v Raymond Jack Bray	[1957] 1 EA 302 (HCU)
Gangabai Harji v Bhoja Keshav	[1957] 1 EA 304 (HCT)
Sita d/o Zatio and two others v R	[1957] 1 EA 308 (CAD)
Yolamu Kaluba v Kerementi Kajaya	[1957] 1 EA 312 (HCU)
Ratilal Gordhanbhai Patel v Lalji Makanji	[1957] 1 EA 314 (CAD)
Purshottam Narandas Kotak v A Ali Abdullah	[1957] 1 EA 321 (CAD)
Velji J Mehta & Bros Limited v RO Hamilton Limited	[1957] 1 EA 326 (HCU)
R v Magata s/o Kachehakana	[1957] 1 EA 330(HCU)
Ramanlal Trambaklal Bhatt v R	[1957] 1 EA 332 (CAD)
Dinkerrai Ramkrishan Pandya v R	[1957] 1 EA 336 (CAD)
The Attorney-General of Uganda v Gaburiel Ottii	[1957] 1 EA 341 (HCU)
Narotthandas Parmanandas Vithlani v R	[1957] 1 EA 343 (HCU)
Timiseo Karyarugokwe v R	[1957] 1 EA 345 (HCU)
R v Kalsons Limited and others	[1957] 1 EA 347 (HCU)
WSO Davies v Mohanlal Karamshi Shah	[1957] 1 EA 352 (CAN)
Mohanlal R Trivedi v R	[1957] 1 EA 355 (HCU)
Heptulla Brothers Limited v Jambhai Jeshangbhai Thakore trading as “London Photographic Arts”	[1957] 1 EA 358 (CAN)
Noor Mohamed v Shree Vishvakrma	[1957] 1 EA 364 (HCU)
Nagarbhai Ramchand Patel v The Trustee of the Property of Bhagubhai Nagarbhai Patel (a Bankrupt)	[1957] 1 EA 366 (CA)
Gopalbhai Nathubhai Mistry v R	[1957] 1 EA 368 (CAN)
John Moody Lawrence Brown and others v R	[1957] 1 EA 371 (CAN)
Taj Deen v Dobrosklonsky and Bhalla & Thakore	[1957] 1 EA 379 (CAN)
Damianus Orinda s/o Otieno v R	[1957] 1 EA 383 (CAN)
Menzour Ahmed s/o Sheikh Soleh Mohamed v R	[1957] 1 EA 386 (CAN)
Haji Yusufu Mutenda and others v Haji Zakaliya Mugnyiasoka and others	[1957] 1 EA 391 (HCU)

Naranjan Singh trading as Ramchand & Co v NJ Patel	[1957] 1 EA 394 (SCK)
Katumo Mulumba v R	[1957] 1 EA 397 (SCK)
Suleman Kara Osman v Walji Mulji Dattani and another	[1957] 1 EA 398 (HCU)
Re Ramniklal Harilal Bharadia	[1957] 1 EA 401 (HCU)
Lal Chand Sharma trading as Regal Provision Stores v Bush Mills	[1957] 1 EA 404 (SCK)
Kanji Purshottam Toprani v Sydney Moss	[1957] 1 EA 408 (CAN)
R v Bhagubhai Nagarbhai Patel and others	[1957] 1 EA 411 (SCK)
Lambert Houareau v R	[1957] 1 EA 414 (CAN)
R v Bhagubhai Nagarbhai Patel and others	[1957] 1 EA 416 (SCK)
Hasham Jiwa v Popatlal Premchand Vora trading as "Supreme Traders"	[1957] 1 EA 420 (CAN)
Musembi s/o Kilonzo and another v R	[1957] 1 EA 422 (CAN)
Joseph Mbebi s/o Mati and others v R	[1957] 1 EA 426 (SCK)
Isiah M'Mwendwa s/o M'amunde v R	[1957] 1 EA 429 (SCK)
Maganbhai Manorbhai Patel v R	[1957] 1 EA 431 (SCK)
Naurang Singh s/o Hukam Singh v R	[1957] 1 EA 433 (SCK)
Mulchand Punja Shah v R	[1957] 1 EA 436 (SCK)
Velji Shahmad v Shamji Bros. and Popatlal Karman & Co	[1957] 1 EA 438 (SCK)
Farrab Incorporated v Brian John Robson and others	[1957] 1 EA 441 (SCK)
Kamrudin Mohamed v Jinja Co-Operative Society Ltd	[1957] 1 EA 443 (CAK)
Josephine Arissol v R	[1957] 1 EA 447 (CAN)
The Uganda Company Limited v The Commissioner of Income Tax	[1957] 1 EA 450 (HCU)
Bonifasi Wenani s/o Ndiyo v R	[1957] 1 EA 453 (CAN)
Zuberi s/o Rashid v R	[1957] 1 EA 455 (CAN)
Farrell Lines Inc v Landing and Shipping Company of East Africa Ltd	[1957] 1 EA 460 (CAD)
The Registrar-General v Manubhai Shankerbhai Desai	[1957] 1 EA 463 (CAD)
Shah Kachra Merag v Gandhi & Company	[1957] 1 EA 466 (CAN)
Shiv Kumar Sofat v R	[1957] 1 EA 469 (CAN)
RR & Company Ltd v Abdul Sakur	[1957] 1 EA 471 (CAK)
Bampamiyki s/o Buhile v R	[1957] 1 EA 473 (CAN)
Abdul Aziz v Pioneer Agencies Ltd	[1957] 1 EA 479 (CAN)
City Council of Nairobi v Maharaj Krishan Bhandari	[1957] 1 EA 481 (CAN)
Omar Bin Mohamed Al Hatim v Mohsin Bin Saleh Alkhlagy Legal Representative of Swaleh Bin Mohussein through his Attorney Mohamed Yahya Bin Shamut	[1957] 1 EA 486 (CAN)
M Suleman Versi Limited (in liquidation) v IH Lakhani & Co (EA) Ltd	[1957] 1 EA 491 (CAD)
Misaki Choda v R	[1957] 1 EA 495 (HCU)
Wafula s/o Waminira v R	[1957] 1 EA 498 (CAN)
Purshottam B Patel v The Commissioner for Income Tax	[1957] 1 EA 500 (HCU)
Hasham Meralli and another v Javer Kassam & Sons Ltd	[1957] 1 EA 503 (CAN)
Alfred Granville Ross v R	[1957] 1 EA 507 (CAN)
Commissioner of Income Tax v Jaffer Brothers Limited	[1957] 1 EA 519 (HCU)
Mohamed Ahmed v R	[1957] 1 EA 523 (CAK)

Girdhari Lal Vidyarthi v Ram Rakha	[1957] 1 EA 527 (CAN)
Noor Binti Sharaf Ahmed v Abdo Ali Sallam & another	[1957] 1 EA 532 (SCA)
Paolo Cavinato v Vito-Antonia Di Filippo	[1957] 1 EA 535 (CAN)
Ngambo Estate and Saw Mills Ltd v Sikh Saw Mills (Tanganyika) Ltd	[1957] 1 EA 537 (CAD)
Juma Subira v R	[1957] 1 EA 544 (HCU)
R (at the instance of Virapin Lesperance Chetty) v VG Pillay	[1957] 1 EA 546 (CAN)
Mohamed Yusuf Arap Abdulla Arap v R	[1957] 1 EA 551 (CAN)
Kaplotwa s/o Tarino v R	[1957] 1 EA 553 (CAN)
Robert Confait v R	[1957] 1 EA 555 (CAN)
GR Hunter v R	[1957] 1 EA 561 (SCK)
Dhirajlal Ramji Khetani v R	[1957] 1 EA 563 (CAK)
Boniface s/o Muhindi and another v R	[1957] 1 EA 566 (CAN)
Shantilal Maneklal Ruwala v R	[1957] 1 EA 570 (CAK)
Lambert Houareau v R	[1957] 1 EA 575 (CAN)
PJN Storm v Central Provision Stores	[1957] 1 EA 579 (SCK)
Pimako Karemira v R	[1957] 1 EA 582 (HCU)
EMK Mulira and another v The Lukiko	[1957] 1 EA 584 (HCU)
DNG Jakana and another v The Lukiko	[1957] 1 EA 587 (HCU)
The Commissioner of Income Tax v Buhemba Mines Limited	[1957] 1 EA 589 (CAN)
Abdul Kaderbhoy Assabwalla v Abdul Aziz Saeed	[1957] 1 EA 597 (CAN)
Trikamlal Vallabhdas Bhimjani v Rambhai Mathurbhai Patel	[1957] 1 EA 600 (CAN)
Puran Singh v Bishen Singh Chadah	[1957] 1 EA 610 (CAN)
Haja Arjabu Kasule v FT Kawesa	[1957] 1 EA 611 (HCU)
Arthur Tisdale-Jones v Edward Sargent	[1957] 1 EA 613 (CAN)
The Trustees of “The Sheikh Fazal Ilahi Noordin Charitable Trust” v The Commissioner of Income Tax	[1957] 1 EA 616 (CAN)
John Baptist Marcus D’Sa v R Prabhudas Becharbhai Chawhan v R	[1957] 1 EA 627 (HCU)
Natubhai Bapubhai Thakor v R	[1957] 1 EA 632 (SCK)
Harbans Singh Isher v R	[1957] 1 EA 635 (SCK)
Natoobhai Kashibhai v R	[1957] 1 EA 638 (SCK)
Highlands Commercial Union Limited v Abdulmalek Ahmed Jamal	[1957] 1 EA 641 (HCT)
Yoana Matovu v The Katikiro	[1957] 1 EA 648 (HCU)
R v Zakaria s/o Mfango	[1957] 1 EA 651 (HCT)
Teja Singh and others v Isher Singh and others	[1957] 1 EA 654 (CAK)
R v Absolom s/o Mohanga and Wilson s/o Wasike	[1957] 1 EA 660 (SCK)
R v John Gedeon and Simon Jeremiah	[1957] 1 EA 664 (HCT)
R v Nazerali Merali	[1957] 1 EA 670 (HCT)
Fatima Sheikh Khairuddin v Sheikh Ali Ahmed	[1957] 1 EA 672 (SCA)
Fatoom Bint Abdul Razak Mamda v Nabiha Bint Ahmed Mohamed Ibrahim	[1957] 1 EA 673 (SCA)
Ali Omer Ockba v Aziza Bint Ali Omer Ockba	[1957] 1 EA 675 (SCA)
The Commissioner of Customs and Excise v Sidik Elias	[1957] 1 EA 680 (CAM)

R v Omari Abdullah	[1957] 1 EA 687 (HCT)
Abdulla Bin Said Bin Hassan v Halima Binti Said Bin Hassan and another	[1957] 1 EA 688 (SCK)
Udham Kaur Administratrix of Hurbaksh Singh s/o Bishen Singh (Deceased) Trading as EA Joinery Works Company v Khimji Premji Patel	[1957] 1 EA 694 (SCK)
In the Estate of Sheikh Fazal Ilahi	[1957] 1 EA 697 (SCK)
Kulsumbai Gulamhussein Jaffer Ramji and another v Abdulhussein Jaffer Mohamed Rahim, Executor of Gulamhussein Jaffer Ramji, Secretary, Wakf Commissioners, Zanzibar and others	[1957] 1 EA 699 (HCZ)
Karsan Velji v R	[1957] 1 EA 702 (SCK)
Shadi Ram Mohindra v BC Mohindra	[1957] 1 EA 708 (SCK)
Elijah Ndegwa v President and Members of Nairobi Liquor Licensing Court	[1957] 1 EA 709 (SCK)
Re GM (an Infant)	[1957] 1 EA 714 (SCK)
Jivandas Goculdas v The Administrator General, Zanzibar, Administrator of the Estate of Amour Bin Mohamed El Muharmi Deceased	[1957] 1 EA 718 (CAZ)
Charles Hermenegildo Dias v Hasham Jiwa and another	[1957] 1 EA 724 (SCK)
Mashavu Binti Nassor v Meyya Binti Said Khalid	[1957] 1 EA 727 (SCZ)
The Municipal Council of Dar-Es-Salaam v Joao Franco Paes	[1957] 1 EA 729 (CAD)
Paul Hecht v ST Morgan	[1957] 1 EA 741 (SCK)
Chunibhai J Patel and another v P F Hayes and others	[1957] 1 EA 748 (CAK)
Trevor Price and another v Raymond Kelsall	[1957] 1 EA 752 (CAK)
R v Bhagubhai Nagarbhai Patel and others	[1957] 1 EA 767 (SCK)
Naumann, Gepp (East Africa) Ltd v Ranchhodbhai Baberbhai Patel and others	[1957] 1 EA 771 (SCK)
Machiby Mahambi and others v Sheikh Mohamed Haidri	[1957] 1 EA 778 (HCZ)
Ravi Bint Mohamed and others v Abdoo Shaher Ahmed	[1957] 1 EA 782 (SCA)
Suleman Mohamed Bhimji v R	[1957] 1 EA 786 (HCT)
Suleiman Fakir-Mohamed v Ambalal Joitram Hindoo	[1957] 1 EA 789 (HCZ)
S F Hassan v The Commissioner of Income Tax	[1957] 1 EA 793 (CAN)
Suleman Kara Osman v Walji Mulji Dattani and another Trading as Walji Mulji Dattani & Bros	[1957] 1 EA 796 (CAK)
Kibiego Arap Kipkiai and others v R	[1957] 1 EA 800 (SCK)
Hamed Bin Suleiman EL Busaidi v Salim Bin Ahmed EL Busaidi	[1957] 1 EA 801 (SCZ)
Kuria Wagachira v R	[1957] 1 EA 808 (SCK)
Charles Alfred Sutton v R	[1957] 1 EA 812 (SCK)
Taws Limited v The Commissioner of Customs and Excise	[1957] 1 EA 816 (CAN)
E L Doutre v Sanitary Stores Ltd	[1957] 1 EA 819 (CAK)
R v Ajit Singh s/o Vir Singh	[1957] 1 EA 822 (SCK)
Pal Singh and Hari Singh v EA Diesel Mart Limited	[1957] 1 EA 826 (CAN)
Shiv Kumar Sofat v R	[1957] 1 EA 840 (SCK)
Sayed Hussein s/o Sayed Ibrahim s/o Sayed Mohamed v R	[1957] 1 EA 844 (SCK)

In the Matter of the Estate of the late Sudi Bin Kwambira of Likoni v In the Matter of an Application for Letters of Administration de bonis non by Khamis Bin Sudi	[1957] 1 EA 848 (SCK)
Re the Highlands Commercial Union Limited	[1957] 1 EA 851 (HCT)
R v Ivan Terence Lacey	[1957] 1 EA 859 (SCK)
Hasham Kara v City Council of Nairobi	[1957] 1 EA 862 (SCK)
Ratanji Mulji v R	[1957] 1 EA 866 (SCK)
Elfie Heinrichsdorff-Gies and another v Henry George Dodd and another	[1957] 1 EA 869 (CAD)
Gokuldas Khimji Hindoo v R	[1957] 1 EA 874 (CAN)
Kabarak arap Chepkiru v R	[1957] 1 EA 879 (SCK)
Shantilal Gordhanbhai Patel and others v R	[1957] 1 EA 881 (SCK)
R v Leonard Kinyanjui s/o Kimani	[1957] 1 EA 885 (SCK)
R v Alfred Granville Ross	[1957] 1 EA 888 (SCK)
Kantibhai C Patel v R	[1957] 1 EA 890 (SCK)
Munyao Muu v R	[1957] 1 EA 894 (SCK)

GR Mandavia v The Commissioner of Income Tax

[1957] 1 EA 1 (CAN)

Division: Court of Appeal at Nairobi

Date of judgment: 4 January 1957

Case Number: 12/1956

Before: Sir Newnham Worley P, Briggs and Bacon JJA

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(In the matter of an Intended Appeal to Her Majesty in Council.)

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[1] Practice – Stay of execution pending appeal to Privy Council – The East African (*Appeal to Privy Council*) *Order in Council,* 1951, *s.* 7.

Editor's Summary

The applicant having obtained conditional leave to appeal to the Privy Council applied for an order directing "that the execution or operation of the order/judgment of this court be suspended pending the appeal to the Privy Council." The application was refused by the learned vice-president in chambers and it was then referred to the full court. It was submitted for the respondent that the application was misconceived in that it did not come within the scope of s. 7 of the East African (Appeals to Privy Council) Order in Council, 1951, as it was not an order "requiring the appellant to pay money or do any act." The order in fact merely confirmed the judgment of the Supreme Court which in turn had confirmed

assessments to tax made on the applicant by the respondent subject to certain modifications of penalties.

Held –

(i) a direction to pay costs is not of itself sufficient to bring the order appealed from within the definition of a "judgment which requires the appellant to pay money or do any act."

(ii) as the respondent could not execute directly on the judgment but must sue for the tax and penalties under s. 83 and s. 86 of the East African Income Tax (Management) Act, 1952, the application did not fall within the scope of s. 7 of the East African (Appeal to Privy Council) Order in Council, 1951.

Application dismissed.

Cases referred to in judgment:

(1) *Wilson v. Church* (No. 2) (1879), L.R. 12 Ch.D. 454.

Judgment

Sir Newnham Worley P: read the following judgment of the court: The applicant in this matter obtained conditional leave to appeal to Her Majesty in Council from the judgment and order of this court in Civil Appeal No. 31 of 1956. He then applied for an order directing

> "that the execution or operation of the order/judgment of this court . . . be suspended pending the appeal to the Privy Council."

This application came before the learned vice-president in chambers, who refused it, whereupon the applicant applied to have his application referred to the court under s. 14 (*b*) of the Eastern African Court of Appeal Order in Council, 1950 and r. 19 (6) of the Eastern African Court of Appeal Rules, 1954. On December 19, 1956, after

hearing the applicant in person and Mr. Hooton, Assistant Legal Secretary, for the respondent, we also refused the application with costs and now give our reasons.

The proceedings which have led up to the projected appeal to Her Majesty relate to assessments for East African income tax raised against the applicant and the operative part of the order of this court runs as follows:–

> "1. That the assessments to income tax raised upon the appellant in respect of the years 1943–1951 inclusive are, so far as such assessments relate to the basic tax, confirmed.
>
> "2. That those parts of the assessments for the years 1943–1950 inclusive which levy a penalty equal to the amount of the basic tax in each year, that is to say a total sum of Shs. 67,639/-, are confirmed.
>
> "3. That those parts of the assessments for the years 1943–1950 inclusive which levy a further penalty equal to twice the amount of the basic tax, that is to say a total sum of Sh. 135,278/-, shall be remitted to the Supreme Court for re-trial by a judge (other than the judge of first instance) whether the whole or any and what part thereof shall be remitted.
>
> "4. That the commissioner of income tax may, if he so desires, before the re-hearing referred to in paragraph 3 above, require all such returns to be made and accounts and information, including claims for allowances, to be submitted as will enable him to assess to his satisfaction the true basic liability to tax of the taxpayer for the years in issue.
>
> "5. That two-thirds of the respondent's costs in this appeal be paid by the appellant.
>
> "6. That the order as to costs of the court below shall stand.
>
> "7. That the costs of any re-trial shall be in the discretion of the judge."

The present application is brought under s. 7 of the East African (Appeal to Privy Council) Order in Council, 1951, which reads:

> "Where the judgment appealed from requires the appellant to pay money or do any act, the court shall have power, when granting leave to appeal, either to direct that the said judgment shall be carried into execution or that the execution thereof shall be suspended pending the appeal, as to the court shall seem just, and in case the court shall direct the said judgment to be carried into execution, the person in whose favour it was given shall, before the execution thereof, enter into good and sufficient security, to the satisfaction of the court, for the due performance of such order as His Majesty in Council shall think fit to make thereon."

The learned vice-president accepted Mr. Hooton's submission that the application was misconceived in that it did not come within the scope of s. 7; the submission was repeated before us and we also accepted it.

The appeal to this court was an appeal against assessments to tax raised by the respondent and confirmed by the Supreme Court. The decision of this court further confirmed those assessments with some modification as to penalties; it also confirmed the order for costs made in the Supreme Court and ordered the applicant to pay two-thirds of the respondent's taxed costs of the appeal. It is contrary to the usual practice, on an application of this nature, to stay any direction for the payment of costs, provided that the solicitor who is to receive the costs gives an undertaking to refund them if called upon to do so: Annual Practice, 1956, p. 1285: *Wilson v. Church* (No. 2) (1) (1879), L.R. 12 Ch.D. 454. Indeed, before the vice-president, Mr. Mandavia appears to have expressly stated that he was not asking for a stay of the order so far as it directed payment of costs. If before us he resiled from this admission, he did so half-heartedly and without conviction.

But, in any case, we think that a direction to pay costs is not of itself sufficient to bring the order

appealed from within the definition of a judgment which “requires the appellant to pay money or do any act.” We think that this phrase is intended to apply

to what may be termed the substantive order or orders of the court, i.e. the order or orders embodying the determination on the issue or issues raised in the appeal to the court. On any other view, the opening words of s. 7 would appear to be meaningless and otiose, since almost every judgment of the court contains an order for the payment of costs by the unsuccessful party, even if it be only a declaratory judgment or one dismissing a claim.

If this view is correct, then it is clear that there is nothing in the judgment which requires the applicant-appellant "to pay money or to do any act." As Mr. Hooton has pointed out the commissioner cannot execute directly on the judgment but must, unless the tax-payer pays voluntarily, sue for the tax and penalties under s. 83 and s. 86 of the East African Income Tax (Management) Act, 1952. He therefore submitted that the court had no jurisdiction to order a stay since the case does not fall within the scope of s. 7 of the Order in Council and he reinforced this submission with a reference to s. 78 (ii) of the Act which provides:

> "notwithstanding that an appeal from the decision of the judge has been lodged, tax shall be assessed and collected in accordance with the decision of the judge."

There follow provisos for adjustment should the amount of the assessment be varied either by this court or by Her Majesty in Council.

The applicant's answer to these arguments amounted to little more than a plea ad misericordiam. He asserted that this court had an inherent jurisdiction to grant a stay which was not limited by s. 7 of the Order in Council, that the commissioner was sufficiently secured by the deposit of title-deeds and that a forced sale of his properties in the present conditions, whether as a consequence of further proceedings or to enable him voluntarily to discharge the assessments would involve him in heavy losses.

We found ourselves unable to accept the view that we have any wider jurisdiction to order a stay than is conferred upon us by s. 7 of the Order in Council. There is nothing in Part VIII or r. 53 of the 1954 Rules of this court which extends or purports to extend that jurisdiction.

We therefore rest this decision solely on the ground that this application does not fall within the scope of s. 7. It is accordingly not necessary for us to express any opinion on Mr. Hooton's argument that sub-s. (ii) of s. 78 of the Act effectively prevents the exercise of the discretion to order a stay even where such discretion exists. We also express no opinion on the merits of Mr. Mandavia's application. There are points which may have to be considered by another court if the commissioner takes further proceedings to collect the tax and penalties confirmed by the judgment of this court.

Application dismissed.

Applicant in person.

For the respondent:
JC Hooton
The Legal Secretary, East Africa High Commission

Abdul Rehman and another v RH Gudka
[1957] 1 EA 4 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	1 March 1957
Case Number:	35/1956
Before:	Sir Newnham Worley P, Sir Ronald Sinclair V-P and Briggs JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya Harley, Ag. J

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[1] Landlord and tenant – Re-building of business premises – Whether tenant's rights under Rent Control Board's order are against the landlord or against the land.

Editor's Summary

The appellants were the successors in title to the landlord of certain premises and the respondent was a protected tenant of one of the shops in the premises. The building having been damaged by fire the landlord obtained possession with a view to rebuilding, the Rent Control Board ordering on March 20, 1951, as one of the conditions of obtaining possession, that he should grant leases for seven years of the shops in the new building to the original tenants, the rents to be assessed by the board. The re-building was completed and the respondent went into possession of his shop on December 1, 1952, and had been in occupation ever since. The new shops were not controlled and the Increase of Rent (Restriction) Ordinance, 1949 (*K*.) ceased to apply to all business premises on December 24, 1954. Before he went into occupation correspondence between his advocate and the landlord's advocate showed that both parties intended and expected that a seven-year lease would be granted. The board at a meeting on December 17, 1952, determined the total rent to be paid in respect of all the shops but the apportionment of that total between the individual shops was not effected. At a subsequent meeting of February 20, 1953, of which no notice was given to the parties, the board assessed the individual rents, the respondent's shop being assessed at Shs. 350/- per month. No formal note of the proceedings was taken but the chairman made and signed a note on one copy of the plan of the building which sufficiently recorded the board's decision. The copy of the plan so annotated was sent to the landlord but the tenants were not notified at all and no copy of the chairman's note was retained in the board's file. There was, therefore, no record in the board's file of the precise decision arrived at by the board, although the minute book showed that a decision was arrived at. The landlord notified the tenant of the assessed rent and this was paid for some months from December 1, 1952. The respondent, along with other tenants, considered applying for a review of the assessment with a view to having it reduced, but on enquiry at the board's office were told that no assessment had been made, their information relying on the board's file only. This state of confusion continued at least until January 26, 1954, when the secretary of the board informed the tenants and the landlord that no assessments had then been made and they would be made on March 5, 1954. The tenant had not received a draft lease and in June, 1953, the present appellants purported to give the tenant notice to determine on August 1, 1953 "the contractual tenancy now subsisting" in respect of the shop and that the "standard rent" of Shs. 350/- would be increased by ten per cent. "from and after the date of termination of the contractual tenancy." The tenant thought he was liable to pay the increased rent and did so for two months by separate cheques of Shs. 35/- each separately from the normal monthly cheques of Shs. 350/- and at the request of the first appellant. Ultimately the

appellant's advocate on January 10, 1955, sent a notice to quit and at the same time offered a new lease at Shs. 550/- per month. A counter offer by the respondent's advocate to accept a lease at Shs. 350/- was refused and the appellants sued. The proceedings were dismissed, the decree ordering that the dismissal should constitute a declaration that the respondent was in lawful possession of the suit premises for a term of seven years and should have costs and a certificate for costs of Queen's Counsel.

Held –

(i) as the respondent had not employed a Queen's Counsel there was no jurisdiction to certify for the costs of a Queen's Counsel and that the decree should be amended accordingly.

(ii) in the absence of any counterclaim there was no jurisdiction to make in favour the declaration which appeared in the decree.

(iii) the rights of the respondent were rights in personam against the landlord; he had no interest in the land as such and would not have any interest unless and until a lease was registered.

Appeal dismissed with costs subject to a variation of the decree of the Supreme Court by deleting the reference to the declaration and the certificate of costs of Queen's counsel.

Cases referred to:

(1) *Inder Singh Gill v. B.E.A. Timber Co.*, E.A.C.A., Civil Appeal No. 18 of 1956, unreported.

(2) *Ragoonathdas v. Morarji* (1892), 16 Bom. 568.

(3) *Ariff v. Jadunath* (1931), 58 I.A. 91.

(4) *Pir Bakhsh v. Mohamed Tahar* (1933–34), 61 I.A. 388.

(5) *Bawa Singh Melaram v. Patel*, E.A.C.A., Civil Appeal No. 99 of 1955, unreported.

March 1. The following judgments were read.

Judgment

Briggs JA: This is an appeal from a judgment and decree of the Supreme Court of Kenya. The appellants are the successors in title of one Allah Ditta Qureshi deceased, who in 1950 was the owner of a building in Nairobi occupied by a number of protected tenants, of whom the respondent was one. He occupied a shop on the ground floor. The building having been seriously damaged by fire, the landlord desired to rebuild. He prepared plans providing for eleven shops on the ground floor and a number of flats on two upper floors. He then applied to the Central Rent Control Board to evict the tenants, and submitted to terms being imposed. On March 12, 1951, the board ordered possession on condition, *inter alia*, that six tenants of ground floor shops, including the respondent, should on completion of the new building forthwith be re-admitted as tenants of specified shops and should be granted leases thereof for seven years at rents to be assessed by the board, sub-letting and assignment to be prohibited unless with the landlord's consent. The rebuilding was duly completed and the respondent went into occupation of his new shop on December 1, 1952. He has been there ever since. It must be observed that, in view of the date of building, the new shops have never been controlled premises, and in addition, that the Increase of Rent (Restriction) Ordinance, 1949, ceased to apply to all business premises on December 24, 1954.

Before the respondent went into occupation of the new shop his solicitor had some correspondence with the landlord's solicitors which shows that both parties then intended and expected that a seven years lease would be executed. This correspondence followed the dismissal of successive appeals by the landlord to the Supreme Court and this court by which he attempted to have his obligation to grant such leases set aside. It will be necessary to refer again to the judgment of this court, which was delivered on April 4, 1952. It must be remembered that, where the board had to assess at this period the standard rent of new premises, such rent was by virtue of s. 2 (1) of the Ordinance based on "the market cost of construction . . . at the date of completing such construction," and therefore could not be assessed until after construction was completed. Again, although the board's duty to assess the rent to be paid under the

new leases was distinct and different in effect from an assessment of standard rent, it was obviously desirable from all points of view that before making that assessment the board should have in mind what a notional standard rent would be. It must therefore, I think, have been contemplated by all concerned that, although possession was to be given immediately on completion of the new building, assessment of the rents could not be effected for some time thereafter, and in consequence the

leases could not be executed before possession was given, but possession would be taken in each case in expectation of a lease.

It seems that the landlord applied in good time to have the rents assessed and on December 1, 1952, the board gave notice to the respondent and others interested that this would be done at a meeting on December 17. At that meeting the total rents of the whole building and the individual rents of the flats were determined, and the total rents of the eleven shops were thus ascertained, but the apportionment of that total between the individual shops was not effected. It seems that neither the respondent nor his solicitor attended the meeting. It is possible that they were told that the matter in which they were primarily interested was not likely to be reached, but this is mere speculation. They certainly had the opportunity to make representations to the board about the amount of the respondent's rent. The matter was apparently not adjourned to any specific date, and no notice was given to the parties of the meeting at which the board later resumed consideration of it. The meeting, however, duly took place and a properly constituted board under the chairmanship of Sir Ribton Meredith assessed on February 20, 1953, the rents of the shops of which leases were to be granted. The chairman took no formal note of the proceedings, but a plan of the building was before the board and he made and signed a note on one copy of the plan which sufficiently records the board's decision. The rent assessed for the respondent's shop was Shs. 350/- per mensem. The copy of the plan so annotated was sent to the appellant by way of informing him of the board's decision, but the tenants were not informed at all. Most unfortunately, no copy of the chairman's note was made on the copy of the plan which was retained in the board's file, and no record of the precise nature of the board's decision existed thereafter in the board's own records, though the fact that a decision was made appears from the minute-book. The results of this error have been far-reaching and, if it had not occurred, this litigation might never have been started.

It was suggested before us that the assessment of rent may have been irregular or a nullity because it was made in the absence of the parties. The point was not pressed, and in view of the terms of the defence I am not sure that it was open to the respondent, but in any event I think that it is without substance. If the respondent had attended on December 17 and stated that he desired to be heard as regards the rent of his shop, I have no doubt that he would have been given full opportunity to attend the later meeting, but it was assumed quite justifiably that he did not wish to attend. This was the more reasonable since the apportionment was in the result a mere arithmetical calculation on a basis of shillings per square foot. Even if notice of the meeting should have been given to the respondent, I think that the omission to give it was a mere irregularity and that the assessment was not a nullity, but valid at least until set aside on appeal or in some other proceeding. I am clearly of opinion that the rent to be paid under the lease of the respondent's flat has been assessed by the board in terms of the board's order of March 12, 1951, and that, if that assessment was ever open to challenge, the time for any such challenge has long since gone past.

On receiving back his plan with the chairman's note the landlord informed the respondent of the assessment, and the respondent paid the assessed rent for some months from December 1, 1952. He seems to have considered that it was rather high and contemplated an application for review with a view to having it reduced. It appears that the tenants of some other shops took the same view, and were also somewhat alarmed that their leases were not forthcoming. They made enquiries at the board's office and were apparently told, incorrectly, but in the circumstances rather naturally, that no assessments had yet been made. Their informant relied on the file and did not consult the minute-book. Reference to Sir Ribton Meredith was later impossible, since he retired in April, 1954, and was then gravely ill. This state of confusion continued at least until February 26, 1954, when the secretary of the board definitely

confirmed the various tenants of the shops and the landlord by letter that no assessments had yet been made, and it was proposed to make them at a meeting of the board on March 5, 1954.

It is now necessary to go back to early 1953. On April 1, 1953, the landlord's solicitors wrote to the respondent's solicitor that they understood that the rent had been assessed at Shs. 350/-. In this, as I have explained, they were right. They added, "A draft lease will be sent to you in due course." Nothing more transpired until about June 14 when the present appellants, who were by this time the landlords, sent to the respondent a most peculiar and, as I think, very disgraceful letter. It purported to give notice to determine as on August 1, 1953, "the contractual tenancy now subsisting" in respect of the shop, and in addition that the "standard rent" of Shs. 350/- would be increased by ten per cent. under s. 13 of the Ordinance "from and after the date of termination of the contractual tenancy."

It is not known who drafted this letter, but it was clearly someone having some knowledge of legal matters. I think he must have known, and the appellants also must have known, that the words "contractual tenancy," if applicable at all to the respondent's occupation, could apply only in a very special sense, and that his rights were not such as could be determined by a notice of this kind. They must also have known that the rent being paid was not a "standard rent" within the meaning of the Ordinance, and was not subject to a ten per cent. or any increase under its provisions. No reference is made to their solicitors' promise to send a draft lease, and no excuse is given for this unexplained volte-face. Nor does it appear why the solicitors on both sides should be by-passed. But there was no doubt a good reason for this. If this letter had come to the hands of the respondent's solicitor, the reply would have been in forcible terms and would no doubt have included a threat of action unless it was withdrawn. The respondent, however, is not a lawyer. He did not protest about the purported termination of his so-called "contractual tenancy." He apparently thought at first that he must pay the additional ten per cent., and for two months he did so, by cheques dated August 11 and September 14, 1953, for Shs. 35/- each. These were given separately from the normal monthly cheques for Shs. 350/-, at the request, it is said, of the first appellant. No good reason is given for this, but the form of the transactions suggests to my mind that the appellants were well aware that they were doing something shady.

The appellant's counsel contended before us that the respondent had never wanted a seven years lease after the time when he was told that the rent was to be Shs. 350/-. He was constrained to admit that at the time when the letter of June 14 was sent the respondent could have protested and could still have enforced the grant of a lease; but he submitted that the absence of protest and the payment of the two sums of Shs. 35/- together amounted to an abandonment or waiver of the respondent's right to a lease, or alternatively, estopped him from relying on such right. I will deal with these submissions in due course.

When the appellants received the board's letter of February 26, 1954, they took steps to correct the mistaken impression that the rents had not been assessed by producing the annotated copy of the plan, and it was before the board on March 5 at their meeting. The deputy chairman was still in some doubt whether the assessments, having been made in the absence of the parties, were valid; but the board directed that any tenant objecting to them should apply formally for review. Some of the tenants, and among them the respondent, did so. Some expressed themselves as satisfied and later obtained leases. The applications for review were set down for hearing on April 13, 1954, but were then adjourned sine die at the request of the appellant's counsel, and had not been heard when the Ordinance on December 24, 1954, ceased to apply to any business premises. It seems then to have been assumed, and I think correctly, that the board's power, if any, to hear the applications had finally lapsed. At least, they have never since been listed or heard.

Meanwhile, however, the appellants had, at some time after April 1, 1953, changed their solicitors and on June 15, 1954, the new solicitors sent to the respondent a second notice purporting to determine his

tenancy on June 30, 1954, or at the end of the relevant month thereafter, and requiring him to pay a small additional sum as rent in consequence of an increase of rates. A cheque for Shs. 65.40 representing such

addition for one year was sent on July 7, 1954. Again the respondent did not consult his solicitor, but the increase was a small one and he presumably preferred to pay, rather than refuse and possibly thereby prejudice his position. No protest was made about the purported determination of his tenancy. The appellant's counsel again relies on these facts as showing abandonment, waiver or estoppel.

As soon as the Ordinance had ceased to apply to business premises, the appellants took prompt and vigorous steps to effect what had apparently been their object ever since June, 1953, namely, to nullify their obligation to grant a lease to the respondent, and to obtain either from him or from someone else a higher rent than that assessed by the board. Accordingly, on January 10, 1955, their solicitors sent a third notice to quit, to take effect on January 31 or at the end of the relevant month thereafter. The letter also contained an offer to grant a new lease as from February 1, 1955, at a rent of Shs. 550/- per mensem and a threat to sue for the ten per cent. increase of rent from July, 1953 onwards. This time the respondent did take the letter to his solicitor, who wrote to the board saying that he understood that no assessment of rent had yet been made (in which he was in error) and asking that assessments be made forthwith. He also wrote to the appellants' solicitors, not asking for the execution of a lease, but stating that the respondent was entitled to continue in occupation by virtue of the board's original order. On January 25 the appellant's solicitors wrote to the board saying, *inter alia*,

> "These tenants have done nothing to get a lease and have slept over the judgment of the board and have by their conduct accepted the position of monthly tenants and their tenancies have been determined by a valid notice to quit.
>
> "We write to ask you to do nothing in the matter as it is our client's intention to institute eviction proceedings against these tenants."

A copy was sent to the respondent's solicitor, who replied offering to accept a lease at a rent of Shs. 350/-. This offer was refused and the appellants sued. Even at this stage there was considerable and unexplained delay, for the plaint is dated August 12, 1955. It claims possession and mesne profits from February 1, 1955. It alleges that prior to December 25, 1954, the respondent was a statutory tenant and that he held over after that date. It alleges further that he was paying a "monthly rent of Shs. 385/-," although he had paid the extra ten per cent. on only two occasions. Deliberately misleading statements of this kind in pleading do not commend themselves to me. The defence set up a right to occupy for seven years from December 1, 1952, by virtue of the board's order and in expectation of a lease thereunder. There was no counterclaim, but the defence purported to pray for a declaration of the rights of the respondent. The suit was heard and was dismissed, the decree being in the following terms:

> "It was Ordered
>
> "1. That the plaintiffs' suit be dismissed, such dismissal to constitute a declaration that the defendant is in lawful possession of the suit premises above referred to, namely Plot No. L.R. 209/163/1/60, Allah Ditta Qureshi Mansion, Ngara Road, Nairobi, for a term of seven years;
>
> "2. That the plaintiffs do pay to the defendant his taxed costs of this suit; and
>
> "3. That this case be certified fit for costs of Queen's counsel."

The appellants appeal to this court and, in addition to the major issue, take certain minor points which I will dispose of at once.

First, they contend that there is no jurisdiction under r. 61 of the Remuneration of Advocates Order, 1955 (*K.*) to certify a case as fit for Queen's Counsel, unless the party in whose favour the order for costs is made has in fact employed Queen's Counsel. On the plain wording of the rule this is obviously right,

and the decree must be amended accordingly. The point is not wholly academic, since, even if only one advocate’s costs were allowed, some of them might be taxed on a higher scale if such

a certificate could properly be given. Whether the rule in its present form is satisfactory in cases where one party justifiably employs a silk as leader and the other has no leader, is another question, and one with which we are not concerned; but it appears to be bound up with the attempt which has been made to standardize instruction fees. The practical answer may be that, if the unsuccessful party has thought the case of sufficient difficulty and importance to justify retainer of a silk as leader, he will find it difficult to resist an application that an instruction fee higher than the standard one should be allowed to the successful party who had no leader.

The second minor point is that, in the absence of any counterclaim, the learned judge had no jurisdiction to make in favour of the defendant the declaration which appears in the decree. In principle this must be correct. I think the point which influenced the learned judge to make this declaration may have been that he desired to indicate how far the decree should operate by way of res judicata. There may be cases where it is desirable to do this by way of recital to the decree by words such as "The court being of opinion that . . . etc." but in general this is unnecessary, since, if any question of res judicata arises later, the scope of the decree for that purpose can always be determined by looking at the words of the judgment on which it was based. In any event, a declaration should not be made in favour of a defendant, unless there is a counterclaim for it, or perhaps where it is merely the negative of a declaration claimed in the plaint. The danger of making such declarations is well exemplified in the present case, for it is clear that the respondent has no absolute and unqualified right to possession of the shop for a term of seven years, even if it were made clear that the term is deemed to have commenced on December 1, 1952. The suit should have been dismissed without further comment or order.

The third minor point arises in this way. Under s. 33 (1) of the Ordinance a certified copy of an order of the board may be filed in a Magistrate's Court and upon such filing and notice thereof to the opposite party the order "may be enforced as a decree of the court." The order of March 12, 1951, was never so filed until after the suit was started, but the respondent's solicitor then considered that it would be desirable to register the order against the title under s. 133 of the Crown Lands Ordinance. Possibly because of the words "Judgments and orders of a court" in the marginal note to the section, he was in doubt whether an order of the board as such could be registered. However that may be, in October, 1955, he sent a copy of the order for filing and at the same time asked the magistrate to prepare a decree giving effect to the order. This was a mistake. When filed, the order has effect as if it were itself a decree and it is neither necessary nor proper to base a decree on it. The magistrate, however, did as he was asked and sealed a "decree" which was sent for registration. It was at first sent to the wrong officer, which caused delay, and later it was found that the "decree" did not give particulars of the title affected, so it could not be registered at all. The respondent's solicitor then asked the magistrate to amend the decree and he did so. Finally the decree was registered against the land on January 19, 1956, a few days before the conclusion of the trial. Numerous questions were raised before us concerning this "decree." Objection was taken to the way it was drawn, to the way it was amended and to the way it was dated. I do not propose to deal with these objections in detail, because in my opinion the "decree" was in any event a nullity. Its registration would give notice on the register of the existence of the order of March 12, 1951, but otherwise I think it is of no importance. It is also, on the view I take of the case as a whole, unnecessary to consider the wider question whether after December 24, 1954, an order of the board relating to business premises could be filed at all under s. 33, but I do not wish to be taken as thinking that it could. It is very arguable that the principles to be applied would be those stated in *Inder Singh Gill v. B.E.A. Timber Co.* (1), Civil Appeal No. 18 of 1956, unreported. I assume for purposes of the rest of this judgment that the order of March 12, 1951, as affirmed by the Supreme Court and this court, stands

alone, and must be considered as if it was never lawfully filed under s. 33 and as if the “decree” had never been drawn up. Some of the consequences of this will be discussed later.

I now turn to the points of substance raised on the appeal. The defence is a most unsatisfactory document. It seems to suggest in parts that the order of the board had conferred on the respondent something which I can only describe as a lease by operation of law. This of course is nonsense. All that the order gave him was a right, enforceable at one time by filing the order and executing in the Magistrate's Court, to have a lease granted to him. The order had, to put it shortly, the effect of a decree of a competent court for specific performance of a notional agreement to grant a lease, but with this difference, that it could not be directly enforced by the board itself. In speaking of a "notional agreement," I have in mind the previous judgment of this court, where it was pointed out that the landlord had never been obliged to act on the order of the board and, if he disliked the conditions imposed, could have let the whole matter drop; but that, having elected to take advantage of the order in his own interest, he must be taken to have agreed to the condition that he should grant leases, and could no longer be heard to dispute the validity of that condition. The rights of the respondent now, if they subsist, are rights in personam against the landlords. He has no interest in the land as such, and will not have any such interest unless and until a lease is executed and registered. If the landlords refuse to execute a lease, his remedy may be by separate action in the Supreme Court, or he may prefer to rely on his de facto occupation and inchoate rights. These questions are not before us, though they might well have been raised by a counterclaim. The preceding remarks are relevant to the appellants' first main ground of appeal. They contend that in law the position of the respondent is, at best, that of a person who has an executory contract for the grant of a lease. Such a person has in this country no legal or equitable interest in the land and his de facto possession in expectation of the lease will be no defence to a suit for possession and ejectment. *Ragoonathdas v. Morarji* (2), 16 Bom. 568; *Ariff v. Jadunath* (3), 58 I.A. 91; *Pir Bakhsh v. Mohamed Tahar* (4), 61 I.A. 388. The last two cases, however, both turned on the point that the defendant had slept on his contractual right until a suit for specific performance would have been statute-barred. If that had not been so, the plaintiffs' suit would have been stayed to enable the defendant to obtain a decree for specific performance, after which, it was assumed, his position would be impregnable. As Lord Macmillan said in *Pir Bakhsh's* (4)(1933–34), 61 I.A. 388, at p. 395,

> "The remedy thus available to the defendant would not have depended on any recognition of the agreement of sale as in itself a defence to the action of ejectment, but rather on the principle that the court will not grant a decree of ejectment which can at once be rendered ineffective by the same court being required to grant a decree of specific performance resulting in reinstatement. But the defendant did not ask for a stay, and did not raise any action for specific performance. Now he is too late to do so; the agreement of sale has become unenforceable."

The essential difference between the cases cited and this case is that here the respondent's right is not merely contractual, but is under an order of the board, a tribunal of competent jurisdiction, which is in effect a "decree of specific performance" entitling him to a lease and therefore to possession. To order possession against him would be to stultify the board's order and to ignore all principles of res judicata, unless it were first shown that for some reason the board's order has become ineffective or the respondent is no longer entitled to rely on it. The appellants attempt both these tasks.

It is contended that the board's order ceased to have effect when the Ordinance ceased to apply to business premises, and that the right, if any, to receive a lease determined at that date. There are two relevant decisions of this court, *Inder Singh Gill v. B.E.A. Timber Co.* (1), and *Bawa Singh Melaram v. Patel* (5), Civil Appeal No. 99 of 1955, unreported. We were asked to apply the rule laid down in *Inder Singh's* case (1), but I am clearly of opinion that *Bawa Singh's* case (5) provides the true analogy and should be followed in this one. *Inder Singh's* case (1) turned on there being a claim which was

enforceable, if at all, only by obtaining an order of the board. We held that after the critical date the board had no jurisdiction to entertain

the application for such an order. In *Bawa Singh's* case (5) the claim was a debt created by statute while the Ordinance was in force. We held that a subsisting civil right of this kind was not destroyed when the Ordinance ceased to apply to the premises in respect of which it arose. So also in this case I think that the respondent's rights under the order were in no way affected when the Ordinance ceased to apply to business premises. In the first place the new premises had never been controlled. The position might have been less clear if the rent had not been assessed before December 24, 1954, but in fact at that date nothing remained for the board to do. The respondent's right had crystallized. It is quite possible that since then he cannot enforce his right in the same way as he would previously have done; but it does not at all follow that other means of enforcement are not open to him. I think the order as such has not ceased to have effect.

The question whether the respondent is no longer entitled to rely on the order raises issues of fact. It soon became apparent that it was important to know whether the rent had been assessed by the board, and if so when, and at what figure, but this did not appear from the record. We accordingly called on our own motion the deputy chairman of the board, Mr. Roberts, whose evidence has enabled me to set out clearly the true facts. It was, however, even more useful for another purpose, that of explaining why the parties and the board were so long unable to understand what had really happened. Counsel for the appellants objected to our calling Mr. Roberts, and it may be that his case would have been more effective in the previous state of obscurity than it is when examined in the light of the facts now known. The necessity, as we thought it, for Mr. Robert's evidence sprang from the bad practice of attempting to prove the official acts of a body such as the board by oral evidence without producing certified copies of its records. If courts of trial would suppress this practice, much time and money would be saved in the long run. The saving in this case would have been such that it may necessitate a special order as to costs.

I have set out the principal acts and omissions of the respondent on which the appellants rely as showing that he is no longer entitled to a lease. They stress also that in 1953 rents were relatively low, but in January, 1955, when the respondent clearly demanded a lease, they were much higher and Shs. 350/- was less than a rack rent. They say that this caused the respondent to change his mind, and that from early 1953 to January, 1955, he never wanted a lease at all, but preferred to accept the position of a monthly tenancy offered to him by notice of June 14, 1953. The respondent's counsel on the other hand points out that at the end of 1952 the emergency was in its gravest phase and landlords were very apprehensive. At that time the appellants would have been only too pleased to grant a seven years lease at any reasonable rent. By June the situation had greatly improved. Confidence was restored and the trend of rents was upwards. The landlords had good reason to change their minds and try to avoid giving a lease. I might be more impressed by the appellants' argument on these lines if I could see the slightest affirmative indication that the tenant was ever reluctant to take up his lease, but I can see none. The negative indications, by failure to protest against the notices to quit and by payment of some small sums not due, must be considered only as showing the respondent's state of mind. In my opinion they show that he relied on his rights under the order, not that he intended to waive or abandon them. The payments are equivocal, for he may well have thought they were legally due. His long inaction seems to me to have been mainly caused by the confusion about assessment of the rent. It is true that the appellants said it had been assessed; but the board said it had not, and they should have known. Later the question of a possible review of the figure assessed must have seemed a good reason for not pressing matters. The respondent had instructed his solicitor to take all necessary steps to obtain a lease, and no doubt thought he was doing so. I think there is no reason for inferring, either from anything the respondent did, or from what he omitted to do, any intention on his part to waive or abandon his right to a lease. It is also, I think, to be

remembered that abandonment or waiver of rights under an order of court or of a competent tribunal is a more difficult matter to prove

than abandonment or waiver of rights which are merely contractual. But here the evidence would have been insufficient even for the latter purpose. I think the learned trial judge was entirely right on this issue. In any event, it was for the appellants to prove waiver or abandonment and they were in a poor position to do so. Their letter of June 14, 1953, was a repudiation of their obligations which was wholly unjustifiable. Their counsel did not allege any change of heart after that time, or seek to put the later notices on any higher level than the first. He sought to justify the first notice as, if I may so express it, a "try-on." Fortunately legal rights cannot be destroyed by such methods. If the respondent chose to treat the notice of termination with silent contempt, I am not prepared to say that he was wrong.

As regards estoppel, it is sufficient to say that it cannot be suggested that the respondent caused any detriment to the appellants. He did not by act or omission induce them to act in any way harmful to them. He gave them some slight advantages to which they were not entitled, but that was all. No basis for estoppel can be shown.

There remain one or two minor points. It might have been possible for the first appellant at one time to contend that, as a purchaser of a half-share of the property at a time when there was no notice of the board's order on the register, he was not bound by its provisions. But no such contention has ever been raised, and it would be much too late to raise it now.

It might also have been possible for the appellants to rely on laches as an answer to the respondent's claim to be entitled to a lease; but laches was never pleaded and no attempt was made to rely on it at the hearing, so the point is not before us.

I do not wish to be understood as agreeing in all respects with the reasoning of the learned trial judge in that part of his judgment where he considered whether the right to a lease had determined when the Ordinance ceased to apply to business premises. I do not think that the passage from this court's judgment which he cites in this connection is really apposite. The question whether the appellants should be allowed both to approbate and to reprobate was important at the time of the first appeal to this court, but did not arise later when the issue was whether the respondent's rights under the order had been rendered null or unenforceable by a subsequent change in the law. Also it may be noted that the judgment of the Supreme Court in *Inder Singh's* case (1) was reversed on appeal, though the short passage cited is no doubt good law. I do, however, as I have said, agree entirely with the learned trial judge's conclusion on this issue.

In the result the appeal in my view substantially fails and should be dismissed with costs; but I would order that the decree of the Supreme Court be varied in the two respects which I have indicated, namely that the words referring to the declaration and the certificate for costs of Queen's Counsel should be deleted. I think the success of the appellants on these two minor points was not sufficiently substantial to justify a modification of the normal order as to costs.

Sir Newnham Worley P: I have had the advantage of reading the judgment prepared by the learned Justice of Appeal. I am in entire agreement with it and do not wish to add anything.

The appeal is dismissed with costs, but the decree of the Supreme Court will be varied as indicated in that judgment.

Sir Ronald Sinclair V-P: I also agree.

Appeal dismissed accordingly.

For the appellants:
JM Nazareth, QC, and *RN Khanna*
DN and *RN Khanna,* Nairobi

For the respondent:
MJE Morgan
Mervyn Morgan & Company, Nairobi

Jagat Singh Bains v Halimabibi
(Widow of Ismail Mohamed Chogley)
[1957] 1 EA 13 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	4 January 1957
Case Number:	97/1954
Before:	Sir Newnham Worley P, Sir Ronald Sinclair V-P and Bacon JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Hooper, J

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[1] Garnishee order – Affidavit based on information and belief.

[2] Landlord and tenant – Garnishee order – Relationship of creditor and debtor – Present debt.

Editor's Summary

The appellant in 1941 had let certain premises to one Bilal for a period of five years at a monthly rental of Shs. 300/-, the lease subsequently being held to be void for want of registration. Bilal then left Kenya for India (his present whereabouts being unknown) and installed the respondent in the premises to manage the business of a bakery carried on there. At the expiration of the lease the appellant applied to the Central Rent Board to obtain possession against both Bilal and the respondent which was granted but this was reversed on appeal and on a retrial the appellant was again granted an order for possession which in turn was appealed and reversed and a retrial ordered. In January, 1949, Bilal, who was then still in India, purported to grant to the respondent a sub-tenancy of the premises for six months from January 1, 1949. The appellant then filed proceedings against both Bilal and the respondent and the Rent Control Board gave judgment against the respondent for ejectment and over Shs. 18,000/- as mesne profits and costs. The respondent appealed to the Supreme Court which set aside the order for mesne profits and the appellant then appealed and the Supreme Court ordered that the order of the board be varied to apply against Bilal instead of against the respondent. The appellant then applied to garnishee upon the respondent on the ground that he was indebted to Bilal for more than the amount of the mesne profits, he having made no payment of rent to Bilal. The learned resident magistrate held that as the relationship of debtor and creditor did not exist between the respondent and Bilal there was no good cause for the

garnishee order nisi to be made absolute. The appellant's appeal to the Supreme Court was dismissed and he appealed again. The respondent having died, his widow was by consent substituted in his place.

Held –

(i) (on a preliminary objection) an affidavit based on information and belief should be accepted in the courts of Kenya in support of an application for a garnishee order nisi.

(ii) in respect of the period from the date when the respondent ceased to occupy the premises as Bilal's manager and took over the business and premises on his own account, he occupied the premises as a licencee of Bilal and while this might give rise to a relationship of creditor and debtor there was no evidence on which the learned magistrate could reasonably have come to the conclusion that this was so.

(iii) in respect of the periods from the execution of the purported sub-lease until the expiry of the valid notice determining Bilal's contractual tenancy and from then until the appellant was evicted the relevant convenant was to pay the appellant in the name of Bilal; there was no reservation of rent in favour of Bilal and he (Bilal) could not therefore have sued the respondent for the rent.

Appeal dismissed.

Cases referred to:

(1) *Vinall v. De Pass*, [1892] A.C. 90.

(2) *Phakey v. World Wide Agencies Ltd.*, 15 E.A.C.A. 1.

(3) *Standard Goods Corporation Ltd. v. Harakchand Nathu & Co.*, 17 E.A.C.A. 99.

(4) *Noormohamed Janmohamed v. Kassamali Virji Madhani*, 20 E.A.C.A. 8.

(5) *Bains v. Chogley*, 16 E.A.C.A. 27.

(6) *Ismail Mohamed Chogley v. Jagat Singh Bains*, E.A.C.A. Civil Appeal No. 57 of 1952, unreported (but see *Chogley v. Bains*, [1955] 3 All E.R. 148).

(7) *R. v. Hassan Bin Said*, 9 E.A.C.A. 62.

January 4. The following judgments were read.

Judgment

Sir Newnham Worley P: All the relevant history and facts of this matter are sufficiently set out in the judgment of the court overruling the respondent's preliminary objections which was delivered on June 22, 1956. In pursuance of that judgment, the appeal was argued before us on September 19 and 20, 1956, when judgment was reserved. We should first formally record that on the motion of Mr. Salter for the appellant, it appearing that the original respondent had died intestate since the filing of the appeal and that no letters of administration have been applied for, we ordered with her consent that the respondent's widow Halimabibi be substituted as respondent in place of her deceased husband and that the appeal should proceed.

As indicated in our previous judgment it is necessary because of the brevity of the operative part of the judgment of the Supreme Court and of the memorandum of appeal, to go to the magistrate's judgment and the memorandum of appeal to the Supreme Court to find out what are the issues of law raised by the appeal now before us.

Before doing so, it will be convenient to consider briefly Mr. Khanna's objection that the garnishee order nisi should never have been issued at all on account of the insufficiency of Bain's affidavit in support of the application for the order nisi. Kenya 0.22 r. 1 is framed in substantially the same terms as the English 0.45 r. 1 and requires an affidavit by the decree-holder or his advocate stating, *inter alia*, that the garnishee is indebted to the judgment-debtor. In England it is well settled that, for this purpose, an affidavit based on information and belief is sufficient provided the sources of information or grounds of belief are stated: see *Vinall v. De Pass* (1), [1892] A.C. 90; Halsbury (2nd Edn.) Vol. 14, p. 112 note (*r*) and Annual Practice, 1956, p. 2569 Form No. 25. I have no doubt that an affidavit based on information and belief should be accepted by the Courts in Kenya. In the instant case, the relevant paragraph of the affidavit read:

> "That the garnishee Ismail Mohamed Chogley is indebted to the said judgment debtor Sidi Bilal in a sum more than the said sum of Shs. 18,971/25 or thereabouts."

Mr. Khanna complains that this allegation could only have been based on information and belief and that, as this was not stated, the order nisi should be set aside: he cited three decisions of this court: *Phakey v. World Wide Agencies Ltd*. (2), 15 E.A.C.A. 1*; Standard Goods Corporation Ltd. v. Harakchand Nathu & Co*. (3), 17 E.A.C.A. 99 and *Noormohamed Janmohamed v. Kassamali Virji Madhani* (4), 20 E.A.C.A. 8 at p. 11. Technically, he is probably correct, but I should be loth to decide this appeal on a technicality and, fortunately, I see no reason for doing so, for I am satisfied that there is no substance in the complaint. *Vinall v. De Pass* (1), is good authority that the belief of the deponent does not have to be justified in fact: it is sufficient that it be reasonable and bona fide. In the instant case, Bains knew that Chogley had been in occupation of the suit premises for years and that he had not paid any rent or made any other money payment to Sidi Bilal. At most therefore it can be said that Bains should have stated that the allegation was founded upon his own belief.

I pass now to the substantial issue in the appeal: did the learned magistrate (and by implication the learned judge on first appeal) err in law in holding that no legal relationship of creditor and debtor had been shown to exist between Sidi Bilal and Chogley, the garnishee?

It is I think common ground that the court must be satisfied, before it makes the order absolute, of the existence of a debt in praesenti: a debt which the judgment-debtor

could sue for if he chose, and that an unliquidated claim for damages cannot, save perhaps in an exceptional case, be attached: Halsbury (2nd Edn.) Vol. 14, para. 173.

It is also common ground that the question must be considered in relation to three separate periods of Chogley's occupation of the premises, namely:

(1) from a date some time in April, 1946, until January, 1949. This period began when Chogley ceased to occupy as Sidi Bilal's manager and took over the business and the occupation of the premises on his own account. It has been held that during this period Sidi Bilal was a yearly tenant and Chogley was his licensee, see *Bains v. Chogley* (5), 16 E.A.C.A. 27;

(2) from January, 1949, until July 1, 1949. This period runs from the execution of the purported sub-lease (Ex. 1 g in these proceedings) until the expiry of the valid notice terminating Sidi Bilal's contractual tenancy;

(3) from 1st July, 1949, until the date of Chogley's actual eviction in 1955. This period runs from the day when Sidi Bilal became, if I may so express it, "a statutory tenant out of possession" until the date when, as a consequence of the Privy Council having dismissed his appeal, Chogley ultimately had to yield possession of the suit premises to Bains.

It will be convenient to consider first the second and third periods. For the appellant it has been contended that, during the second period there was the contractual relationship of head-tenant and sub-tenant between Sidi Bilal and Chogley, involving a legal obligation on Chogley to pay to his lessor a monthly rent of Shs. 300/-, and that this rent has not only accrued due but is in fact in arrears and could be sued for. Further that when Sidi Bilal's contractual tenancy was terminated, Chogley held over as his sub-tenant on the same terms and conditions as before, that Sidi Bilal was still entitled to receive the rent reserved by the lease or mesne profits and that this right was unaffected by any of the previous judgments of the courts which have entertained the various appeals in this matter. Much of this argument might be conceded and yet there would still remain an inherent fallacy in it. Sidi Bilal could not at any time during these two periods have sued Chogley for accrued rent for the simple reason that there is no reservation of rent payable to him. The relevant convenant is to pay to Bains in the name of Sidi Bilal the rent due on the head tenancy. A breach of this covenant might give Sidi Bilal a cause of action sounding in damages but I do not see how he could sue for rent or mesne profits and, since the damages are unliquidated, no attachment can issue. This admittedly was not the ground upon which the learned Magistrate based his decision as regards these two periods. He relied upon the decision of this Court in *Civil Appeal No*. 57 of 1952 (6), that Chogley was not a lawful sub-tenant. I think it is not necessary to decide whether he was right or wrong in so doing. The respondent in this appeal can support the decision on any other point of law which arises from the accepted facts, and, in my opinion, has successfully done so.

As to the first period, the learned magistrate held that previous to January 25, 1949 (the date of the execution of the sub-lease), there was no relationship of tenant and sub-tenant between Sidi Bilal and Chogley and that it must be assumed that until then Chogley was merely Sidi Bilal's manager and there was no evidence that in that capacity Chogley was debtor to Sidi Bilal. With respect, I think that there was no evidence to support this assumption. Chogley's own evidence was to the effect that April, 1946, he ceased to be a manager and took over the business from Sidi Bilal. Thus the true position is, in the absence of any evidence of the creation of a tenancy, that he thenceforward occupied the premises as a licensee of Sidi Bilal. Before us, counsel have accepted that position and argued on that assumption. Such a relationship might, of course, give rise to a relationship of creditor and debtor. Mr. Khanna has contended that there is no evidence of any agreement between Sidi Bilal and Chogley since the go-between Sayed Alhadad has not given evidence. Mr. Salter, on the other hand, has sought to rely on

Chogley’s admissions: “I have paid no one since 1946” and “I owe rent from July 1, 1946, until today. No part of that rent

has been paid to anyone." He further asks us to infer that the amount payable for the licence was Shs. 300/- a month, i.e. the same as the rent due from Sidi Bilal to Bains. Garnishee proceedings are inquisitional: the purpose is to find out whether the garnishee is indebted to the judgment debtor at all, and not merely whether he owes a particular debt: *Vinall v. De Pass* (1), (*supra*). Owing to the misdirection to which I have referred the learned magistrate has made no finding as to Chogley's liability as the licensee of Sidi Bilal nor has the Supreme Court. We, sitting as a second appellate court, cannot make any findings of fact, but we are entitled to hold as a matter of law that there was no evidence on which the learned magistrate could reasonably have come to the conclusion that Chogley was indebted to Sidi Bilal: *R. v. Hassan Bin Said* (7), 9 E.A.C.A. 62. In my view, there was no evidence before the learned magistrate which could support a finding that Chogley was indebted to Sidi Bilal in respect of the first period. No inference could legitimately be drawn from Chogley's two admissions referred to above that he owed any amount at all to Sidi Bilal. On the contrary, throughout the first period Chogley attempted to pay rent to Bains. If any inference at all could be drawn from the evidence as to the terms of Chogley's licence to occupy the premises, it would be that Chogley himself was to pay the rent due by Sidi Bilal direct to the landlord. If that were in fact a term of the licence, a breach of that term might give Sidi Bilal a cause of action sounding in damages, but the damages would be unliquidated and no attachment could issue.

For these reasons I would dismiss the appeal. As to the costs of and incidental to the preliminary objections, which were reserved in the interlocutory judgment upon them, I would direct that the appellant's costs be taxed and that the respondent should pay to the appellant two-thirds thereof, such amount to be set off against the general costs of the appeal which are to be paid by the appellant to the respondent. My reason for awarding a fraction only of the costs of the preliminary objections is that the objection to the form of the memorandum was justified though not fatal to the appeal.

As the other members of the court agree with this judgment an order will be made in these terms.

Sir Ronald Sinclair V – P: I agree and have nothing to add.

Bacon JA: I also agree.

Appeal dismissed.

For the appellant:
C Salter, QC, and *SC Gautama*
Madan & Shah, Nairobi

For the respondent:
DN Khanna
DN & RN Khanna, Nairobi

Gathuthi Hotel v Fazal Ilahi
[1957] 1 EA 17 (CAN)

Division: Court of Appeal at Nairobi

Date of judgment:	26 April 1957
Case Number:	67/1956
Before:	Sir Newnham Worley P, Briggs and Bacon JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Corrie, J

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[1] Landlord and tenant – Business premises – Specific performance of agreement to grant a lease.

Editor's Summary

The respondent and his brother owned certain premises in Nairobi and carried on the business of an eating house on the ground floor under the firm name of Akbari Hotel. On June 30, 1953, the respondent agreed to sell the business to the appellants for Shs. 20,000/-. In the agreement the purchase money was apportioned as to Shs. 8,000/- for goodwill and Shs. 12,000/- for fixtures and fittings. The agreement also provided that the benefit of the trade licence, the tenancy and the trade name should pass to the appellants. Subsequently the respondent became the sole owner of the premises which were held under a Crown Lease. At the time of the sale of the business the premises were controlled and the rent of the ground floor was Shs. 300/- per month. It was common ground that the respondent was to have the right to raise the rent if the premises became decontrolled. This happened on December 25, 1954, and, in anticipation, the respondent on November 29, 1954, served a notice to quit on December 31, 1954. The appellants failed to quit and early in 1955 agreed to pay a rent of Shs. 750/- per month, but defaulted in April and May. A further Notice to quit was served expiring on July 31, 1955, and proceedings in the Magistrate's Court for recovery of the rent for April and May, being a claim simply for rent, resulted in judgment for the amount claimed being entered for the respondent. On July 19, 1955, the appellants applied in the Magistrate's Court, under Part II of the Landlord and Tenant (Shops and Hotels) (Temporary Provisions) Ordinance, 1954 (*K.*) for a new tenancy, but this was dismissed as being made out of time. On November 22, 1935, the respondent sued in the Supreme Court for possession and mesne profits. In their defence and counterclaim the appellants claimed that they were entitled to occupy the premises for an unlimited time and counterclaimed specific performance of an agreement to grant a permanent lease and alternatively for damages. Judgment was entered for possession, mesne profits and costs.

Held–

(i) the question in issue was purely one of construction of the agreement in light of the surrounding circumstances.

(ii) it was improbable that the fixtures and fittings were worth Shs. 12,000/-, that the goodwill of such a business could not survive a removal of the premises, unless the distance were very short, and that the appellants would not have paid a substantial amount for goodwill unless they received some security of tenure.

(iii) the respondent had agreed to transfer the remainder of the Crown Lease, less one day, for the purpose of the business of an eating house and no other purpose, subject to the usual convenants and the following additional covenants:

(*a*) no assignment or sub-letting be permitted unless on a sale of the business.

(*b*) the premises would not be used for any other purpose other than the purpose of the business.

and a proviso that the appellants might determine the lease at the end of any quarter on twelve months' notice.

(iv) the judgment and decree of the Supreme Court should be set aside and a decree substituted dismissing the plaintiff's claim with costs and on the counterclaim ordering specific performance of the agreement to grant a lease on the terms indicated; if the consent of the Governor to the lease could not be obtained there should be an enquiry as to damages.

Appeal allowed.

Cases referred to in judgment:

(1) *Lace v. Chandler*, [1944] 1 All E.R. 305.

April 26. The following judgments were read.

Judgment

Briggs JA: This is an appeal from a judgment and decree of the Supreme Court of Kenya. The respondent and his brother were in early 1953 the owners of certain premises in Racecourse Road, Nairobi, and carried on the business of an eating house in the ground floor thereof under the firm name of Akbari Hotel. On June 30, 1953, the respondent, perhaps intending to act for himself and his brother, but in his own name alone, agreed in writing to sell the business to the appellants for Shs. 20,000/-. The material parts of the document are as follows:

> "1. The Vendor hereby agrees to sell and the Purchasers to purchase the said business for the price or sum of Shillings Twenty Thousand (Shs. 20,000/-) which shall be apportioned in the manner following that is to say the sum of Shillings Eight Thousand (Shs. 8,000/-) as to the goodwill of the said business and the balance of Shillings Twelve Thousand (Shs. 12,000/-) being the agreed value of the furniture, fittings, cooking utensils and refrigerator etc., all passing by manual delivery.
>
> "2. The said purchase price shall include:
>
> (*a*) the goodwill of the said business;
>
> (*b*) the furniture, fittings, cooking utensils and refrigerator etc., lying in the business premises;
>
> (*c*) the benefit of trade licence in respect of the said business which shall be transferred in favour of the purchasers;
>
> (*d*) the benefit of the tenancy in respect of the said business which shall be transferred by the Vendor in favour of the purchasers.
>
> "8. The purchasers shall be entitled to trade under the said firm name or style of 'AKBARI HOTEL' and all proprietary rights therein shall belong to the purchasers and the vendor shall have no interest or right therein and shall have no authority to withdraw the same."

At that time the premises were controlled and the rent of the ground floor was Shs. 300/- per month. It is common ground that the respondent was to have the right to raise the rent if the premises ceased to be controlled, but no figure was then agreed. Shortly afterwards the respondent bought his brother's half-share in the premises and he is now sole owner. His title is a lease under the Crown Lands Ordinance and is believed to be for 99 years from January 1, 1906. On December 25, 1954, the premises became decontrolled, and in anticipation of this the respondent on November 29, 1954, served on the appellants one month's notice to quit on December 31, 1954. They did not do so. A further notice was served for July 31, 1955. Early in 1955 the appellants agreed to pay in future a rent of Shs. 750/- per month. They defaulted in April and May and the respondent sued and recovered judgment in the Magistrate's Court on August 9, 1955. This was a claim for rent and nothing more. It is accepted that it constitutes a res judicata as to the amount of present and any future rent. On July 19, 1955, the appellants made an application in the Magistrate's Court under the Landlord and Tenant (Shops and Hotels) (Temporary Provisions) Ordinance. On its face the application was made under Part II and asked for a new tenancy, but it seems highly probable that the appellants really intended to apply under Part I and merely to ask for rent to be fixed. The application was never heard on the merits, but was dismissed as

being made out of time. On November 22, 1955, the respondent sued the appellants in the Supreme Court for possession of the premises and mesne profits. The appellants' defence and counterclaim is a rambling and inconsequential document; but the gist of it is that they claim to be entitled to occupy the premises

for an unlimited period and counterclaim for specific performance of an agreement to grant a permanent lease and alternatively for damages. Instead of basing their claim on the written agreement they allege an elaborate oral agreement, which cannot have been in fact anything but negotiations for the written agreement, and all evidence of the supposed oral agreement should in my opinion have been excluded under s. 91 of the Indian Evidence Act. Fortunately for the appellants, the respondent expressly relied on this written agreement in his reply and defence to counterclaim, and the right to receive a lease under the provisions of the written agreement is sufficiently put in issue. It should be noted that the appellants never in fact used the business name of Akbari Hotel, but at once begun to use and are still using the name of Gathuthi Hotel.

The learned trial Judge was inclined to think that para. 2 (*d*) of the agreement could not be read as an agreement to grant a permanent tenancy. He observed that in the first proceedings in the Magistrate's Court the duration of the tenancy was not in issue. He observed also that the fact that the respondent was at one time only a part owner of the premises was not material. He discussed the terms of the appellant's application for a new tenancy and said:

> "In my view the terms of the defendants' application to the Landlord and Tenant Court in Case 333 of 1955 are entirely inconsistent with their present claim that they are entitled to a permanent tenancy of the premises. By that application they alleged that the tenancy which began on June 30, 1953, had been determined; and they asked the court to grant them a fresh tenancy for the duration of the Landlord and Tenant Ordinance at a rent to be fixed by the court. I hold that they are now estopped from claiming that they were entitled to a permanent tenancy.
>
> "Actually they were not granted a fresh tenancy as their application was refused on the ground that it was filed out of time."

He thereupon dismissed the counterclaim and gave judgment on the claim for immediate possession, mesne profits and costs. We are informed that execution has been stayed and the appellants are still in possession. They appeal from this judgment.

Mr. Salter for the respondent did not attempt to support the finding that the second proceedings gave rise to an estoppel. There are no grounds constituting an estoppel in pais and there can be no estoppel by record, since the magistrate's decision was in effect that he had no jurisdiction, and there was no decision on the merits. The question is therefore purely one of construction of the agreement in the light of the surrounding circumstances. I start from the point that it is highly improbable that the chattels used in the business would be worth Shs. 12,000/- or anything like it, and that the evidence indicates that they were probably worth not more than Shs. 2,000/- at most. I note next that the goodwill of an eating-house of this kind could not survive a removal of premises, unless the distance were very short, and I think the appellants cannot have intended to pay a large sum for goodwill unless they were going to have some security of tenure in the premises they took over. The respondent admitted in evidence that he had agreed that, if the appellants duly paid the rent and "kept the place clean," (by which I understand him to mean "observed the municipal regulations for eating houses") he would continue the tenancy. These factors all indicate the inherent improbability of a mere monthly tenancy. Mr. Salter suggests that the appellants would have been sufficiently protected by the Increase of Rent (Restriction) Ordinance, 1949 (K.); but it was already universally known in June, 1953, that business premises would very soon be removed from the ambit of the Ordinance. That the appellants themselves were well aware of this appears from the express agreement that the rent might then be raised.

Looking at the words of the agreement with these points in mind, one sees that the respondent

undertook to transfer “the benefit of the tenancy in respect of the said business.” The words are unexpected in their context of fact, for the respondent was not, at least in the colloquial sense, a “tenant.” Yet “the tenancy” which he

agreed to transfer must mean his own tenancy. It was not merely "a tenancy." It seems to me that there is only one possible interpretation, if the words are to have a grammatical meaning. The respondent was agreeing to transfer the remainder of his interest under the Crown lease in the premises in question. This would not be a "permanent lease" as suggested by the appellants, and, for myself, I am by no means convinced that a permanent lease would be capable of registration under Kenya law. In this case there is an unexpired term of something under forty years, and a lease for one day less than that would be a perfectly ordinary transaction. It would of course be subject to the usual covenants, and, in addition, to any covenants which may appear from the terms of the agreement to have been expressly or impliedly intended by the parties to be embodied in the lease. These require some consideration.

I think the tenancy was to be transferred for the purposes of this business of an eating-house, and for no other purpose. I think no assignment or sub-letting should be permitted unless on a sale of this business, and that there should be a covenant that the premises will not be used for any purpose other than the purposes of this business – to whomsoever it may from time to time belong. The usual covenants will provide that the business must be conducted in a lawful and decent manner. I think next that there is a clear intention to allow the appellants to surrender the lease if they wish to discontinue the business. I would suggest that a fair effect could be given to that intention by a provision that they may determine the lease at the end of any quarter by giving twelve months' notice to do so. The amount of the rent now causes no difficulty: it will be Shs. 750/- per month, payable as it is now paid.

Mr. Salter raises various objections to this interpretation of the agreement. He says first that, if a consideration was given for the creation of the tenancy, it was an unlawful premium under s. 18 of the Increase of Rent (Restriction) Ordinance; but if, as I think, the term is to be nearly forty years a premium could lawfully be paid under the provisions of sub.-s. (3) of that section. He says next that the lease could not be valid under the Crown Lands Ordinance without the consent of the Governor. That is true; but it is the duty of the respondent, having made an open contract in this respect, to obtain that consent. If he cannot do so, he will have to pay damages in lieu, and I would order an enquiry as to those damages, if the necessity should arise. Mr. Salter's principal argument, however, was that the agreement is so vague and uncertain in its terms as to be unenforceable. He relies on *Lace v. Chandler* (1), [1944] 1 All E.R. 305. In that case the document which fell to be considered was itself intended to operate as a lease. I think different considerations apply to an executory agreement. If the court can fairly find from an executory agreement the intention of the parties as to all essential terms of the proposed lease, that is sufficient. It is also to be noted that the event which was to determine the "lease" in *Lace v. Chandler* (1), was one outside the control of the parties and the term of the lease was therefore wholly uncertain.

Mr. Salter was constrained to admit on the evidence that the parties had contemplated a reasonably extended term, but he said that its actual extent could not be ascertained from the agreement. The respondent is grantor in this case and I think the agreement should be construed, if necessary, contra proferentem. If the words "the tenancy in respect of the business" were too wide to express the respondent's true intention, he should have used other words. Construing them so as to make them, if possible, effective rather than ineffective, I think they refer to a term of one day less than the unexpired period of the Crown Lease.

I give full weight to the fact that the respondent has consistently alleged that there is only a monthly tenancy, and also to the fact that the appellants, in that very inept document, their application to the Magistrate's Court, stated that their tenancy had been determined. I note also that they were advised to base their claim primarily on an alleged oral agreement instead of the obviously valid written one. In

spite of these matters I think the correct interpretation of the written agreement is as I have described it. I think that the agreement, though admittedly somewhat obscure, is not too uncertain to be enforced.

I would accordingly allow this appeal and set aside the judgment and decree of the Supreme Court. I would substitute a decree dismissing the plaintiff's claim with costs and on the counterclaim ordering specific performance of the agreement to grant a lease, the lease to be on the lines which I have described above: in the alternative, if the consent of the Governor to the lease cannot be obtained, there should be an inquiry as to damages. The plaintiff should pay the defendants' costs of the counterclaim, and the parties should have liberty to apply. Both parties have stated that they expect to be able to settle the draft lease by agreement, and that it is not necessary at this stage to refer it to conveyancing counsel of the court. The respondent must pay the costs of this appeal.

Sir Newnham Worley P: I have had the advantage of reading beforehand the judgment which has just been delivered. I agree with it and do not wish to add anything. An order will be made in the terms suggested in that judgment, and a draft of that order is to be submitted to Mr. Justice Briggs for approval before it is passed by the Registrar.

Bacon JA: I also had the advantage of reading the judgment now delivered by my brother Briggs, J.A. I agree and have nothing to add.

Appeal allowed.

For the appellants:
MJE Morgan and *RN Sampson*
Mervyn Morgan & Company, Nairobi

For the respondent:
C Salter, QC, and *DV Kapila*
DV Kapila, Nairobi

Jadavji Shamji Pandya v The Oriental Fire and General Insurance Co Ltd
[1957] 1 EA 21 (CAM)

Division:	Court of Appeal at Mombasa
Date of judgment:	20 April 1957
Case Number:	19/1957
Before:	Sir Newnham Worley P, Sir Ronald Sinclair V-P and Briggs JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Mayers, J

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[1] Hire Purchase – Motor Insurance – Proposal form and cover note – misrepresentation and non-disclosure in proposal – Rights of owners of vehicle.

Editor's Summary

The Appellant carried on business as a garage owner under the name of "Kenya Garage" and on January 6, 1956, one Dhanji Jasmat took from him an Austin car and purported to enter into a hire purchase agreement for it on behalf of a company called Dhanji Jasmat Ltd. The car was insured by the respondents who were underwriters and the proposal form gave the name of the proposers as Dhanji Jasmat Ltd. and the appellant and was prepared by the appellant and signed for the appellant by his clerk. It contained the answer "H.P. with Kenya Garage" to the question whether the proposer was the sole and absolute owner and "No" to the question whether the proposer or any other person who would drive the car suffered from defective vision or other infirmity. In fact, Dhanji Jasmat Ltd. was non-existent, Dhanji Jasmat himself was an undischarged bankrupt and had lost one eye. He was wearing dark sunglasses when he saw the appellant, and the latter was wholly unaware of these three material facts. A cover note was issued when Dhanji Jasmat took away the car which was damaged beyond repair in an accident about two weeks later. A policy was issued after the accident in the name of Dhanji Jasmat Ltd. as the insured with an endorsement stating that Kenya Garage was the owner of the vehicle under a hire purchase agreement and were entitled to any monies which, in the

absence of an endorsement, would have been payable to the insured. The appellant in the Supreme Court contended that Dhanji Jasmat's conduct even if actively fraudulent could not affect the appellant's rights under the policy but this submission was rejected on the grounds that the appellant could not be entitled to any monies unless, under the endorsement, they were payable to the insured and that, as the insured was non-existent, they were not so payable.

On the appeal it was argued that the relevant document governing the contract of insurance was not the policy but the cover note and that as this was in the names of both Dhanji Jasmat Ltd. and Kenya Garage the latter was insured.

Held–

(i) on the construction of the cover note, containing a provision that the insurance was granted "in terms of the Company's usual form of Comprehensive Policy", and the policy with its endorsement, the appellant was directly insured under the policy to the extent that he had an independent right of action if monies became payable under the policy.

(ii) his rights under the policy were gravely restricted and dependent on a notional effective claim by "the insured."

(iii) a notional policy in the same terms as the actual policy was imported into the contract contained in the proposal form and cover note and that the appellant could not recover under them any more than under the policy itself.

Appeal dismissed.

Cases referred to:

(1) *Samuel v. Dumas*, [1924] A.C. 431.

(2) *Salim bin Said and another v. South British Insurance Co.*, 14 K.L.R. 84.

Judgment

Briggs JA: read the following judgment of the court: This was an appeal from a judgment and decree of the Supreme Court of Kenya dismissing with costs the appellant's claim against the respondents in respect of insurance of a motor car destroyed by accident. We dismissed the appeal with costs and now give our reasons.

The appellant is a garage owner and trades in the name of "Kenya Garage". The respondents are underwriters. One Dhanji Jasmat on January 6, 1956, took from the appellant an Austin car, and purported to enter into a hire purchase agreement in respect thereof on behalf of a company called Dhanji Jasmat Ltd., which, he said, was incorporated in Uganda, and in which he claimed to be largely interested. The appellant did not know Dhanji Jasmat but he was well-dressed and looked respectable. He gave a cheque, which was subsequently dishonoured, for the amount immediately payable on the car. He paid for the insurance on which this suit was brought. A fortnight or so later he had an accident while driving the car and it was damaged beyond repair. It was not disputed that, but for the matters mentioned hereinafter, the respondents would have been liable for this loss.

The proposal form for the insurance is dated January 6, and was prepared by the appellant and signed

for Kenya Garage by his clerk. It gives, as “name of proposer”, “Dhanji Jasmat Ltd. and Kenya Garage” with the address of the latter. Among the particulars the following are relevant:–

“3.	Are you the sole and absolute owner of the cars? If not, give particulars of any other interest.	H.P. with Kenya Garage.
11.	Do you, or any other person who to your knowledge will drive, suffer from defective vision or hearing or from any other physical infirmity?	No.”

The proposal form is warranted complete and accurate and is to be the basis of the

policy. On the same day the respondents issued a cover-note granting temporary cover "in terms of the company's usual form of Comprehensive Policy" and giving, as "name of policyholder", "Dhanji Jasmat Ltd. and Kenya Garage". The relative policy was only issued on February 16, some time after the accident. It is issued to Messrs. Dhanji Jasmat Ltd. alone, but embodies an endorsement by way of special condition in the following terms:–

> "It is hereby understood and agreed that Messrs. Kenya Garage (hereinafter referred to as the owners) are the owners of the motor vehicle described in the schedule hereto and that the said motor vehicle is the subject of a hire purchase agreement made between the owners of the one part and the insured of the other part, and it is further understood and agreed that the said owners are interested in any monies which but for this endorsement would be payable to the insured under this policy in respect of loss of or damage to the said motor vehicle (which loss or damage is not made good, by repair, reinstatement or replacement) and such monies shall be paid to the said owners as long as they are the owners of the vehicle and their receipt shall be a full and final discharge to the company in respect of loss or damage.
>
> "Save by this endorsement expressly agreed nothing herein shall modify or affect the rights or liabilities of the insured or the company respectively or in connection with this policy or any conditions or term thereof.
>
> "Subject otherwise to the terms, exceptions and conditions of this Policy."

There is not, and has never been, a company called Dhanji Jasmat Ltd. Dhanji Jasmat himself was at all material times an undischarged bankrupt, having been adjudicated in Tanganyika. He had lost one eye at the age of twenty and was wearing dark sunglasses when he saw the appellant. The appellant was wholly unaware of these three material facts and had no reason to suspect any of them, but it was common ground that the company, being non-existent, could not recover on the policy and that, even if Dhanji Jasmat personally had been the assured, the policy would have been voidable for misrepresentation and non-disclosure. The appellant contended in the court below that Dhanji Jasmat's conduct, even if actively fraudulent, could not avoid his (the appellant's) rights under the policy, that he must be treated as being separately insured and that, since his own conduct had admittedly been entirely proper, he could recover the value of the car. The learned trial judge rejected this submission, holding that the claim was made under the policy and that the appellant could not be entitled to any monies unless, but for the endorsement quoted, such monies would have been payable to the named assured. In this case nothing was so payable.

Before us the appellant changed his line of attack. His counsel submitted, first, that on the form of the pleadings the action need not be considered to be brought on the policy actually issued, but could be treated as being brought on the contract of insurance contained in the proposal form and cover-note alone. In strict accuracy this should have been the form of the action, for, although a policy when issued ordinarily replaces the cover-note, where a loss takes place before issue of the policy the cover-note itself contains with the proposal form the relevant contract of insurance. Whether in this case the pleadings could fairly be read as relying on that type of contract, as opposed to the policy itself, might have been a question of some difficulty, but it was not necessary to decide this point. We assumed in favour of the appellant that it was open to him to argue the appeal on that basis.

The argument for the appellant proceeded as follows. Although, if the policy had been the governing document, the learned judge's decision would have been right, it was not the governing document. The cover-note was the governing document. It stated that both Dhanji Jasmat Ltd. and Kenya Garage were insured. Their interests in the subject-matter of the insurance were not joint, but separate and complementary, and they must be taken to be insured "for their respective rights and interests." This would bring into play the rule laid down in *Samuel v. Dumas* (1), [1924] A.C. 431, that where the

interests of two persons insured under a single contract of insurance are distinct and severable, the fraud, misrepresentations and non-disclosure

of one assured do not affect the rights of the other, if he was not aware of them at the time of making the contract. The appellant also relied on *Salim bin Said v. South British Insurance Co.* (2), 14 K.L.R. 84, decision of the Supreme Court of Kenya. This argument was attractive and might have been accepted, were it not for the provision in the cover-note that the insurance was granted "in terms of the company's usual form of Comprehensive Policy." The evidence of the appellant, which was given with commendable candour, showed clearly that he had on several previous occasions insured cars under hire-purchase with the respondents, and that on each of such occasions the policy had been issued in the name of the hirer alone with an endorsement in his favour as owner in the form which we have quoted, and furthermore, that on the first of those occasions he had objected to this, desiring to have a policy issued in the names of the hirer and himself, but, on being informed that this was the respondents' normal practice, had withdrawn his objection and thereafter accepted willingly policies in this form. Lastly, the appellant admitted that he expected in this case to get a policy in the form in which it was subsequently issued.

The appellant sought to overcome this difficulty by saying that the reference in the cover-note to the usual form of policy could not have the effect suggested, because under the policy as issued the appellant was not insured at all, whereas the cover-note said he was insured. The cover-note being a printed form, the deliberately inserted name of the appellant as assured must override the intention apparently expressed in the printed words. The "usual form", if this were the usual form, would be repugnant to the express provisions of the governing document. This argument could of course be countered by showing that under the policy as issued the appellant was in fact "insured", though not in the sense or to the extent that he would have wished. We were of opinion that on the true construction of the policy, and in particular the endorsement in question, the appellant was directly insured under the policy, in the sense that his insurable interest was admitted in the endorsement and it gave him an independent right of action against the respondents if monies became payable for loss or damage. The appellant's rights under the policy were gravely restricted and dependent on a notional effective claim by "the insured"; but we think that he had direct rights under the contract and was a party to it for this purpose. He was therefore "insured" under it, though in a very precarious manner.

We were accordingly of opinion that a notional policy in the same terms as the actual policy was imported into the contract contained in the proposal form and cover-note, and that the appellant could not recover under them any more than under the policy itself. The appeal therefore failed.

We wish only to refer to one other matter. The appellant said in evidence that, when he objected to this form of policy, he was assured by the respondents' Mombasa manager that "this policy has the same strength as one issued in two names" and that he "should not fear at all." He was also told that the endorsement entitled him to make an effective claim without joining the insured. His evidence on this was not contradicted by the respondents; but it was not strictly relevant to the issues in this case. The last piece of information was, we think, correct; but the others were certainly incorrect and it is difficult to see how the manager, as an expert in insurance, could have believed them to be correct. But this is not an action for deceit and in these proceedings we cannot assist the appellant. If however, what he said was correct, we are unable to agree with the remark of the learned judge that the appellant and the respondents were equally the victims of Dhanji Jasmat. We think the true moral aspect of this case would in that event be quite different.

Appeal dismissed.

For the appellant:
B O'Donovan and *UK Doshi*
UK Doshi & Doshi, Mombasa

For the respondent:
RP Cleasby and *KC Thakkar*
Patel and *Thakkar*, Mombasa

Siraj Din v Ali Mohamed Khan
[1957] 1 EA 25 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	22 March 1957
Case Number:	10/1956
Before:	Sir Newnham Worley P, Sir Ronald Sinclair V-P and Bacon JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Rodwell, Ag. J

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[1] Landlord and tenant – Claim for possession and arrears of rent – Principles to be considered by Rent Control Board – Onus and quantum of proof – Increase of Rent (*Restriction*) *Ordinance,* 1949, *s.* 16 (*K.*).

Editor's Summary

The appellant landlord applied to the Central Rent Control Board for an order for possession on the ground that rent was unpaid for thirteen months and also for payment of such rent and mesne profits. The board by a majority of two to one, the reasons being recorded in writing, granted the application. The respondent tenant appealed to the Supreme Court and made an interlocutory application for stay of execution, but before the application was heard gave up possession. The Supreme Court, not being informed that the question of possession had disappeared, treated the matter on the basis that possession and "reasonableness" were the main issues and set aside the board's order. On further appeal the appellant in his memorandum of appeal asked that the majority decision of the board should be restored, but at the hearing his advocate conceded that the majority decision had been wrong as to both the onus and the quantum of proof and did not oppose remission of the proceedings to the board for a hearing de novo. The respondent's advocate submitted that the decision of the dissenting member of the board who had correctly directed himself as to both onus and quantum should be upheld as the decisions of the majority showed that they would have found for the respondent had they not misdirected themselves in law.

Held–

(i) it would be wrong to give effect to the views of the majority of the board, when those views were manifestly arrived at on an erroneous legal basis and on apparently unsatisfactory appreciation of the low value of some of the very material evidence.

(ii) the reasons given by the Supreme Court, first that the majority view was based on a misconception of the law and secondly that the board had not considered the reasonableness of the present appellant's claim, did not justify anything other than an order for a re-hearing.

(iii) when there is an application for possession for non-payment of rent (apart from the question of reasonableness) the landlord must prove that some rent was lawfully due from the tenant at the date of the institution of the proceedings and that that rent was unpaid; where the claim for rent is not consequential to a claim for possession but a specific and independent application the onus of proof is upon the landlord only to the extent that he must prove the tenancy and establish what rent was payable and at what dates; if the tenant asserts that the rent has been paid, the onus lies on him to prove such payment as he relies on.

(iv) the quantum of proof ordinarily required in civil litigation is not such as resolves all doubt whatsoever but such as establishes a preponderance of probability in favour of one party or the other.

Appeal allowed in part, judgment and decree of the Supreme Court set aside and a re-hearing before the board ordered, limited to a claim for arrears of rent and mesne profits.

The court expressed the view that where a majority decision is arrived at and the board desires to record the reasons for the decision, only the majority decision should be recorded although the fact that it is a majority decision should be indicated.

Cases referred to:

(1) *Bird v. Hildage*, [1947] 2 All E.R. 7; [1948] 1 K.B. 91.

(2) *Cumming v. Danson*, [1942] 2 All E.R. 653.

(3) *Robins v. National Trust Co., Ltd.*, [1927] A.C. 515.

Judgment

Bacon JA: read the following judgment of the court: In this second appeal the appellant is the landlord of a dwelling-house who originally applied to the Central Rent Control Board at Nairobi for an order in the first place for possession on the ground that rent for a period of thirteen months was due and unpaid, and secondly for payment of such rent and mesne profits. By a majority of two members to one the board, by decisions of each individual member recorded in writing, granted that application.

We were informed at the hearing of this second appeal that the respondent gave up possession of the premises before taking the case to the Supreme Court of Kenya, and he apparently did so not only before the hearing of the first appeal but even before the hearing of an interlocutory application for stay of execution of the board's order. It was so stated by Mr. Kean at the hearing of that application and not contradicted by Mr. Morgan. Nevertheless we observe that there is nothing in the record to indicate that the learned first appellate judge was so informed and his judgment proceeded on the footing that possession and therefore "reasonableness" were still the main issues. We can only say that, by their failure to inform themselves and the court precisely upon the fact that possession had been given up, the advocates concerned may have unnecessarily increased the costs in this matter and this may be reflected in what we have to say as to who should bear the additional expense. At all events the present respondent successfully appealed to the Supreme Court which set aside the board's order and entered judgment for him on both issues.

On this second appeal the appellant landlord by his memorandum of appeal asked that the majority decision of the board should be restored. But at the commencement of the hearing his counsel conceded that the majority decision of the board had been wrong as to both the onus and the quantum of proof, and stated that he did not oppose remission of the case to the board for a hearing de novo by a fresh panel. Counsel for the respondent argued that we should uphold the dissenting member of the board who, he contended, had correctly directed himself as to both onus and quantum, since the decisions of the majority showed that they would have found for the respondent tenant had they not misdirected themselves in law.

After hearing full argument we announced that we should allow the appeal in part, set aside the judgment and decree of the Supreme Court and order a re-hearing by the board, and we reserved the question of costs for consideration. We now give our judgment accordingly.

Since the case is to be heard afresh we refrain from any comment on the merits. We founded our decision, not on any particular aspect of the merits, but on these two grounds: first, that it would be wrong for this court, on a second appeal arising out of a decision by the board, to give effect to the views of the majority as to the facts when at the original hearing those views were manifestly arrived at on an erroneous legal basis, and also, as we shall presently observe, on an apparently unsatisfactory appreciation of the low value of some of the very material evidence; secondly because, with respect, in our view the Supreme Court should not have given judgment for the tenant but should have ordered a re-hearing. The Supreme Court gave two reasons for its decision. The first was that "the majority decision is based on a misconception of the burden of proof," which in the circumstances of this case,

was tantamount to saying that the board's approach to and consideration of the dispute may well have been rendered nugatory by a fundamental error in law. That being so, the majority members may well have never decided the case, as it then stood, on a proper footing. The second reason expressed by the Supreme Court was that

> "the board did not consider the reasonableness of the respondent's" [the present appellant's] "claim."

If that was so – and the written decisions of the members of the board do not show the contrary – one of the issues required by law to be decided on a claim for possession was never decided at all. Neither of those reasons appeared to us to justify anything other than an order for a re-hearing. We appreciate, of course, that the issue as to whether it was reasonable to make an order could only relate to the claim for possession, and that since the question of possession had in reality disappeared from the case that issue had gone with it. But of this fact the learned first appellate judge was apparently unaware, and we are at this moment dealing only with the position as it must have been presented to him.

Apart, however, from those two reasons for its decision expressly stated by the Supreme Court at the conclusion of its judgment, there were we think at that time two further good reasons for ordering a re-hearing, which reasons still hold good today. First, as that judgment itself pointed out, the leading majority decision, with which the other majority decision expressed agreement, dealt with the essential questions of fact as to the payment or non-payment of rent in such a nebulous and speculative manner that, with all due respect to the members concerned, it is impossible to discover any firm foundation upon which they can be seen to have based their decision, and there seems to be at least a considerable doubt as to whether their weighing of some of the evidence was rather more hazardous than judicial. *Inter alia*, although they found in the landlord's favour they cast considerable doubt on the reliability of his son, an important witness, saying that

> "many of the questions put to [him], if answered truly, might have been to the tenant's advantage but he evaded such questions."

At the time of the hearing by the board the landlord himself was said to be in Pakistan. Secondly, the majority of the board erred not only as to the burden of proof but, what is more important at the present stage of the proceedings, also as to the quantum or weight of proof required by law.

We pass then, to consider some aspects of the law which should be borne in mind with relation to cases such as the instant one was at the first hearing and will be at the second. A brief review of some fundamental principles may be of assistance on future occasions as well as for the purposes of this case.

Two errors in law appeared on the face of the board's majority decisions. It was erroneous to say that the onus rested on the tenant to prove that he had paid the rent, and to say that the evidence must

> "be of such a nature that the board has no doubt whatsoever in granting judgment in his favour."

To deal first with the latter proposition, the quantum of proof required in civil litigation is not such as resolves all doubt whatsoever but such as establishes a preponderance of probability in favour of one party or the other. That is the criterion which the board should always apply to any matter in the nature of civil proceedings in which they have to decide between opposing views. To say that all doubt whatsoever must be dispelled is to invoke a test which is even higher than the standard required by law in criminal matters. The criminal test is, of course, higher than the civil, but even criminal guilt need only be established beyond all reasonable doubt.

As to the burden of proof where the payment of rent is in dispute, there is a vital distinction between an application for possession on the ground of non-payment of rent, and, on the other hand, an application for an order for the payment of arrears of rent (and sometimes also mesne profits) simpliciter. The former would be made pursuant to sub-s. (1) (*a*) and sub-s. (2) of s. 16 of the Increase of Rent (Restriction) Ordinance, 1949 (*K*.), the latter under sub-s. (1) (*f*) (ii) of s. 5 thereof.

Where the claim is for possession under sub-s. (1) (*a*) and sub-s. (2) of s. 16 the burden lies on the

landlord to prove two things, disregarding for the moment the question as to whether it is reasonable that an order for possession should be made: he must prove

> "that some rent was lawfully due from the tenant at the date of the institution of the proceedings and that that rent was unpaid"

Bird v. Hildage (1), [1948] 1 K.B. 91 at p. 99. (We mention, in passing, that valuable guidance as regards this kind of claim is to be found in that report of proceedings in the Court of Appeal.) The onus is on the landlord by reason of the structure of s. 16 of the Ordinance, which in effect places on him the burden of proving any one of the specified grounds upon which possession of controlled premises may be granted provided that the board considers it reasonable to make such an order.

The issue of reasonableness should be decided, not merely by way of answering the question whether the premises are reasonably required by the landlord (which is not the criterion prescribed by the Ordinance) but in accordance with the judgment of Lord Greene, M.R., in *Cumming v. Danson* (2), [1942] 2 All E.R. 653 at p. 655 where he said:

> "In considering reasonableness . . . it is, in my opinion, perfectly clear that the duty of the judge is to take into account all relevant circumstances as they exist at the date of the hearing. That he must do in what I venture to call a broad, common-sense way as a man of the world, and come to his conclusion giving such weight as he thinks right to the various factors in the situation. Some factors may have little or no weight, others may be decisive, but it is quite wrong for him to exclude from his consideration matters which he ought to take into account."

As we have already indicated, there is nothing in the evidence or the written decisions of the board in the instant case which shows that any appreciable consideration was given to the question of reasonableness as a matter depending on all the relevant circumstances.

Where, however, a claim for arrears of rent is made, not as a consequential or secondary matter following a claim for possession on the ground of non-payment of rent, but as a specific and independent application, the onus of proof is upon the landlord only to the extent that he must prove the tenancy (unless it and its terms are admitted) and thereby establish what rent was payable and at what dates; if the tenant asserts that the rent claimed or part thereof has been paid, the onus lies on him to prove such payment as he relies on.

Thus, if the landlord claims possession of controlled premises on any ground or grounds specified in sub-s. (1) of s. 16 other than non-payment of rent and does not set up non-payment of rent as one of his grounds but at the same time claims arrears of rent, this latter claim is an independent one and the burden of proving payment, if payment is alleged, falls on the tenant.

Sub-s. (1) (*f*) of s. 5 of the Ordinance which empowers the board to make an order for possession or an order for the recovery of arrears of rent (or both simultaneously) contains the introductory phrase "subject to the provisions of s. 16." These words, however, are to be read as only taking effect in relation to a claim for possession, whether founded upon non-payment of rent or upon any of the other statutory grounds prescribed by s. 16. In the case of a claim for arrears of rent which is independent of and not ancillary to one for possession, and is therefore a specific claim per se, the words in question have no application. For s. 16 does not lay down grounds upon which rent is in arrears may be claimed or conditions which must be fulfilled before such a claim is granted; only one such ground is known to the law, namely that the arrears were, at the time when the proceedings were commenced, due and payable but unpaid: the legal right to recover them is not given by the Ordinance but by the general law; in this instance all that s. 5 of the Ordinance does is to give jurisdiction to the board to hear and determine the claim.

It follows from what we have said that, as the issue of possession has vanished from the instant case since the first hearing by the board, if at the fresh hearing the respondent asserts that the rent claimed or any part of it was paid before the claim was made, then the burden of proving payment will be upon him, although at the first hearing the burden of proving non-payment should have been put upon the

appellant landlord. We appreciate that the majority at the first hearing did (though erroneously at that time) place that onus on the respondent and found against him; but it by no means follows that the same result should be reached at the fresh hearing, for the availability of essential witnesses such as the landlord himself may then be different, any fresh evidence may be tendered, or the conduct of the case on either side may differ from its conduct on the previous occasion. The order that a re-hearing shall take place is not academic but practical.

To conclude this brief statement of the basic rules we mention one other matter. The part played by the legal burden of proof, on whichever party it may lie, should not be over-estimated. In many – perhaps in the great majority of – cases it is not of much practical consequence (although it appears from the majority decisions in the instant case that this may well have been one in which it was). We cite Viscount Dunedin's statement of the matter in *Robins v. National Trust Co., Ltd.* (3), [1927] A.C. 515 at p. 520:

> ". . . Onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no such conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it and need not be further considered."

Thus if on any given issue neither party has, in the opinion of the Board, succeeded in proving that his contention is more probably right than is that of his opponent, then the issue must be decided against the party upon whom the burden of proof lies.

We add the following general observations, which are prompted by the very unusual course adopted by the board in this instance, namely the recording in writing of an individual decision and reasons therefor by each member of the panel including a dissentient member. We are of the opinion, with respect, that this course is undesirable inasmuch as it may well lead – as it has led in this case – to difficulties which the legislature did not intend should occur. For the guidance of the board, we think that the following three propositions should be observed in future.

First, there is no legal obligation on the board to record any reasons for any of its decisions. Secondly, however, it may well be desirable for the board to record its findings of fact and the reasons for its decision, either for the assistance of the courts in the event of an appeal or appeals, or because the board is aware that an appeal is intended and itself hopes for judicial decision of a controversial point of law. Whatever be the cause of its wish to do so, the board is always at liberty to record in writing its findings and reasons. There is no doubt but that the courts will welcome that course in any case involving a point of law which is to be argued before them. Thirdly, however, if the board is divided on any given case, the majority decision (and, if the majority think it right to record them, their reasons) should alone be recorded, though the board will no doubt also wish to state the fact that its decision was by a majority only.

The appeal will therefore be allowed in part, the judgment and decree of the Supreme Court will be set aside and the case will be remitted to the board for re-hearing. The board will be directed to hear the case de novo before a fresh panel, the re-hearing being limited to the determination of the landlord's claim for thirteen months' arrears of rent and for mesne profits until vacant possession was given.

The costs up to and including the first hearing by the board will be in the discretion of the panel on the re-hearing.

Appeal allowed in part as indicated.

For the appellant:
M Kean
Sirley & Kean, Nairobi

For the respondent:
MJE Morgan
Mervyn Morgan & Co, Nairobi

GG Somaiya & Co Ltd and another v Govindji Popatlal
[1957] 1 EA 30 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	23 March 1957
Case Number:	22/1956
Before:	Sir Ronald Sinclair V-P, Briggs and Bacon JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – de Lestang, J

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[1] Contract – Contract tainted with fraud – Agreement unenforceable – Costs.

Editor's Summary

The respondent, a money lender, sued and obtained judgment in the Supreme Court against the appellant company as borrower and the second appellant as guarantor for Shs. 85,000/- and interest arising out of an agreement to which the appellants and the respondent were parties in the following circumstances.

Prior to July, 1953, one G. C. Patel and others had conducted a crossword competition in Gujerati and English which, although intended to make a profit, resulted in a heavy loss. The winners did not receive their prizes and Patel had faked the winning entries for the last two competitions. Subsequently, in July, 1953, Patel, the respondent and the second appellant entered into an agreement to form a limited company under the name of The Crossword Competitions Limited and the respondent in accordance with that agreement deposited Shs. 50,000/- in the National Bank of India, Ltd., to the credit of the "winners account" of that company which, however, was never incorporated. A printed brochure was published which recited the unfortunate history of the crosswords and stated that (1) it had been taken over by the company, (2) the chairman, the respondent, had deposited thousands of shillings with the Bank, (3) there were guaranteed prizes for a Gujerati puzzle of Shs. 50,000/-, and also reproduced a copy of the Bank's letter acknowledging receipt of the Shs. 50,000/- deposited. A similar pamphlet was published announcing a competition in English, which stated that Shs. 10,000/- had been deposited with the Bank to be used exclusively for the prizes. The respondent simultaneously deposited a further Shs. 10,000/- with the bank. The two puzzles were adjudged on September 19, and G. C. Patel and the second appellant signed the results, based on fictitious entries, and fictitious winners were declared. No part of the Shs.

60,000/- was used for paying prize money to anyone. The agreement sued on was made on October 8, 1953, and was a straightforward loan by the respondent to the appellant company of Shs. 85,000/- which the second appellant guaranteed, but it referred to a collateral agreement which was an agreement between the respondent, the second appellant, Patel and the appellant company under which the first three parties agreed to sell their interest in "The Crossword Competitions Ltd." to the appellant company and it was agreed that the respondent should on the signing thereof be at liberty to withdraw his deposit of Shs. 60,000/- which he promptly did. It was apparent, therefore, that the main consideration for the loan of Shs. 85,000/- was the liberty to withdraw the deposit of Shs. 60,000/-. The trial Judge held that for the defendants to succeed it had to be shown that some member of the public could be defrauded by withdrawal of the deposit and as there was no genuine winner in either competition, it was difficult to see how anyone could have been so defrauded.

Held–

(i) the trial judge had overlooked the loss of entrance fees amounting to some Shs. 4,000/- in each competition and that under the rules there must have been genuine winners even though their identities might never have been discovered.

(ii) the making of the loan was the inducement whereby the respondent persuaded his associates to participate with him in the commission of a gross fraud on each and every genuine competitor and as the agreement sued on was thus tainted with fraud from start to finish it was unenforceable.

(iii) in the circumstances each party should bear his own costs.

Appeal allowed.

Cases referred to in judgment:

(1) *Holman v. Johnson*, [1775] 1 Cowp. 341.

Judgment

Bacon JA: read the following judgment of the court: The respondent is a money-lender who, in the suit out of which this appeal arose, obtained judgment in the Supreme Court of Kenya for Shs. 85,000/- together with a further sum being interest thereon, the appellant company being held liable as the borrower and the second appellant as the guarantor under an agreement in writing made on October 8, 1953, to which the appellants (in those capacities respectively) and the respondent were parties. It has never been denied that the loan was made, or that the second appellant guaranteed repayment and payment of interest, nor has it ever been alleged that the interest to which the respondent was adjudged entitled, the rate of which was specified in the agreement as 7½ per cent. per annum, was excessive. The appeal turns entirely on the circumstances in which and the terms upon which the loan was made. Of the various contentions submitted by the appellants we find it necessary only to deal in this judgment with one, which in our view succeeds and is conclusive. The history of the loan is as follows.

Prior to July, 1953, one Gordhandas C. Patel and certain Asian associates who are not parties to this appeal conducted public crossword competitions both in English and in Gujerati. Their intention was that the undertaking should produce profits. By that month they had promoted one competition in English and four in Gujerati. The business, however, resulted in a heavy loss, successful competitors did not receive their prizes and the whole enterprise was threatened with collapse. G. C. Patel admitted at the trial that in the third and fourth Gujerati competitions he faked winning entries.

In July, 1953, G. C. Patel, the respondent and the second appellant met and the two last-named became interested in the crossword venture. They all decided to form a private company for that purpose, to be called "The Crossword Competitions Limited" (which we shall call "Crosswords Limited") and accordingly entered into an agreement in writing dated July 27, 1953. After providing for the immediate registration of Crosswords Limited with a nominal capital of Shs. 100,000/- the agreement stipulated that the respondent should place in the "winners account" of Crosswords Limited

> "(in formation), to be opened immediately in the National Bank of India, the sum of shillings fifty thousand."

The respondent did so forthwith.

The intention of the parties to that agreement was plain: to carry on at a profit the series of crossword competitions started by G. C. Patel and his associates at a loss, and for that purpose to foster public confidence in the undertaking. Pursuant to that policy the third issue of a printed brochure or magazine called "Harifai", partly in Gujerati and partly in English, was published about a fortnight later, dated August 15, 1953, and described (at the head of p. 1) as the "official *Gazette* of the Gujerati crossword competition." Its first and most prominent announcement was to the effect that the crossword organization had been taken over by Crosswords Limited. There was no truth in that statement, for Crosswords Limited has never been formed to this day. It was next said that "the chairman, Mr. Govindji Popatlal," viz. the respondent, had made the bank deposit to which we have referred,

> "which sum shall exclusively be used for the distribution of prizes for puzzle No. 5."

Page 2 of "Harifai" consisted of a named portrait of the respondent. Page 3 contained the rules for

Gujerati puzzle No. 5, including one to the effect that all the entry-forms received would be handed over to the adjudicating committee when it met to settle

the most suitable solution and that, after it had been so settled, the forms would be checked in the presence of the committee and of competitors, and another rule to the effect that the first prize (the amount of which was elsewhere in the brochure declared as Shs. 36,000/-) would be awarded to the competitor whose solution was correct, or nearest to the correct solution, or would be divided amongst competitors who tied.

Page 4 of "Harifai" consisted of a lengthy lament regarding previous losses and consequent failure to pay prize-money, followed by a heartening announcement that

> "none but one of the foremost and rich businessmen of the town, Mr. Govindji Popatlal Madhavji"

had

> "by giving thousands of shillings and by depositing the same in the bank . . . adopted a system which we think will be highly welcome by our East African competitors. By this system, the competitors are assured of their winning sums."

That was followed by another announcement that Crosswords Limited had been formed and a statement that the respondent had "willingly accepted" its chairmanship.

That issue of "Harifai" also contained a statement of the alleged results and prize-monies of Gujerati puzzles Nos. 3 and 4, and a prominent announcement of the forthcoming English puzzle No. 2 with Shs. 10,000/- prize monies deposited in the National Bank of India Ltd. at Nairobi, "which sum shall exclusively be used for the distribution of the prizes" for that particular competition.

We should here note that on August 15, 1953, the date of the above-mentioned issue of "Harifai", the respondent in fact deposited in that bank a further Shs. 10,000/- to be used for the English puzzle no. 2.

Lastly, there was an announcement of Gujerati puzzle No. 5 with "guaranteed prizes Shs. 50,000/-". By way of making assurance doubly sure, the brochure also contained a facsimile reproduction of the bank's letter dated July 28, 1953, acknowledging the deposit of Shs. 50,000/- in the "winners account". That letter included the following:

> "We note that the company" (Crosswords Limited) "is in formation and that we will receive the memorandum and articles shortly."

Those responsible for the publication of "Harifai" on August 15, 1953, among whom was the respondent who lent his name to the whole thing, were thus plainly, indeed emphatically, representing that between July 28 and August 15 Crosswords Limited had been formed, that the respondent, upon whom the public could rely, was its chairman and that the forthcoming prize-winners of the two competitions then launched were, by reason of the eminently suitable steps which had been taken, certain to receive their money. In the outcome, each of those representations proved to be totally false.

We also respectfully agree with the learned trial judge's finding that the respondent, when in July, 1953, he associated himself with the crosswords enterprise and agreed that his name should be used to attract public support, knew full well that the previous competitions had been conducted at a loss, and had moreover (as admitted in "Harifai") involved the promoters in breach of faith with competitors.

The promoters of the puzzles also published a pamphlet, printed in English, announcing English puzzle No. 2. The pamphlet stated that the puzzle was "presented by The Crossword Competitions Ltd. (in formation)" and named "the proprietors" in those same terms. In the original exhibit the words "in formation" were crossed out by hand in both places, but there does not appear to be any evidence as to when and by whom that was done. The pamphlet contained the competition rules, including rules

identical with those cited by us in relation to Gujerati puzzle No. 5. It announced the first prize as Shs. 7,500/- and the remaining prizes as amounting to Shs. 2,500/-. It stated that Shs. 10,000/- had been deposited at the bank to be “exclusively used for the distribution of the prizes”, and (in another place) that “the

policy" was "to give an absolute security to prize-winners for their winning sums."

The two new puzzles, the first two promoted by the new syndicate, were adjudged on September 19. G. C. Patel and the second appellant signed the alleged results. Fictitious entries having again been concocted, fictitious winners were declared. It is clear from the rules which we have cited (and from the evidence to which we shall later refer) that there must have been genuine winners, since completion of the solution has selected by the committee was not required. The genuine winners were thus defrauded not only of their prizes but also of their entrance fees – 4/- minimum for the English puzzle, 1/- for the Gujerati. No part of the Shs. 60,000/- deposited at the bank was used for paying any prize-money to anyone.

On that same day, September 19, 1953, the three members of the syndicate agreed that any loss which might result from the two new puzzles should be borne by them in certain specified proportions. By then it must have become clear that a loss had been incurred. This situation led to the making of the two agreements in writing dated October 8, 1953, on which the case turns.

We shall refer first to the agreement sued on. It was, with one exception, a straightforward money-lending transaction whereby the respondent lent Shs. 85,000/- to the appellant Company, with a guarantee by the second appellant. The exception was cl. (*a*), which provided for the execution by those three parties and by G. C. Patel of a collateral agreement, the terms of which were agreed to form "part of this contract" so far as

> "they affect or relate to the lender on the one side and the borrower and guarantor on the other side."

The collateral agreement was as follows. The first, second and third parties thereto were the respondent, the second appellant and G. C. Patel respectively. The fourth party was the appellant Company referred to as "the purchaser." The inchoate Crosswords Limited was called "the company." There were recited the agreement of July 27, 1953, the promotion of the two new puzzles, the deposit of Shs. 60,000/- in all "to gain the confidence of the public," the fact that differences had arisen, the fact that neither the second appellant nor G. C. Patel had contributed any funds for the undertaking and, finally, the fact that the respondent had agreed to lend Shs. 85,000/- to the appellant company upon the terms thereinafter stated. The most material of the operative parts of this collateral agreement were the following:–

> "1. The first, the second and the third party for the consideration hereinafter set out HEREBY agree to transfer and assign to the purchaser ALL THAT their right title and interest in the business of the company or held by any of them the first the second and the third party in connection with the company and the right to register or incorporate the company and all stationery furniture and other articles held by the first, the second and the third party or any of them in connection therewith and capable of passing by manual delivery (the receipt whereof the purchaser hereby acknowledges) but nothing herein contained shall entitle the purchaser to the said sum of Shillings Sixty thousand (Shs. 60,000/-) deposited with the National Bank of India Limited which sum shall immediately on the execution of these presents (and to this the first, the second and the third party hereby expressly agree) be repaid to or be withdrawn by the first party for his sole use and benefit."

There was later the undertaking to lend Shs. 85,000/- (cl. 4), the guarantee given by the second appellant (cl. 5), and then this:–

> "6. As between the first party of the one part and the second party and the third party jointly and severally of the other part it is hereby agreed and declared that they the second and third party have and have had no interest or claim whatsoever in the said sum of Shillings Sixty thousand (Shs. 60,000/-) deposited as aforesaid on the Twenty-eighth day of July, One thousand Nine hundred and Fifty-three,

all of which was contributed by the first party exclusively as the second party and the third party hereby admit and acknowledge

> and which is as provided by cl. 1 hereof to be repaid to or withdrawn by the first party."

It thus clearly appears, as the learned trial judge held, that the two agreements of October 8, 1953, were inextricably interwoven and that the main consideration for the loan which the respondent now seeks to recover was the liberty to withdraw the deposit of Shs. 60,000/-.

Thereafter the respondent withdrew and retained the deposit, thereby secretly, as he well knew, defrauding the competitors in the puzzles of the guaranteed fund on the faith of which they had paid their fees and to which some of them had become entitled.

Argument was directed to the questions as to whether the making of the deposit constituted a trust for or created a contract with the competitors. We do not think it necessary to decide those questions. The broad ground upon which we base our decision is that the making of the loan was the inducement whereby the respondent persuaded his associates to participate with him in the commission of a gross fraud on each and every genuine competitor. That the respondent, and incidentally the appellants, well knew that their whole scheme for persuading the public to part with their money (to say nothing of throwing away their time and labour) rested upon the use of the respondent's name and the provision of his funds is abundantly clear. It is equally clear that, when they found that the scheme had failed, they resorted to the clandestine tactics of October 8, 1953. Since the agreement sued on was thus tainted with fraud from start to finish, it is unenforceable.

With respect, in our view the error in the judgment appealed against appears in the following passage:

> "The second question for decision is whether the withdrawal of the deposit constituted a fraud on the public . . . For the defendants to succeed on this point, it seems to me that it must be shown that some member of the public could be defrauded by the withdrawal of the deposit, but, as there was no genuine winner in either competition, it is difficult to see how anyone could have been so defrauded."

The error seems to be twofold. First, the learned judge overlooked the loss of entrance fees, proved to have amounted to something like Shs. 4,000/- in each competition. Secondly, under the rules there must have been genuine winners, even though their identities may never have been discovered.

The appeal succeeds, the judgment and decree of the Supreme Court are set aside and judgment will be entered for the appellants. As regards the costs, we refer to Lord Mansfield's observations in *Holman v. Johnson*, (1) [1775] 1 Cowp., at p. 343:

> "If from the plaintiff's own stating or otherwise the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes: not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault potior est conditio defendentis."

Each party will accordingly pay his own costs here and below.

Appeal allowed.

For the appellants:
HC Oulton
Gledhill & Oulton, Nairobi

For the respondent:

B O'Donovan and *SC Gautama*
Shah & Gautama, Nairobi

Yowana Settumba v R

[1957] 1 EA 35 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	8 January 1957
Case Number:	254/1956
Before:	Sir Newnham Worley P, McKisack CJ (U) and Bacon JA
Sourced by:	LawAfrica
Appeal from	H.M. High Court of Uganda – Sheridan, J

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[1] Evidence – Wrongful admission and exclusion of evidence – Order for re-trial.

Editor's Summary

The appellant had been convicted by a magistrate of being in possession of a firearm without a licence and of corruption of a public officer. His appeal against conviction to the High Court was dismissed and he again appealed. At the trial the weapon was described as "a home-made gun" but no evidence was given that it came within the definition of a firearm in s. 2 of the Firearms Ordinance (U.). It was found hidden in the grass at the edge of the appellant's compound and the defence was that it had been "planted" there. It was also agreed on behalf of the appellant that hearsay evidence of conversations between the appellant's son and other persons had been admitted and that the appellant wished to call evidence of local people that he had not a gun, but was not allowed to do so. Finally, the magistrate had told the appellant "that a witness as to his character would be of little avail to him".

Held–

(i) evidence should have been given that the home-made gun was a firearm under s. 2 of the Firearms Ordinance.

Gatheru s/o Njagwara v. R., 21 E.A.C.A. 384 applied.

(ii) evidence of good character is always relevant and admissible if the accused chooses to put his character in issue: a fortiori if the prosecution has been permitted to lead evidence tending to show that he is a man of bad character.

(iii) the wrongful admission and exclusion of evidence may well have led to a failure of justice and for this reason alone the convictions could not stand.

Appeal allowed, conviction and sentences on both counts quashed and a retrial ordered before another magistrate.

Cases referred to in judgment:

(1) *Gatheru s/o Njagwara v. R.*, 21 E.A.C.A. 384.

Judgment

Sir Newnham Worley P: read the following judgment of the court: The appellant was convicted in the Magistrate's Court at Mubende of the offences of being in possession of a firearm without a licence and of corruption of a public officer and was sentenced to undergo three years' imprisonment on the first charge and one year on the latter, the sentences to run concurrently. His appeal to the High Court of Uganda was dismissed and he has preferred a second appeal to this court. After hearing counsel on his behalf and for the Crown respondent we allowed the appeal, quashing the convictions and sentences on both counts and directing that the appellant be tried again before another magistrate on the same two charges.

The trial of the appellant was unsatisfactory in several respects. The weapon which formed the subject of the first charge is described as "a home-made gun" and no evidence was led to prove that it came within the definition of a firearm in s. 2 of the Firearms Ordinance No. 36 of 1955: see *Gatheru v. R.* (1), 21 E.A.C.A. 384. Further, the prosecution case was that, acting on the information received, a party of police discovered the home-made gun in question hidden in grass or bush on the edge of the appellant's compound. The defence put forward was that it had been "planted there". The prosecution case was supported by the evidence of a witness who testified that he had seen the gun exhibited in the hands of the appellant on three previous occasions. This witness was permitted to testify to a conversation between the appellant's son and other people which he claimed to have overheard after the seizure of the gun, which was to the effect that the informer would have to be shot, and in answer to the court the witness also said that the appellant had had an illegal gun

for about ten years, but the local people and chiefs were afraid to speak against him because he threatened and abused them. This evidence was clearly inadmissible. After the appellant had given evidence himself he stated that he wished to call some local people to testify that he did not possess a gun and also to bring the Muruka chief to speak to his good character. In view of the prosecution evidence of previous possession which the magistrate had already admitted, evidence tending to contradict prior possession was clearly relevant and admissible. Finally, the magistrate misdirected himself and did less than justice to the appellant when he assured him "that a witness as to his character would be of little avail to him". Evidence of good character is always relevant and admissible, if the accused chooses to put his character in issue: a fortiori if the prosecution has been permitted to lead evidence tending to show that he is a man of bad character.

The wrongful admission and exclusion of evidence may well have led to a failure of justice and for this reason alone the convictions cannot stand. The appellant has already been in custody since his arrest in May of last year and we therefore make no order for his retention in custody or for him to give bail. Mr. Dickie for the Crown-respondent is satisfied that the appellant will appear in answer to a summons if the Crown decides to proceed with the retrial.

Appeal allowed.

For the appellant:
BKM Kiwanuka
BKM Kiwanuka, Kampala

For the respondent:
JJ Dickie (Crown Counsel, Uganda)
The Attorney-General, Uganda

Patrisi Ozia v R
[1957] 1 EA 36 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	28 March 1957
Case Number:	292/1956
Before:	Sir Ronald Sinclair V-P, McKisack CJ (U) and Briggs JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Uganda – Keatinge, J

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[1] Evidence – Cautioned statement by accused not in mother tongue – Whether statement evidence against co-accused – Evidence (*Statements to Police Officers*) (*No.* 2) *Rules*, 1955, *Rule* 4 *and Rule* 5, (*U.*).

Editor's Summary

The appellant, a Congolese, whose mother tongue was Kaliko, and who also spoke Swahili, was convicted of murder. After his arrest he made a cautioned statement to the police in Swahili, which was duly recorded in Swahili by the officer to whom it was made. On appeal the question was raised whether this procedure was correct. In the course of his judgment, the trial judge stated that the sworn evidence of his co-accused could not be evidence against the appellant.

Held–

(i) the words "language being used" in r. 4 and r. 5 of the Evidence (Statements to Police Officers) (No. 2) Rules, 1955, mean the language being used on that occasion and at that time and the Rules do not require that the statement must be in the accused's mother tongue.

(ii) while an unsworn statement by a co-accused is not evidence against another accused, if he gives evidence on oath, it may be used, though such evidence must be regarded with extreme caution.

Appeal dismissed.

Cases referred to in judgment:

(1) *R. v. Gutaka*, Kampala Criminal Sessions Case No. 362 of 1955 (unreported).

Judgment

Briggs JA: read the following judgment of the court: It is unnecessary to set out the facts concerning this appeal from a conviction of murder by the High Court of Uganda. The conviction was clearly right and we dismissed the appeal. But two minor points of law require comment.

The appellant is a Congolese and his mother tongue is Kaliko. He also speaks Swahili, and after his arrest he made a cautioned statement to the police in Swahili, which was duly recorded in Swahili by the officer to whom it was made. A question has been raised whether, under the provisions of r. 4 and r. 5 of the Evidence (Statements to Police Officers) (No. 2) Rules, 1955, this procedure was correct. The rules are as follows:

> "4. If a police officer decides that a statement made by any person should be recorded and it is likely to be tendered in evidence in any proceedings and there is present any police officer literate in the language being used by such person the police officer literate in such language shall record the statement and write it down as nearly as possible in the actual words used by the person making the statement.
>
> "5. If a police officer decides that a statement made by any person should be recorded and it is likely to be tendered in evidence in any proceedings and there is not present any police officer literate in the language being used by such person the statement shall be translated to him by some person with a knowledge of the language being used and shall be written down by the police officer in the language into which it is translated. Such statement shall be recorded, as nearly as possible, and in so far as translation admits, in the words used by the person making the statement."

It was held by the High Court in *R. v. Gutaka* (1), Kampala Criminal Sessions Case No. 362 of 1955, that these rules require that the statement must be made in the accused's mother tongue. This ruling, which was given in the course of the trial, and does not appear in the judgment, is not reported. We are informed that in another case another learned judge of this High Court declined to follow it. With respect, we think the ruling was erroneous. If the words had been "language used", there might be some justification for reading them as meaning "language habitually used", but the words are "language being used", which, we think, can only mean "being in fact used on that occasion and at that time". If an accused person is able and willing to talk to a police officer in a language other than his mother tongue, it would be most unreasonable that what he said in that other language could not be recorded. In many cases, for example if he speaks fluent English, the chances of error are reduced if he does not use his mother tongue. An accused person cannot be made to speak in a language which he does not wish to use, but that is a sufficient protection to him. If he chooses to speak in a language not his own, the danger that he may speak it badly is met, so far as possible, by the provision that his actual words must be recorded.

The other point is that the learned trial judge made a slip in saying that the sworn evidence of his co-accused could not be evidence against the appellant. That would be correct if the co-accused had made an unsworn statement; but where he gives evidence on oath it may be used against another accused, though such evidence must of course be regarded with extreme caution.

Appeal dismissed.

Appellant in person.

For the respondent:
MJ Starforth (Crown Counsel, Uganda)

The Attorney-General, Uganda

Khatijabai Jiwa Hasham v Zenab d/o Chandu Nansi,

widow of Haji Gulamhussein Harji deceased as legal representative

[1957] 1 EA 38 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	15 March 1957
Case Number:	21/1956
Before:	Sir Ronald Sinclair V-P, Briggs JA and Connell J
Sourced by:	LawAfrica
Appeal from	H.M. Supreme Court of Kenya Harley, Ag. J

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[1] Contract – Anticipatory breach – Whether ground for ordering specific performance.

[2] Witness – Evidence accepted – Falsehood on material points – Failure to appreciate.

Editor's Summary

The appellant had agreed to sell certain premises to the respondent. The contract provided for completion of the transaction six months after the date of the contract. As a result of the repudiation of the contract by the appellant proceedings for specific performance were instituted before the six months had expired. The main ground of appeal was that no cause of action had arisen at the time when the proceedings were instituted. The court considered at length the authorities governing the doctrine of anticipatory breach of contract.

Held–

(i) although the repudiation of a contract by one party before the time for performance has arrived is, perhaps, not an actual breach of the contract, it may be treated by the other party, if he thinks fit, as an immediate breach of the contract giving him the right to bring an action for damages or for specific performance.

(ii) if the injured party sues for damages, he must treat the contract as having been brought to an end by the breach except for the purposes of the action, since he clearly cannot recover damages for the total breach of the contract and still treat it as subsisting for all other purposes; but the same considerations do not apply if he sues for specific performance. If the injured party does not accept the repudiation, the contract subsists for all purposes, but he may treat the repudiation as a breach for the purposes of an action for specific performance.

(iii) where the trial judge fails to appreciate or attach importance to a deliberate falsehood on a material point told by a witness whose evidence is accepted, an appellate court may place its own valuation upon the evidence of that witness.

Observations of Lord Greene, M.R., in *Yuill v. Yuill*, [1945] 1 All E.R. 183 at p. 189 applied.

Appeal dismissed.

Cases referred to:

(1) *Hochster v. De la Tour* (1853), 2 E. & B., 678.

(2) *Frost v. Knight* (1872), L.R. 7 Ex. 111.

(3) *Johnstone v. Milling* (1886), 16 Q.B.D. 460.

(4) *Danube and Black Sea Company v. Xenos* (1863), 13 C.B. (N.S.) 825.

(5) *Heyman v. Darwins Ltd.*, [1942] 1 All E.R. 337; [1942] A.C. 356

(6) *Roberto v. Bumb* (1943), 2 D.L.R. 613.

(7) *Roy v. Kloepfer Wholesale, Hardware and Automotive Co. Ltd.* (1951), 3 D.L.R. 122.

(8) *Yuill v. Yuill*, [1945] 1 All E.R. 183.

(9) *Martin v. Stout*, [1925] A.C. 359.

March 15. The following judgments were read.

Judgment

Sir Ronald Sinclair V-P: This is an appeal from a judgment and decree of the Supreme Court of Kenya for specific performance of a contract for the sale by the appellant to the respondent of Plot No. 209/58/1 consisting of a house and just over two acres of land situated next to the Mayfair Hotel, Nairobi. The Supreme Court also awarded to the respondent Shs. 1,500/- damages for delay and made other consequential orders.

The appellant is a Khoja Ismaili woman of about fifty-eight years of age. She is not literate in English, nor can she understand it. The respondent is a land and estate agent residing and carrying on business at Nairobi. He, also, is a Khoja Ismaili. In 1948 the appellant's husband and two others purchased the premises in question for Shs. 152,000/-, each holding a one-third share. In 1950 the appellant's husband died leaving her his share. In June 1953 the appellant became the registered owner of half the property. Towards the end of 1953 she entered into an agreement to purchase the remaining half for Shs. 55,000/-, subject to her taking over the entire responsibility for the mortgage to the Diamond Jubilee Investment Trust Limited on which there was at that time owing the sum of Shs. 81,000/-. By February, 1954, she had paid Shs. 25,000/- of the Shs. 55,000/-, so that she then owed the balance of Shs. 30,000/- for the purchase of the other half of the property and Shs. 81,000/- on the mortgage, a total of Shs. 111,000/-.

On February 18, 1954, the appellant signed a document giving the respondent an option to purchase the property for Shs. 100,000/-. That option was written by the respondent in English and was witnessed by a young Ismaili girl named Amina Hasham. It reads:

"Nairobi. 18.2.54.

Mr. Haji G. Harji
Nairobi.

Dear Sir,

Re my house on Slater Road
adjoining Mayfair Hotel, Nairobi.

In consideration of Shs. 5/- five I hereby giving you option to purchase the above property for Shs. 100000/- net one hundred thousand.

The above property is over 2 two acres and subdivision is completed.

The House of above property will be given in vacant Position with all vacant land contain.

This option is good up to 22nd February 1954 up to 1 p.m. to you or to your nominis.

Yours sincerely,
(Signature in Gujerati)

Witness: Amina V. Hasham".

Later that day the respondent agreed to sell the property to one Hasham Nanji, one of the proprietors of the Mayfair Hotel, for Shs. 107,000/-. He had already obtained from the appellant the key of the house which was vacant. On the following day, February 19, the respondent and Hasham Nanji went to Mr. Ishani, the respondent's advocate. Mr. Ishani was also the advocate for the Diamond Jubilee Investment Trust Limited. The respondent handed the option to Mr. Ishani and instructed him to prepare two agreements of sale, one between the appellant and himself and the other between himself and Hasham Nanji. The respondent then went away and called the appellant who arrived at Mr. Ishani's office with one Sultan Ali. Mr. Ishani was not acting as the appellant's advocate in this transaction, though he was her nephew and had acted for her or her family on previous occasions. The agreement between the appellant and the respondent, which had been prepared by Mr. Ishani in duplicate, was signed by the appellant, the original first and then the duplicate. It provided *inter alia* for payment of Shs. 15,000/- against the purchase price of Shs. 100,000/- on or before the execution of the agreement, for the sale to be completed within six months of the date of the agreement and for payment of the balance of Shs. 85,000/- on presentation of documents of transfer, either by the taking over of the mortgage for Shs. 81,000/- and payment of Shs. 4,000/- on completion of transfer, or, if so required, free from

encumbrances. In the agreement the appellant gave complete vacant possession and the respondent acknowledged receipt thereof. Almost immediately after signing the duplicate of the agreement, the appellant tore up the original agreement stating that she intended to sell only a portion of the whole plot. She thereby repudiated the contract. She did not take the cheque for Shs.

15,000/- deposit which the respondent had signed. Later the same day the respondent's advocates wrote to the appellant insisting on the performance of the contract, and the appellant's advocate wrote to the respondent confirming her repudiation of the contract and alleging that the whole transaction was fraudulent.

The plaint was filed in July, 1954, the respondent claiming specific performance of the agreement of February 19, 1954, and damages for delay or, alternatively, rescission of the agreement and damages for breach of contract and loss of bargain. In her defence the appellant set up a number of alternative defences:

(*a*) that the agreement of sale, by introducing new terms not contained in the option, was not an unqualified exercise thereof, but constituted a counteroffer which the appellant at no time accepted, and that the appellant at no time completed the signing and delivery of the agreement or acknowledged it as binding upon her as her act and deed;

(*b*) that the appellant was induced to grant the option and make the agreement of sale by the fraud or misrepresentation of the respondent;

(*c*) that the appellant was induced to grant the option and make the agreement of sale by undue influence of the respondent;

(*d*) that the agreement was entered into by mistake in that the terms thereof were drawn up so as to contravene the intention of the parties by purporting to refer to the whole of Plot No. 209/58/1, whereas it should have referred to a portion only;

(*e*) that the respondent dealt with the appellant in an unfair and unjust manner and was thereby disentitled from having specific performance of the agreement;

(*f*) that the respondent and the appellant verbally agreed at the office of Mr. Ishani on February 19, 1954, to rescind the option and agreement of sale.

The learned trial judge rejected those defences and gave judgment for the respondent as indicated above. The appellant appeals against that judgment.

I shall deal first with the submission of the appellant that no cause of action at the date of institution of the suit is disclosed by the plaint on the evidence. Mr. O'Donovan's argument in support of this ground ran as follows: a cause of action must be complete at the time when the suit is instituted: the time for completion of the contract in the present case was not until six months after its execution, namely on August 19, 1954, some weeks after the plaint was filed at the beginning of July, 1954: when the appellant repudiated the contract on February 19, 1954, the respondent was put upon his election either to treat the contract as at an end subject only to his right to sue for damages, or to treat it as still continuing, in which case no breach could occur until the time for completion had elapsed: in the former case, having treated the contract as at an end, he could not sue for specific performance at all and, in the latter case, no cause of action could arise until after August 19, 1954. He referred us to section 39 of the Indian Contract Act and to *Hochster v. De la Tour* (1) (1853), 2 E. & B., 678, *Frost v. Knight* (2) (1872), L.R. 7 Ex. 111 and *Johnstone v. Milling* (3) (1886), 16 Q.B.D. 460 amongst other authorities.

Mr. Khanna for the respondent submitted that the repudiation of the contract by the appellant constituted a complete anticipatory breach which gave the respondent an immediate right to sue either for damages or for specific performance. He also submitted that, in any event, the appellant committed actual breaches of the contract when she refused to take the deposit and claimed back the key and possession of the house. I shall dispose of the latter submission at once. In my view those acts of the appellant were not breaches of the contract but were merely indications that her repudiation was genuine and adhered to.

Section 39 of the Indian Contract Act reads:

> "When a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety, the promise may put an end to the contract, unless he has signified by words or conduct, his acquiescence in its continuance."

That section is in substance a codification of the English law and it should be read in the light of the English decisions. The English law relating to an anticipatory breach of a contract, in so far as it concerns an action for damages, was thus stated by Cockburn, C.J., in *Frost v. Knight* (2) (1872), L.R. Ex 111, at page 112:

> "The law with reference to a contract to be performed at a future time, where the party bound to performance announces prior to the time his intention not to perform it, as established by the cases of *Hochster v. De la Tour* and *The Danube and Black Sea Co. v. Xenos* on the one hand, and *Avery v. Bowden, Reid v. Hoskins*, and *Barwick v. Buba* on the other, may be thus stated. The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance: but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which would justify him in declining to complete it.
>
> "On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss."

That passage was cited with approval by Cotton, L.J., in *Johnstone v. Milling* (3). At common law, therefore, if the injured party accepts the repudiation by the other party, he may at once bring an action for damages as on a breach of the contract; but, if he does not accept the repudiation, he must wait until the time for performance of the contract has arrived. The question for decision in this appeal is whether, if the injured party does not accept the repudiation, he may, nevertheless, treat such repudiation as a breach of the contract entitling him to sue at once for specific performance. There appears to be no reported decision in England on the point, and it therefore becomes necessary to examine the principle upon which *Hochster v. De la Tour* (1), and the later cases were decided.

The doctrine of anticipatory breach was first clearly laid down in *Hochster v. De la Tour* (1), where a travelling courier sued his employer who wrote before the time for performance arrived that he would not require his services. The courier sued for damages at once, and it was held, as stated in the headnote of the report, that a party to an executory agreement may, before the time for executing it, break the agreement either by disabling himself from fulfilling it, or by renouncing the contract, and that an action will lie for such breach before the time for the fulfilment of the agreement. The following extracts from the judgment of the court, which was delivered by Lord Campbell, C.J., are pertinent:

> "Another reason (in support of such an action) may be, that, where there is a contract to do an act on a future day, there is a relation constituted between the parties in the meantime by the contract, and that they impliedly promise that in the meantime neither will do anything to the prejudice of the other inconsistent with that relation. . . . In this very case, of traveller and courier, from the day of the hiring till the day when the employment was to begin, they were engaged to each other; and it seems to be a breach of an implied contract if either of them renounces the engagement.
>
> "It seems strange that the defendant, after renouncing the contract, and absolutely declaring that he will never act under it, should be permitted to object that faith is given to his assertion, and that an opportunity is not left to him of changing his mind. If the plaintiff is barred of any remedy by entering into an engagement inconsistent with starting as a courier with the defendant on June 1, he is prejudiced by putting faith in the defendant's assertion: and it

> would be more consistent with principle, if the defendant were precluded from saying that he had not broken the contract when he declared that he entirely renounced it."

Hochster v. De la Tour (1) was followed in *Danube and Black Sea Company v. Xenos* (4), (1863), 13 C.B. (N.S.) 825, where Williams, J., said that, if one of the parties to a contract expressly repudiates and renounces it before the time for performance arrives, the party to whom the promise is made may treat that as a breach of the contract, at his option; but he is bound to exercise his option if he means to rely on the breach. Williams, J., went on to say:

> "I think it is a necessary consequence of the decision in *Hochster v. De la Tour* (1), that, where there is by the party making the promise a renunciation which amounts to a breach, it must operate as a discharge of the other party from the performance of the contract on his part."

He was then considering a cross-action for breach of contract by the party who had repudiated the contract, and he clearly meant no more than that, if the injured party accepts the repudiation, he is discharged from further performance of the contract. The same view was taken in *Frost v. Knight* (2), as the following passage from the judgment of Cockburn, C.J., indicates:

> "The considerations on which the decision in *Hochster v. De la Tour* is founded are that the announcement of the contracting party of his intention not to fulfil the contract amounts to a breach, and that it is for the common benefit of both parties that the contract shall be taken to be broken as to all its incidents, including non-performance at the appointed time; as by an action being brought at once, and the damages consequent on non-performance being assessed at the earliest moment, many of the injurious effects of such non-performance may possibly be averted or mitigated.
>
> "It is true, as is pointed out by the Lord Chief Baron, in his judgment in this case, that there can be no actual breach of a contract by reason of non-performance so long as the time for performance has not yet arrived. But, on the other hand, there is – and the decision in *Hochster v. De la Tour* proceeds on that assumption – a breach of the contract when the promisor repudiates it and declares he will no longer be bound by it. The promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. In the meantime he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests. His rights acquired under it may be dealt with by him in various ways for his benefit and advantage. Of all such advantage the repudiation of the contract by the other party, and the announcement that it never will be fulfilled, must of course deprive him. It is therefore quite right to hold that such an announcement amounts to a violation of the contract in omnibus, and that upon it the promisee, if so minded, may at once treat it as a breach of the entire contract, and bring his action accordingly.
>
> "The contract having been thus broken by the promisor, and treated as broken by the promisee, performance at the appointed time becomes excluded, and the breach by reason of the future non-performance becomes virtually involved in the action as one of the consequences of the repudiation of the contract; and the eventual non-performance may therefore, by anticipation, be treated as a cause of action, and damages be assessed and recovered in respect of it, though the time for performance may yet be remote."

Counsel for the appellant, however, relied strongly on the following passage from the judgment of Lord Esher, M.R., in *Johnstone v. Milling* (3), in support of his contention that the repudiation of a contract by one party does not amount to a breach of the contract unless it is accepted by the other party:

> ". . . a renunciation of a contract, or, in other words, a total refusal to perform it by one party before the time for performance arrives, does not, by

> itself, amount to a breach of contract but may be so acted upon and adopted, by the other party as a rescission of the contract as to give an immediate right of action. When one party assumes to renounce the contract, that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract. Such a renunciation does not of course amount to a rescission of the contract, because one party to a contract cannot by himself rescind it, but by wrongfully making such a renunciation of the contract he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission. The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation. He cannot, however, himself proceed with the contract on the footing that it still exists for other purposes, and also treat such renunciation as an immediate breach. If he adopts the renunciation, the contract is at an end except for the purposes of action for such wrongful renunciation; if he does not wish to do so, he must wait for the arrival of the time when in the ordinary course a cause of action on the contract would arise. He must elect which course he will pursue."

That passage is, no doubt, correct in its context but, if it is to be taken as a statement of general principle, I think it is too widely expressed. But I do not think that Lord Esher intended to lay down as a principle of general application that the repudiation of a contract by one party cannot amount to a breach of the contract, or cannot be treated as a breach by the other party, unless the other party adopts the repudiation as a rescission of the contract. That would, in my view, be inconsistent with the opinions expressed in *Hochster v. De la Tour* (1), *Danube and Black Sea Company v. Xenos* (4), and *Frost v. Knight* (2). Lord Esher was considering an action for damages for breach of contract and, read in that context, I think the passage must be understood as meaning no more than that the repudiation of a contract unless adopted by the injured party as a rescission of the contract, does not amount to a breach on which an action for damages can be founded. That appears to have been the view of Cotton, L.J., who said in the same case at page 471 of the report:

> "It must be taken therefore that the law is that, when one party has done an act which amounts to a wrongful renunciation of the contract and the other has acted upon it as such, there is a cause of action in respect thereof, but, when the other has not done so, then both the parties, as well he who has attempted to renounce the contract as he who asserts its existence, are entitled to the benefit of its provisions."

Strictly speaking, the contract is not rescinded even when the injured party accepts the repudiation. As Lord Macmillan said in *Heyman v. Darwins Ltd.* (5), [1942] A.C. 356 at p. 373:

> "Repudiation, then, in the sense of a refusal by one of the parties to a contract to perform his obligations thereunder, does not of itself abrogate the contract. The contract is not rescinded. It obviously cannot be rescinded by the action of one of the parties alone. But, even if the so-called repudiation is acquiesced in or accepted by the other party, that does not end the contract. The wronged party still has his right of action for damages under the contract which has been broken, and the contract provides the measure of those damages. It is inaccurate to speak in such cases of repudiation of the contract. The contract stands, but one of the parties has declined to fulfil his part of it. There has been what is called a total breach or a breach going to the root of the contract and this relieves the other party of any further obligation to perform what he for his part has undertaken."

My conclusion from the authorities is that, although the repudiation of a contract by one party before the time for performance has arrived, is perhaps, not an actual breach of the contract, it may be treated by the other party, if he thinks fit, as an

immediate breach of the contract giving him the right to bring an action for damages or for specific performance. As Lord Campbell said in *Hochster v. De la Tour* (1),

> "it would be more consistent with principle if the defendant were precluded from saying that he had not broken the contract when he declared that he entirely renounced it."

I also repeat the words of Cockburn, C.J., in *Frost v. Knight* (2):

> "It is therefore quite right to hold that such an announcement (of repudiation) amounts to a violation of the contract in omnibus, and that upon it the promisee, if so minded, may at once treat it as a breach of the entire contract, and bring his action accordingly."

If the injured party sues for damages, he must treat the contract as having been brought to an end by the breach except for the purposes of the action, since he clearly cannot recover damages for the total breach of the contract and still treat it as subsisting for all other purposes. But the same consideration does not apply if he sues for specific performance; if the injured party does not accept the repudiation, the contract subsists for all purposes, but he may treat the repudiation as a breach for the purposes of an action for specific performance.

There are two Canadian decisions which are in point; one of them supports the conclusion to which I have come. As the reports of those cases are not readily available, I feel it necessary to quote from them at length. In *Roberto v. Bumb* (6) (1943), 2 D.L.R., 613, which was a decision of the Ontario Court of Appeal, Laidlaw, J.A., said at page 620:

> "The respondent did not wait until after the time fixed for completion of the sale, viz. October 15, 1942, but commenced this action on October 8, after the appellant had repudiated the contract. The respondent had the right to keep the contract open as a subsisting and effective contract and the sole question is whether he could properly maintain an action for specific performance before the time for performance by the appellant.
>
> "It is clear that the renunciation by one of the parties before the time for performance has come does not of itself put an end to the contract, but it discharges the other, if he so chooses, and entitles him at once to sue for the breach. *Frost v. Knight* (2); *Hochster v. De la Tour* (1); *Dullea v. Taylor* (1873), 34 U.C.Q.B. 12; *Dalrymple v. Scott* (1892), 19 O.A.R. 477; *Neostyle Envelope Co. v. Barber-Ellis Ltd*. (1914), 16 D.L.R. 871, 6 O.W.N. 43 reversing 12 D.L.R. 385, 4 O.W.N. 1585; *American Red Cross v. Geddes Bros*. (1920), 55 D.L.R. 194, 61 S.C.R. 143; *Martin v. Stout*, [1925] A.C. 359. The cause of action was not complete when the proceedings were commenced in the court, but when the matter came on for trial the appellant was in default and all conditions precedent to relief then existed. The respondent was prepared to show an existing contract; that he was willing and anxious to fulfil his obligations and that the appellant was in default. I think that a Court of Equity would not permit an appellant to avoid the contract merely because the action was started prematurely, nor would the respondent be thus deprived of his equitable right to a decree of specific performance, if he were otherwise entitled to it. Such a court would not look favourably on such defence. Moreover no real benefit could be had by the appellant by giving effect to this objection to the proceedings, because the respondent would be free to commence a new action and to make the same claim as in the present one. The result would be multiplicity of proceedings concerning the matter and that should be avoided. The Judicature Act, R.S.O. 1937, c. 100, s. 15 (*h*)."

In that case, as in the instant case, the time for performance of the contract had not arrived when the action was commenced, but the defendant was in default at the time the action came on for trial. It will be observed that Laidlaw, J.A., stated that the cause of action was not complete when the proceedings were commenced. The same point arose later before the Ontario High Court in *Roy v. Kloepfer Wholesale*,

Hardware and Automotive Co. Ltd. (7) (1951), 3 D.L.R., 122. In his judgment on that case Wells, J., after reviewing the English authorities, said at p. 129:

> "It is, of course, quite clear that these decisions, and the rule that established them, arose in cases where all that was being considered was the common law right to damages for breach of contract. None of them deals with the situation where the equitable remedy of specific performance is sought, and until recently there seems to have been little authority in this respect. If, however, as Cockburn, C.J., stated in *Frost v. Knight*, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, surely he is not deprived of his rights in equity . . .
>
> "It may, of course, be argued that by the bringing of the action for specific performance the party repudiating is deprived of the opportunity of taking advantage of any set of circumstances which might, in law, relieve him from performing the contract from which he is attempting to escape. This fact has not deterred the courts from giving the wronged party an immediate right of action where damages are sought, and, in my opinion, there is no reason why there should be any distinction in dealing with an equitable remedy such as the asked here. It is obvious, I think, that an action for specific performance does not put an end to the contract. The purpose of it is, of course, to obtain the assistance of the court in the performing of the contract. Moreover, if the party attempting to repudiate is given the opportunity of otherwise escaping from the consequences of the contract by virtue of something which may arise between the time of the repudiation and the time fixed for performance, and the court insists on giving him that time, surely the court is then assisting the wrongdoer to take advantage of his own wrongful act. If the wronged party is prepared to grant this advantage to the one repudiating that is one thing, but I know of no case in equity where the court has assisted a wrongdoer to reap the fruits of his own wrongdoing. The proper rule would seem to me to be to follow the procedure indicated by the common law decisions, that is, where there is an unequivocal repudiation, to permit the party seeking the completion of performance of the contract to bring his action at once. The matter is discussed by Williston on Contracts chiefly in relation to the common law decisions, and it is interesting to note that after a very critical examination of these cases by the learned author, in which the defects in the reasoning followed are thoroughly examined, he says in reference to the decision in *Hochster v. De la Tour, supra*, at pp. 3710–11, Revised Edition, Vol. 5, para. 1314: 'It has, however, settled the law in England that an action may be brought for an anticipatory repudiation, and that doctrine has been adopted in Canada, and in the United States, either by dictum, or decision, both in the federal courts and in the courts of almost all the states in which the question has arisen.'
>
> "In applying these principles to an action for specific performance of an agreement to sell land, Williston says in the same volume at pp. 3708–09, last part of para. 1311: 'Where the owner of specific property agrees to sell it at a future day, it is certainly much easier to imply a promise that he will not otherwise dispose of it in the meantime, than it is to imply a promise in every contract not only to do but to say nothing inconsistent with the principal promise. But would a court, it may be asked, grant specific performance on January 1, of a contract to convey Blackacre the following July, on the ground that the defendant had been guilty of an anticipatory repudiation on the earlier day? If such repudiation is an actual breach justifying an action at law, there seems no reason why a suit in equity should not be maintainable. Certainly no decree would require performance before July 1, and it would at least be made clear that repudiation does not accelerate the obligations of a contract.' "

That decision appears from the 1952 Current Law Year Book, §. 655, to have been upheld by the Ontario Court of Appeal and the Supreme Court of Canada. With

respect, I agree with the conclusion arrived at by Wells, J., though not with all his reasons. I am unable to agree that

> "by the bringing of the action for specific performance the party repudiating is deprived of the opportunity of taking advantage of any set of circumstances which might, in law, relieve him from performing the contract from which he is attempting to escape."

Neither the bringing of an action for specific performance nor a decree for specific performance can advance the time for performance. A decree for specific performance orders the defendant to perform the contract according to its terms. Until the time for performance has elapsed, the party who has repudiated the contract is, in my view, entitled to take advantage of any supervening circumstance which would justify him in declining to complete it; if a decree has already been made, I think he would be entitled to be relieved from performance. A decree for specific performance of a contract where the time for performance has not arrived would necessarily be in a special form which would provide for such relief to be given. I do not agree that the court would be assisting the wrongdoer to take advantage of his own wrong.

For these reasons, I think that the appellant had a complete cause of action when the suit was instituted, and that the first ground of appeal must fail.

I turn now to the contention of the appellant that the judgment is against the weight of evidence. According to the respondent, whose evidence the learned judge accepted, he met the appellant by chance in an Indian bazaar on February 17, 1954. She was alone. She stopped him and said

> "I have got a plot about two acres with a building thereupon and I want to sell it off – in Sclaters Road."

She told him that the land was over two acres, that it was vacant and that she wanted Shs. 100,000/- for the land and building. In answer to his enquiry, she said that the land was sub-divided and that beacons had been fixed. She agreed to give him an option for three days and it was arranged that he should meet her on the following day at the house of Mrs. Valli Hasham. The next day, February 18, he wrote out the option in English and took it to the appellant who was alone in the dining room. He read over and explained the option to the appellant in Gujerati which is the language of both of them. When he was translating the document she asked that the word "net" should be inserted after "Shs. 100,000/-" and that the words "and Bicans is already been put" which appeared after the words "the above property is over 2 acres and subdivision is completed" should be deleted, as she was not sure whether beacons had been fixed. He made the addition and deletion requested. He had written that the option was good up to February 20, but she agreed to extend it to February 22. He accordingly crossed out the date "20" and put "22". These alterations appear in the option, Ex. A. The appellant then called Amina Hasham who read over and explained the option to the appellant. Thereupon the appellant signed it and Amina Hasham also signed it as a witness. On February 19, when he brought the appellant to Mr. Ishani's office, Mr. Ishani produced the agreement of sale between the appellant and the respondent, told the appellant that he had prepared it on the strength of the option given by her to the respondent, and read over and explained the contents to the appellant. The agreement as originally drafted provided for a deposit of Shs. 10,000/-. When Mr. Ishani reached the reference to Shs. 10,000/- deposit, the appellant said she was in need of Shs. 20,000/- and must have it. Mr. Ishani explained that as there was a mortgage of Shs. 81,000/- on the property, the balance was only Shs. 19,000/- and she could not demand a deposit of Shs. 20,000/-. She said "That all right, give me Shs. 15,000/-". Mr. Ishani made the necessary amendments to the agreement and he, the respondent, signed a cheque for Shs. 15,000/- which was handed to the appellant. Mr. Ishani read over the remainder of the agreement which the appellant then signed, the original first and then the

duplicate. In examination-in-chief the respondent said immediately after signing, the appellant asked him if he had sold the property to Hashambhai. He agreed that he had sold it to Hashambhai, whereupon the appellant sprang up from her chair, tore up the agreement and left

the office. He said that the appellant made no mention of intending to sell only half an acre. He maintained the same story in cross-examination, but in re-examination, in answer to a leading question, he agreed that after tearing up the agreement the appellant said that she intended to sell only a portion of the land and not the whole.

The appellant in her evidence said that when she met the respondent on the first occasion, her son Sadru Din was with her. She told the respondent that she wanted to sell a half-acre plot together with a house on it for Shs. 100,000/-, that the land was subdivided into four half-acre plots and that it was the plot with the house on it which she wished to sell. The respondent told her that he would try to find a buyer for her at the price she wanted. Two or three days later the respondent called to see her at her uncle's house where she was staying. She was on a visit from Mombasa where she lived. The respondent suggested that she should accept Shs. 80,000/- or Shs. 85,000/-. She insisted on Shs. 100,000/-. The respondent then wrote something on a piece of paper which she signed. He did not read it over to her, but said only that she "was bound for three days to sell for Shs. 100,000/-." She saw no alterations or corrections on the paper and none were made at her request. She signed the paper, having called Amina Hasham to witness her signature. Nothing was explained to Amina Hasham, nor did Amina Hasham explain the contents of the document to her. The document she signed is the option, Exhibit A. Her account of what happened at Mr. Ishani's office on February 19 was as follows:

> "Q. – When you got inside his office, did he say anything to you? A. – Yes, I was asked by him, 'Does this plot belong to you alone,' and I said 'Yes.'
>
> "Q. – Did he make any inquiry about the option? A. – He also asked me whether the option was binding on me and I said Yes.
>
> "Q. – Did he ask you anything further? A. – He took out a piece of paper and started writing.
>
> "Judge: What was he writing with-ink, pencil or what? A. – He wrote down something in pencil and gave it to somebody to type out.
>
> "Mr. O'Donovan: Was it typed out? A. – Two or three papers were brought in duly typed out.
>
> "Q. – Could you recognise the piece of paper which was typed out, if you saw it again? [Shown to witness] A. – I will see.
>
> "Judge: Is there any document in that bundle which looks anything like the typed document which he brought to you? [Bundle Exhibit A is handed to witness who fails to identify the document].
>
> "Mr. O'Donovan: What happened after the document had been typed out and brought back? A. – I was given one of them and told to put my signature to it.
>
> "Q. – Who told you? A. – Mr. Ishani told me.
>
> "Q. – Did you sign it? A. – At the time of signing I said I wanted Shs. 25,000/-.
>
> "Q. – What for? A. – Against the bargain which I wanted to make for Shs. 100,000/-
>
> "Q. – What do you mean you wanted Shs. 25,000/-a cash payment of Shs. 25,000/-? A. – Yes, I wanted 25 per cent.
>
> "Q. – Did Harji say anything about that? A. – Harji said he would give Shs. 15,000/-, then he said he would give me Shs. 20,000/-. At that moment Mr. Ishani intervened.
>
> "Q. – Mr. Ishani intervened. Mr. Harji first said he would pay Shs. 15,000/- and then he went up to Shs. 20,000/-? A. – Yes.
>
> "Q. – And what did Mr. Ishani say? A. – He said that Shs. 81,000/- is due to the Jubilee Trust. I said 'That is my responsibility.' I will pay my dues in respect of this half acre and for the rest I will make an understanding

with the Diamond Jubilee people.

"Q. – What do you mean by 'make an understanding'? A. – I meant that I would not pay the whole amount of Shs. 81,000/- but that I would pay a proportion.

> "Judge: You mean that Shs. 81,000/- was due to the Diamond Jubilee Trust in respect of the whole plot of land? A.-That is so.
>
> "Q. – And you said you would pay that off in so far as the one quarter portion was concerned. A. – Yes.
>
> "Q. – Then after that it would be a matter of understanding between you and the Diamond Jubilee Trust how much they would still allow on mortgage on the remaining three-quarters? A. – That is quite right.
>
> "Q. – When was it first mentioned that Shs. 81,000/- was due on mortgage in respect of this property? A. – When I demanded Shs. 25,000/-.
>
> "Mr. O'Donovan: Mr. Sultan was there? A. – At that moment when we were discussing this Mr. Sultan said, 'Oh, two acres are mentioned here.' I was struck with horror.
>
> "Q. – What did you do? A. – I snatched the paper on which I had put my signature and threw it away. I said, 'What is all this nonsense'? Then Mr. Ishani said there was some misunderstanding, and that Mr. Harji admitted this misunderstanding. Mr. Harji lowered his head, and then Mr. Ishani said that the matter was over and that the bargain was cancelled.
>
> "Q. – At the time when you were surprised and tore up the agreement you signed, did Mr. Harji give you any explanation about the option or agreement? A. – Yes. Mr. Ishani said, 'Don't you get puzzled. There is some misunderstanding and Mr. Harji admits this misunderstanding'-and, as if in consent, Harji lowered his head.
>
> "Judge: He lowered it or nodded it? [Witness demonstrated].
>
> "Mr. O'Donovan: Had the document which Mr. Ishani got typed out been read over to you before you signed it? A. – No."

The appellant called Sadru Din, Amina Hasham, Sultan Ali and Mr. Ishani to corroborate her account as to what occurred at her interviews with the respondent. The learned judge disbelieved the evidence of the appellant and her witnesses and, as I have said, accepted the evidence of the respondent. But, in accepting the evidence of the respondent he did not, in my view, give sufficient consideration to the respondent's repeated denials in his examination-in-chief and cross-examination that the appellant made any mention in Mr. Ishani's office of intending to sell only half an acre. In his judgment he dealt with the respondent's evidence on this point as follows:

> "After contradicting himself Plaintiff added (in re-examination) a further point which I accept as the truth.
>
> "When I went to Sultan's shop to deliver my letter dated February 19 signed by Mr. Khanna, I received from Sultan in exchange Mr. Akram's letter also dated February 19.
>
> "Q. – Did Mrs. Khatijabhai after tearing up the agreement say that she intended only to sell a portion of the land and not the whole? A. – Yes. She was very angry.
>
> "Q. – Can you remember the substance of the words she uttered? A. – She said. 'I have sold you only half an acre and not the whole plot. I will say and maintain the same in court.' "

The reason why the appellant tore up the agreement immediately after signing it was a fundamental question to be decided, and the reason for doing so given by the appellant at the time was, of course, evidence to be taken into consideration in determining that question. The respondent's denials that the appellant said she intended to sell only half an acre seem somewhat pointless in view of the following passage in his advocates' letter to the appellant of February 19, 1954:

> "After signing the agreement it appears you changed your mind, putting foreward the excuse that you were only selling the house and part of the land and not the whole of the 2.04 acres, and tore up the stamped and signed agreement and went away, declining to go through with the completion of the transaction."

Nevertheless, I cannot accept the submission of Mr. Khanna that the respondent's denials were merely the result of a lapse of memory; to my mind it is clear that the respondent was definitely lying on this point, and lying because he thought the reason given by the appellant for tearing up the agreement would be detrimental to his case.

> "An impression as to the demeanour of a witness ought not to be adopted by a trial judge without testing it against the whole of the evidence of the witness in question. If it can be demonstrated to conviction that a witness whose demeanour has been praised by the trial judge has on some collateral matter deliberately given an untrue answer, the favourable view formed by the judge as to his demeanour must necessarily lose its value":

per Lord Greene, M.R., in *Yuill v. Yuill* (8), [1945] 1 All E.R. 183 at p. 189. Although the learned judge made no comment on the demeanour of the respondent and clearly took into account the inherent probabilities when coming to his conclusion to accept the respondent's evidence, I think that his failure to appreciate that the respondent told a deliberate untruth on a material point or, if he did appreciate it, his failure to attach any importance to it, must detract from the favourable view which he took of the respondent's credibility. In those circumstances the issues of fact become at large for this court, and a fresh evaluation of the evidence is necessary.

I can see no reason to differ from the unfavourable view which the learned judge took of the credibility of the defendant and the other witnesses for the defence. There can be no doubt that the defendant herself gave perjured evidence and that she suborned her son, Sadru Din, to commit perjury. Mr. O'Donovan did not attempt to put her forward as a witness of truth. Sadru Din testified that he was present on the first occasion when the appellant and the respondent met and discussed the sale of the property. That was on February 17, 1954. He supported the appellant's evidence as to what was said on that occasion. But it was proved that he was not present at that meeting and was not even in Nairobi at the time. It is not surprising that the learned judge commented:

> "What am I to think of a defendant who unblushingly fabricates his (Sadru Din's) presence to bolster up her own story?"

From the testimony of the appellant herself and that of her sons, it is apparent that she was an astute business woman whose advice was sought by her family in transactions relating to property. It is impossible to believe that she would sign such a document as the option unless it were read over and fully explained to her. Moreover, I can think of no reason why the respondent should make the alterations which were in fact made to the option, unless they were made at the instance of the appellant when the option was being read over to her. With the exception of the extension of the date, they could not benefit the respondent. Amina Hasham, who is the appellant's cousin and understands English, said that she merely witnessed the appellant's signature to the option and did not read it herself or explain it to the appellant. But I can see no purpose in her being called by the appellant merely to witness her signature. The obvious inference is that she was called because of her knowledge of English in order to explain the document to the appellant in her own language.

Mr. O'Donovan argued that whatever the property was worth, the appellant obviously thought it was worth more than Shs. 100,000/-. Only a few months before she signed the option, she had purchased her co-owner's half share in the property for Shs. 55,000/- and taken over the entire responsibility of the mortgage of Shs. 81,000/-. In February, 1954, she still owed Shs. 111,000/- on the property. She must, therefore, it was argued, have been a lunatic to sell the whole property for Shs. 100,000/-; as she was not a lunatic, but said to be a good business woman, the probability must be that she intended to sell only the

half-acre plot as she alleged. As to the value of the property, Mr. Flatt, a Chartered Land Agent and a Fellow of the Land Agents' Society, inspected it in February, 1954. He said that the house was in an appalling state of repair and not habitable. There had been considerable destruction by white ants and dry rot and the building did not justify reinstatement.

Its only value was as scrap on demolition. In his opinion £5,350 was a fair value for the whole property at that time. The house and the half-acre plot on which it stood was not worth £5,000 or anything near it. He said that owing to Mau activities there was no great demand for Asian houses at the beginning of 1954; it was a stalemate period, but after 1954 prices rose considerably. There seems no reason to question Mr. Flatt's valuation; his opinion of the house was confirmed by Mr. Connell, an architect, and by Mr. Graham, a building inspector employed by the Nairobi City Council. It must be remembered that the appellant lived at Mombasa, and it may well be that she was not aware of the dilapidated state of the house when she purchased the half share of the property in 1953, but became aware of it when she visited Nairobi in February, 1954. That would explain her willingness to sell the property for Shs. 100,000/- at that time. In my view, the strong probability is that the option was read over and fully explained to the appellant as alleged by the respondent.

I find it equally impossible to believe that the appellant signed the agreement in Mr. Ishani's office without its being read over to her, especially if it is accepted that the option was read over to her. Although Mr. Ishani substantially supported the appellant's evidence as to what occurred in his office, his testimony as a whole was so unsatisfactory and evasive and, if true, showed such unprofessional conduct, that I think the learned judge rightly rejected it in favour of the more probable account given by the respondent. Moreover, it seems to me unlikely at the least that, if the respondent's purpose was to defraud the appellant, he would have selected as his advocate to complete the transaction Mr. Ishani, who was the appellant's nephew and who had acted for her or her family in previous transactions.

It is apparent from the appellant's evidence that her intention when she signed the option was that she should get Shs. 100,000/-cash. That was, no doubt, the reason why she asked for the insertion of the word "net." I do not think she could have believed that the mortgagees would have permitted her to sell one plot and the house and leave the mortgage on the remainder of the property. It is not unreasonable to conclude that she hoped to keep the whole of the Shs. 100,000/-, and that the real reason why she tore up the agreement was because she was angry when she found that reference to the mortgage had been made in the agreement.

Taking all these factors into consideration, I think that on a balance of probabilities the evidence of the respondent should be accepted in preference to the evidence of the appellant and the other witnesses for the defence. Once the evidence of the respondent is accepted, the defences raised by the appellant must fail. The agreement which the respondent sought to enforce was undoubtedly a concluded contract. The allegations of fraud or misrepresentation, whether made in the defence or in the evidence, were not proved. The particulars of the fraud or misrepresentation alleged in the defence are contained in para. 4 which reads:

> "On or about February 18, 1954, the plaintiff verbally represented to the defendant that he had a prospective purchaser for the said portion of land and that in order to complete negotiations for the sale thereof it was necessary for the defendant to give him (the plaintiff) an option to purchase the same for Shs. 100,000/- and he (the plaintiff) produced a document to the defendant written in the English language which he represented to be the said option."

When asked whether the respondent said what was alleged in that paragraph, the appellant replied: "Nothing of the sort." In her evidence the appellant based her case plainly on fraud, though not the same type of fraud as alleged in the defence, and no question of common mistake could arise. Indeed, the appellant herself said that there was no misunderstanding, as the following extract from her evidence shows:

“Q. – Will you carefully answer this question which I am going to put to you with a view to finding out exactly what your case is? Is it your case that you made a slip and told Mr. Harji that you wanted a hundred thousand for the two acres? A. – No, No, Sir. I know everything. No slip has been committed

> by me. I know the rates, the land, I know all my debts and liabilities. I have to pay three thousand to one Gullam Hussein.
>
> "Q. – You were quite clear as to what you were saying to Mr. Harji? A. – No Sir, I have not committed that slip. It was all in my mind. I know everything.
>
> "Q. – Did you use any words which could possibly have been misunderstood by Mr. Harji that you were really selling two acres? A. – No Sir. There is no question like any misunderstanding on his part.
>
> "Q. – There was no room for misunderstanding your intention? You were quite explicit as to what you wanted to say? A. – That is so, there was no room for misunderstanding."

The defence of undue influence was abandoned at the trial. As to the allegation that the respondent and the appellant agreed to rescind the option and agreement of sale, Mr. O'Donovan did not attempt to argue that it had been established.

If the case is considered on the evidence of the appellant rather than on the mere form of the pleadings, it is clear that the only substantial defence on the facts was fraud. This is of importance when one considers the forceful and valid criticisms which counsel has raised concerning the respondent's evidence. It seems clear that, on a most material point his original evidence was deliberately untruthful, and if the case were to be decided on a mere balance of probabilities this would weigh very heavily against him. But the burden of establishing fraud lay on the appellant and was a heavy burden as it must always be. It could not be discharged merely by showing that the respondent was unreliable. In my view, that is all that the appellant succeeded in doing. Her own evidence and that of her witnesses was equally or more unreliable and was not such as would support a finding of fraud.

Finally, it was submitted that, if the contract is binding on the appellant, this is a case where specific performance should be refused and the respondent left to his legal rights; the remedy of specific performance is equitable and discretionary and the court should not grant it where it would inflict great hardship. In my view no sufficient grounds have been shown for refusing specific performance. Inadequacy of price alone is not a sufficient ground, but in any event, the price was not proved to be inadequate. Although the appellant was not literate in English, she was not thereby prejudiced as both the option and agreement of sale were explained to her in her own language. It was suggested that the reference in the option to the sub-division might have caused the appellant to think that it related only to the house and that portion of the sub-divided plot on which it stood. That suggestion was never made by the appellant herself and it is negatived by her evidence.

I would therefore dismiss the appeal with costs.

Briggs JA: I have had the advantage of reading the judgment of the learned Vice-President. I agree entirely with his reasoning and his conclusions, and I should think it unnecessary to add anything to what he has said, were it not that the appeal raises an important question of law on which there appears to be no direct English or local authority – the question whether the suit would lie, having been filed before the date named for completion. On this I should like to add some remarks.

The objection is put in two ways. First, it is said that the cause of action in a suit for specific performance of a contract is not complete unless it is possible to plead and prove a breach of that contract. I would accept that in principle. Although in some cases equity will act quia timet, I am not aware that it normally does so in suits for specific performance. But in this case I think there was a breach of contract, committed, to be precise, either when the appellant tore up one copy of the contract animo revocandi or when her solicitors on the same day wrote a letter purporting to explain and justify

her conduct. The letter alleged that “the whole transaction was fraudulent,” and that has been the appellant’s own attitude ever since. I agree with the learned Vice-President that the appellant has entirely failed to establish her allegation of fraud. We have, accordingly, before us a contract in itself valid, which the appellant has refused to perform in accordance with its terms. The case is now therefore, in my view, one of repudiation of liability under a contract. At one stage

it was a case of repudiation of the agreement as a whole on the ground that it was void – not, in this country, voidable – as having been induced by fraud. I think these distinctions may be of importance. If in fact there was a valid contract, and the appellant alleged that there was none, and gave that as her ground for refusing to perform it, it was the clearest possible example of an act of renunciation. The effect of such an act has been considered at length in *Heyman v. Darwins, Ltd*. (5). I would refer to the passage at p. 373 cited by the learned Vice-President from the speech of Lord Macmillan, in which Lord Russell concurred, and also to the following passages from the speeches of Lord Wright and Lord Porter. Lord Wright said at p. 379:

> "An anticipatory breach does not necessarily involve an actual intention to break the contract. Intention is to be judged by the party's conduct. The difference between repudiating a contract and repudiating liability under it must not be overlooked. It is thus necessary in every case in which the word repudiation is used to be clear in what sense it is being used."

and almost immediately before that passage, on the same page,

> "But perhaps the commonest application of the word 'repudiation' is to what is often called the anticipatory breach of a contract where the party by words or conduct evinces an intention no longer to be bound and the other party accepts the repudiation and rescinds the contract. In such a case, if the repudiation is wrongful and the rescission is rightful, the contract is ended by the rescission but only as far as concerns future performance. It remains alive for the awarding of damages either for previous breaches or for the breach which constitutes the repudiation. That is only a particular form of contract-breaking and would generally under an ordinary arbitration clause involve a dispute under the contract like any other breach of contract."

Lord Porter said at p. 397:

> "What, then, is the effect of such repudiation if it be accepted? In such a case the injured party may sue on the contract forthwith whether the time for performance is due or not, or, if he has wholly or partially performed his obligation, he may in certain cases neglect the contract and sue upon a quantum meruit. In the former case he is still acting under the contract. He requires to refer to its terms at least to ascertain the damage, and he may require to refer to them also if the repudiation of the contract is in issue."

and again at p. 399:

> "To say that the contract is rescinded or has come to an end or has ceased to exist may in individual cases convey the truth with sufficient accuracy, but the fuller expression that the injured party is thereby absolved from future performance of his obligations under the contract is a more exact description of the position. Strictly speaking, to say that on acceptance of the renunciation of a contract the contract is rescinded is incorrect. In such a case the injured party may accept the renunciation as a breach going to the root of the whole of the consideration. By that acceptance he is discharged from further performance and may bring an action for damages, but the contract itself is not rescinded."

I think the question whether an unjustified "repudiation" is itself a breach of the contract was already sufficiently answered by the judgments in *Hochster v. De la Tour* (1), and *Frost v. Knight* (2), but if any doubt remained thereafter it must have been resolved by *Heyman v. Darwins Ltd* (5). Whether the breach is actual or notional seems to me to matter not at all. It was at least sufficiently real to have assigned to it a "local habitation" as well as a name by the Privy Council in *Martin v. Stout* (9), [1925] A.C. 359, at 368. There is a breach which suffices to complete the cause of action in question.

The other point made for the appellant is distinct, though related. It is said that, although repudiation, in the sense in which it occurred in this case, may constitute an actual or notional breach for the purpose of founding a cause of action for damages,

it does so only by virtue of the "acceptance" of the plaintiff, which itself has the effect of putting an end to the contract: and, if the plaintiff by his own voluntary act so puts an end to the contract, he cannot thereafter specifically enforce it. It is implicit in this argument that, if he chose to await the date of completion and the defendant then wrongfully refused to complete, the contract could be specifically enforced. The argument is attractive and gains force from many dicta of the courts, in particular those of Lord Esher in *Johnstone v. Milling* (3), to which the learned Vice-President has referred. It seems clear that the wording of s. 39 of the Indian Contract Act is derived from this and similar sources. But the words "put an end to the contract" must be read in relation to the circumstances, whether in a case such as *Johnstone v. Milling* (3), or in the Indian statute, which deals only with common law remedies. In the context of a claim for damages the phrase is convenient and sufficiently accurate; but the House of Lords has not hesitated to say that it represents only one facet of the truth. When an action is brought by the party injured by a wrongful repudiation of the contract, he may bring it to enforce the contract as one still valid and binding. The whole basis of the decision in *Heyman v. Darwins Ltd*. (5), depends on that conception. It is true that their Lordships in that case distinguished between ordinary executory obligations under a contract and the special obligations of an arbitration clause, but by giving effect to that clause they unmistakably treated the contract as subsisting, though no longer to be performed wholly according to its terms. I cite two further passages from the speech of Lord Macmillan, both at p. 374:

> ". . . whereas in an ordinary contract the obligations of the parties to each other cannot in general be specifically enforced and breach of them results only in damages, the arbitration clause can be specifically enforced by the machinery of the Arbitration Acts. The appropriate remedy for breach of the agreement to arbitrate is not damages, but its enforcement."
>
> "I am, accordingly, of opinion that what is commonly called repudiation or total breach of a contract, whether acquiesced in by the other party or not, does not abrogate the contract, though it may relieve the injured party of the duty of further fulfilling the obligations which he has by the contract undertaken to the repudiating party. The contract is not put out of existence, though all further performance of the obligations undertaken by each party in favour of the other may cease. It survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement."

It seems impossible in face of this to contend that an "accepted repudiation" necessarily bars an action for specific performance.

I have attempted so far to discuss these matters in relation to English law, but I am fortified by the Canadian cases of *Roberto v. Bumb* (6), and *Roy v. Kloepfer Wholesale*, etc. (7), more particularly since the latter decision appears from the 1952 Current Law Year Book, § 655, to have been upheld both by the Court of Appeal of Ontario and the Supreme Court of Canada. Although we have not seen their judgments, the substantial point in issue was so narrow that it seems unlikely that the decisions went on another point. I agree, however, with the learned Vice-President that, with all respect to the learned Canadian Judges, I should not wish to follow all of their reasoning. As to *Roberto's* case (6), I think the cause of action was complete at the time when the suit was filed, since the contract had been broken by renunciation. As to *Roy's* case (7), I think the passage beginning with the word "Moreover" and continuing for two sentences, which the learned Vice-President has read, is unnecessary to the decision and contains some defective reasoning. But subject to these minor criticisms I agree with the reasoning and the conclusions. I am particularly impressed by the passages cited from Williston on Contracts and much regret that that great work is not available to me here. The particular difficulty, to which he refers, of the decree being made before the contracted date of completion, does not arise in this case, and did not arise in *Robert's* case (6) or *Roy's* case (7), so it is unnecessary to consider it. Finally, I am encouraged to

find that

Roy's case (7) is treated as authoritative by the learned editor of Chitty on Contracts (21st ed. p. 249, note (*g*)).

I am of opinion that the suit could properly be brought although the date of completion remained in futuro, and that the decree of specific performance was rightly made. I agree that the appeal should be dismissed with costs.

Connell J: I have had the advantage of reading the judgments of the learned Vice-President and of Briggs, J.A., and am in entire agreement with both judgments.

I will add only that the case depends from one point of view to a great extent upon the question whether the learned judge was justified in preferring the evidence of the respondent to that of the appellant. The appellant was palpably indulging in falsehoods on a number of points and she obtained perjured evidence to support those falsehoods. The respondent was also indulging in a falsehood when he stated in examination-in-chief and cross-examination that the appellant made no mention of intending to sell only half an acre. This "error" he corrected in re-examination in answer to a leading question. This falsehood however was a singularly purposeless falsehood because on the very same evening on which the transaction took place, viz. February 19, the respondent had written through his advocate

> "After signing the agreement it appears you changed your mind, putting forward the excuse that you were only selling the house and part of the land and not the whole of the 2.04 acres, and tore up the stamped and signed agreement and went away, declining to go through with the completion of the transaction."

In not wholly rejecting the evidence of the respondent I agree that the learned judge was correct though his analysis on that aspect left much to be desired. A useful test in the assessment of this type of evidence is laid down in Field's Introduction to the Law of Evidence, p. 37, quoting Norton on Evidence:

> "The falsehood should be considered in weighing the evidence; and it may be so glaring as utterly to destroy confidence in the witness altogether. But when there is reason to believe that the main part of the deposition is true, it should not be arbitrarily rejected because of a want of veracity on perhaps some very minor point."

In view of the letter above quoted I do not think the falsehood can be said to be so glaring as utterly to destroy confidence in the witness altogether.

I agree that the appeal should be dismissed with costs.

Appeal dismissed.

For the appellant:
B O'Donovan and *JK Winayak*
Khetani & Winayak, Nairobi

For the respondent:
DN Khanna
DN & RN Khanna, Nairobi

Sultan Sir Saleh Bin Ghaleb and others v Saif Bin Sultan Hussain Al Quaiti and others

[1957] 1 EA 55 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	16 April 1957
Case Number:	17/1956
Before:	Sir Newnham Worley P, Sir Ronald Sinclair V-P and Briggs JA
Appeal from	H.M. Supreme Court of Aden – Knox Mawer, J

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[1] Arbitration – Award under Muslim law – Construction – Application of equitable principles.

[2] Statute – Proceedings under special Ordinance – Jurisdiction of court to award damages – Whether claims of heirs statute-barred – Objection taken on appeal – The Sultan of Shihr and Mukalla's Fund Ordinance s. 4 (*A.*).

[3] Evidence – Public records over thirty years old produced from proper custody – Admissibility of translations of lost deed of sale.

Editor's Summary

By his will Sultan Omer al Qu'aiti of Shihr, who died in 1865, created a Wakf of one-third of all his possessions and property, including jaghirs and mukhtars, in Arabia and Hindoostan and to manage the Wakf he appointed three of his sons, Abdullah, Saleh and Awadh. The remaining two-thirds, after allowing for the shares of his other two sons and his widow who took their shares and were not concerned in these proceedings, were held by the three first named sons in accordance with the Sharia in equal shares. After their father's death Awadh and Saleh remained in Hyderabad and the Nizam confirmed or regranted to them the jaghirs and mukhtars enjoyed by their father. Abdullah continued to live in Arabia and in 1873 the three brothers entered into an agreement to hold the properties in common, each having a one-third share. On January 21, 1878, Abdullah sold to Awadh his one-third share in all the properties except his share in the original family lands in the interior of Arabia (referred to as the Hadramaut property). The price was 186,000 Maria Theresa dollars, only 46,000 dollars of which had been paid when Abdullah died in 1888. It appeared that this agreement had been kept secret and that Abdullah's sons Husein and Munassar were unaware of it. The agreement had provided not only for the sale of Abdullah's property but also settled in Awadh's favour the right of succession to the Sultanate, although Abdullah had continued as the de facto ruler of the family territories in Arabia. By a letter to the Resident, Aden, Abdullah had confirmed the transfer to Awadh of his interest in the Sultanate by the agreement of January 21, 1878, and after his death the British Government recognised Awadh alone as Sultan, Husein and Munassar refused to accept the situation and after they had rebelled against their uncle they were removed to Aden and not allowed to return to Arabia. Awadh however granted them allowances and their dispute with him had been referred to the arbitration of a mansab. The arbitrator's award was delivered in 1903 and its effect was that the sale by Abdullah to Awadh was declared valid, that Husein and Munassar had no claim to their father's one-third share or to share in the Government of the Sultanate, that they were entitled to the balance of the purchase money 140,000 dollars, that they were to be compensated for their shares in the Hadramaut properties which had not been included in the sale and which were valued at 70,000 dollars and that they were awarded 50,000 dollars "as a matter of

sympathy and mercy." Awadh's claim for Rs. 24,00,000 remitted from India for the maintenance of the Government during the time of Abdullah and his sons was rejected. Awadh accepted the award and paid Rs. 2,14,500 into the National Bank of India at Aden. Husein and Munassar refused to accept the award and after attempting unsuccessfully to sue their uncle in the courts of British India were ultimately in 1909 given permission by the Government of Hyderabad to institute claims in the Revenue and Finance Department in respect only of the jaghirs and mukhtars. Husein and the heirs of Munassar then petitioned the Revenue Department and a commission found that although they had no claim in law to the jaghirs and mukhtars there was a moral obligation on the possessor of them to maintain and support the descendants of Omer and accordingly

recommended allowances of Rs. 5,250 a year, payable from 1922. These were subsequently substituted by law, by a statutory allowance payable until 1960 and the total amount which will have been received in respect of these by 1960 is Rs. 1,52,771 annas 6. Between 1924 and 1942 the heirs of Awadh and the heirs of Husein and Munassar each repeatedly tried to obtain payment out of the fund to themselves and ultimately the Government of Bombay, who then held the fund, stated that it proposed to transfer it to the Government of Aden and to provide by legislation for its disposal. This was done by the Sultan of Shihr and Mukalla's Fund Ordinance 1954 and at the time of the commencement of these proceedings the fund, amounting to some £74,000 was vested in the Government of Aden. The Financial Secretary instituted an interpleader suit in the Supreme Court. The parties to the proceedings fell into two groups, one, the appellants, being the heirs of Sultan Awadh who had originally deposited the fund and the other, the respondents, the heirs of his nephews Husein and Munassar. The Supreme Court in effect decreed that the latter group was entitled to the fund subject to the deduction of certain costs and payment to the former group of Shs. 274,157.10 representing damages awarded to them by the court.

The appellants appealed against the finding that the respondents were entitled to the fund and alternatively supported the award of damages; the respondents cross-appealed against the award of damages and respondents one, two and three also cross-appealed claiming the whole fund for themselves and at the same time complained that the court had failed to apportion the fund amongst the respondents.

Held–

(i) (On a preliminary objection that the Supreme Court had no jurisdiction to entertain the respondents' claims as they had not been made within the six months laid down by the Ordinance) while an objection to the jurisdiction may properly be taken for the first time on appeal, if the objection depends on the existence of a certain set of facts which might, if the objection had been taken in the court of trial, have been shown by evidence not to exist, the absence of such evidence from the Appellate Court's record will normally be considered to be due to the objector's failure to make his objection at the right time and the court will not make any presumption against a party who might have called the evidence, but will, on the other hand, presume that the evidence could and would have been called and accordingly will overrule the objection.

(ii) the award of the mansab was binding on all the parties concerned and that the heirs of Awadh remained liable to pay to the heirs of Abdullah the sum of Rs. 214,500 awarded and thus could never claim the whole of the fund.

(iii) the proceedings instituted by Husein and the heirs of Munassar in Hyderabad were a breach of the obligations flowing from the award and they thereby obtained allowances which they should not have received.

(iv) the heirs of Awadh were involved in payment of costs in defending those proceedings to which they should never have been subjected.

(v) the Supreme Court had no power to award damages under its inherent powers where the matters allowed to be put in issue in the suit are limited by statute.

(vi) applying the equitable principles that "he who seeks equity must do equity" and that "he who comes into equity must come with clean hands" the heirs of Abdullah ought not to be allowed to enjoy both the sum of Rs. 2,14,500 given to them by the award and the allowances they obtained by flouting the award and that there was an obligation on them before enforcing after 54 years their

claim under the award to compensate the heirs of Awadh for their previous conduct, inconsistent with the award, in receiving the allowances and forcing Awadh's heirs to incur costs.

(vii) the heirs of Abdullah had demanded payment of the Rs. 2,14,500 by a letter of April 7, 1942, to the Chief Secretary, Aden and that accordingly, on that date, the heirs of Abdullah were entitled to receive that sum, subject to their accounting for such part of the sums of Rs. 1,52,771 annas 6 and Rs. 30,000 (the amount of the costs incurred by the heirs of Awadh) as were properly attributable to any period prior to that date.

Appeal and cross-appeals allowed in part. Costs to be taxed as between solicitor and client and paid out of the fund but if bills not lodged within forty-two days parties to bear their own costs.

Cases referred to:

(1) *Banbury v. Bank of Montreal*, [1918] A.C. 626.

(2) *Westminster Bank Ltd. v. Edwards*, [1942] 1 All E.R. 470; [1942] A.C. 529.

(3) *Colonial Bank of Australia v. Willan* (1874), L.R. 5, P.C. 417.

(4) *Sarwarlal v. State of Hyderabad* (1954), A.I.R. Hyd. 227.

(5) *Hochster v. De la Tour* (1853), 2 E. & B. 678.

(6) *Heyman v. Darwins Ltd*., [1942] 1 All E.R. 337; [1942] A.C. 356.

(7) *Lodge v. National Union Investment Co. Ltd.*, [1907] 1 Ch. 300.

(8) *Sheo Ratan Singh v. Karan Singh* (1924), 46 All. 860.

April 16. The following judgment was read by direction of the court.

Judgment

This appeal and cross-appeal have been brought from the decree of the Supreme Court of Aden passed in an interpleader suit instituted by the Financial Secretary of that Colony in pursuance of the provisions of section 4 of the Sultan of Shihr and Mukalla's Fund Ordinance, 1945 (Aden Ordinance No. 11 of 1945). The preamble to that Ordinance recites briefly the origin of the Fund and the Ordinance itself empowers the Financial Secretary to administer the Fund and the Supreme Court to hear and determine claims to share in the distribution of it. It is convenient at this stage to note that the provision in s. 6 for appeals to the High Court of Judicature at Bombay has been replaced by provision for appeals to this court: see the Aden Colony (Amendment) Order in Council, 1947, and s. 6 of the Appeals to the Court of Appeal Ordinance (Chapter 7 of the Laws of Aden, 1955). The Fund was transferred to the Financial Secretary by the State of Bombay on or about April 27, 1951, and then amounted to approximately Rs. 11,14,500: Aden Official *Gazette*: G.N. No. 225 of June 7, 1951. On August 15, 1955, the value of the Fund is said to have been Shs. 1,481,713/ – . The present claimants to the Fund fall into two groups: one group may be conveniently described as the heirs of Sultan Awadh bin Omer, who deposited the original sum of Rs. 2,14,500; the other as the heirs of Awadh's nephews, Husein bin Abdullah bin Omer and Munassar bin Abdullah bin Omer. The latter group were made plaintiffs in the interpleader issue and the former group were made defendants. The Supreme Court in effect decreed that the latter group was entitled to the Fund, subject to the prior deduction of certain costs and also subject to the payment to the former group of the sum of Shs. 274,157.10, representing damages awarded to them by the court. The heirs of Awadh appeal to this court against the finding that the heirs of Husein and Munassar are entitled to the Fund, and alternatively support the award of damages. The heirs of Husein and Munassar have cross-appealed against the award of damages. There is also a cross-appeal by respondents Nos. one, two and three claiming the whole Fund for themselves to the exclusion of the other respondents and, also complaining that the Supreme Court had failed to apportion the Fund amongst the respondents.

At the hearing before us Mr. Nazareth for the appellants raised a preliminary point challenging the

jurisdiction of the Supreme Court to adjudicate upon the majority, if not all, of the respondents' claims. It will however be more convenient to postpone consideration of this until we have set out the history and origin of the Fund.

It begins with one Omer al Qu'aiti, a soldier of fortune and the founder of the present ruling family of the Sultanate of Shihr and Mukalla. He is referred to in some of the documents in the case as Shamsheer-ud-doula and we shall refer to him as Omer I. The Qu'aiti family held the lordship of Shibam, Houra, Hijrain and

other places in the Hadhramaut which they had wrested from another local tribe. Omar I, like many other Hadhramauti Arabs in the first half of the 19th century took service with the Nizam of Hyderabad (Deccan): he there became a commander of the Nizam's Arab troops, a noble of consequence in the State and a man of considerable wealth. Among other benefits he enjoyed in his lifetime a number of royal grants called jaghirs and mukhtars, the nature of which we shall have to consider later in this judgment. Omer I died at Hyderabad in 1865 leaving five sons, Awadh (also known as Nawaz Jung), Abdullah, Saleh (alias Barak Jung), Ali and Muhammed. Ali and Muhammed took their portions and went their separate ways: we are not concerned with them or their heirs.

Omer I left a will which is an important document in the case (Ex. 24). By it he created a Wakf of one-third of all his possessions "which he holds in the country of Arabia, Hadhramaut etc. together with all produce of the villages ("Wadi"), all property in Cities, Forts, Fields, Trees, those grown through the effects of rain, and those grown under artificial irrigation, Wells, Ships, Houses, Cash, Weapons, Gold, Silver, Goods in trade, debts due and all property which can be seen, and all things which can be called property great and little, and one third of all properties and goods which he leaves behind in Hyderabad, Hindoostan, together with debts, and all property which can be seen, Cash, Silver, Gold, all Goods in trade, Mukhtars, Jaghirs, Weapons, Houses, Karkana (Establishment) of Arabs etc. and all its belongings in the shape of animals etc., that is to say the one third of all his property and rights in Arabia and Hindoostan, or in any other country.

> "The objects of the Wakf were to meet the expenses of the city of Shilham (Shibam) and the city of Horah (Houra) and other cities which may after this be taken into his possession",

to maintain the dignity of his descendants, to carry on war and suppress rebellion and generally for the welfare of his realm and subjects. For the management of the Wakf, he appointed his three sons, Abdullah, Saleh and Awadh jointly

> "one is to aid and assist the other and whichever one of these is in Hindoostan will be able to represent the other two, and whichever of these three may be in Hadhramaut he will have the power to represent the other two: in like manner for the other cities."

They were also to have power to appoint a successor.

After the death of Omer I, Awadh and Saleh remained in Hyderabad and in 1866 the jaghirs and mukhtars which their father had enjoyed were confirmed, or regranted to them by the Nizam. Abdullah's name does not appear as Jaghirdar or Mukhtardar. He lived mostly, if not wholly, in Arabia, where he had ruled Shibam and its dependencies as his father's deputy and continued to rule de facto after Omer's death. Between 1866 and 1873 the possessions of the family in Arabia were greatly enlarged by conquest and their wealth and power proportionately increased. During this period they gained control of the coast and the port of Shihr, and perhaps Mukalla, Brum and other places, mainly, it would seem, through the energy and leadership of Awadh who brought troops from Hyderabad for that purpose.

The remaining two-thirds of the estate of Omer I, after allowing for the shares of Omer's widow and the two sons Muhammed and Ali, was held in accordance with the Sharia in equal undivided shares by Awadh, Abdullah and Saleh. On May 24, 1873, these three brothers entered into an agreement which has been variously referred to as a "family compact" and a partnership deed. The original document is missing, nor was any translation of it produced, but the parties are agreed that it provided for ownership in common of their properties, each having a third share; and for each to be the agent for the other two and to look after the interests of the others in Arabia or India, wherever each happened to reside. Abdullah appears to have continued to live in Arabia, administering the family property and exercising

the power of government: Awadh and Saleh continued to live mostly in Hyderabad.

Early in 1878 a bargain was concluded between Awadh and Abdullah which is the prime source of the present dispute. It is now common ground that Abdullah sold

to Awadh, for the sum of 186,000 Maria Theresa dollars his one-third share of the properties held in common under the partnership, whether in India or Arabia, excepting, as to Arabia, his share in the original family lands and villages in the interior (which we shall refer to as the Hadhramaut property). But the respondents contend that Abdullah had a beneficial interest in the jaghirs and mukhtars which had been confirmed to Awadh and Saleh by the Nizam and that this interest was not included in the transaction. The appellants contend that, if Abdullah did have any such interest, which they do not admit, then it was included in the property sold. We shall examine this question at length later in this judgment. It is also common ground now that only $46,000 of the purchase price was paid at the time of the sale, and that the balance of $140,000 remained unpaid at the time of Abdullah's death in 1888.

The original sale deed (also called "the letter of vow") is missing and neither of the two alleged translations of it (Ex. 25 and p. 95 of Secretariat Record) which were produced at the trial was agreed as correct or admitted in evidence in the Supreme Court. Some confusion has been caused by the learned judge having marked certain documents as exhibits when they were first tendered, and before considering the question of their admissibility, instead of marking them for identification in the first place and as exhibits only when actually admitted in evidence. A further difficulty arises as to the set of documents known as the "Secretariat Record." This is a large bound volume containing originals, translations and copies of all kinds of documents relating to the early history of this case, and evidently collected in the Aden Secretariat for purposes of permanent record. It is the primary source for all the relevant facts. Many documents which have been obtained from Hyderabad and put in evidence are only copies of copies earlier obtained from this volume. The volume was admitted in evidence as a whole by consent of all parties and its contents are all clearly evidence, for what they are worth, being public records over thirty years old and produced from proper custody. Some parts of the book have been copied and included in the record for this court, but we have also relied on many parts of it which have not been copied or included in our record. So far as we deal with matters of fact which do not appear from our record itself, this is the material on which we base our remarks.

Reverting to the two alleged translations of the sale-deed, it has been suggested that the original may be in Hyderabad. At all events, it cannot be produced and there is no suggestion that it is being deliberately suppressed. At one time it was contended that the original was a forgery, but that part of the respondents' case has been abandoned. The two translations, although naturally not identical, are not so different as to lead to any inference that they are not both bona fide translations from the original document. In the circumstances, we think they should have been admitted in evidence, though it would be necessary to use them with some caution. Similar remarks apply to a letter alleged to have been written by Abdullah to the Resident, Aden, on August 15, 1888. The original has disappeared, perhaps in Hyderabad, and its authenticity is still challenged. At the time of the arbitration referred to later it was an essential part of Husein and Munassar's case that this letter must be a forgery, and they so contended. But Government appears to have considered at all material times that it was genuine, and the Mansab (to whom we refer later) certainly thought so. We think that the purported translation of the letter (Ex. 26 at p. 94 of the Secretariat Record) was admissible and should have been received in evidence, again with mental reservations. We shall have occasion to refer again to this letter.

Going back to the sale-deed of 1878, it is apparent from the translations that it had a much more important purpose than the mere sale of Abdullah's possessions. It settled in Awadh's favour the right of succession to the Sultanate. This might seem a somewhat strange thing for Abdullah to do; but one must remember the provisions of Omer's will and the circumstances of the family as a whole, including the terms of the partnership deed, so far as we know them. Awadh's military record made him the obvious

choice as the next head of the family and, if he succeeded, his sons must

later do so. Abdullah may have recognized that this was inevitable. If so, his principal concern would be to secure adequate portions for his own sons. The sale-deed had this effect.

It seems highly probable that this transaction was kept secret from Abdullah's sons, Husein and Munassar. Although Abdullah had parted with his birthright, both as landowner and as Sultan, he continued to be the de facto ruler of the family territories in Arabia. By 1881 the British Government was taking an interest in the control of the Southern coast of Arabia and in October of that year, with the assistance of a British warship, Awadh and Abdullah were enabled finally to take possession of the ports of Mukalla and Brum. This was followed by a treaty signed on May 29, 1882, by which Abdullah, for himself and his brother Awadh and his and their heirs and successors, undertook not to dispose of any of the territories of Shihr and Mukalla and their dependencies to any power other than the British Government and, *inter alia*, to accept the advice of that Government on foreign relations. This was followed on May 1, 1888, by a second treaty establishing a British Protectorate over the Sultanate: this was also signed by Abdullah on behalf of himself and Awadh. Awadh was in Hyderabad during these years and, ex facie, the treaties recognized him and Abdullah as joint rulers of the State. This is probably the explanation for Abdullah's letter of August 15, 1888. In it he stated with regard to the treaties that he had, for himself and his heirs, transferred his interest in the Government of the Sultanate to Awadh by the agreement of January 21, 1878. It may well be that this letter was not unconnected with the state of Abdullah's health, for he died on November 25, 1888. The signature of the treaties by Abdullah as a ruler in his own right might after his death have cast doubt on the authenticity of the sale-deed of 1878. This letter would remove any such doubts. There is every reason to believe that Awadh and Abdullah were on good terms right up to Abdullah's death, and, if so, he would be anxious to make the position clear. On the other hand the sale-deed and letter would come as a great shock to Husein and Munassar, and if they heard of them only after Abdullah's death they may honestly have believed that they were not genuine. If they wished to maintain any pretensions to the Sultanate, they would be obliged to adopt that attitude, whatever their own opinions might be. We think the probabilities are in favour of the authenticity of Ex. 26. It appears from the Secretariat Record that after Abdullah's death the British Government formally recognised Awadh alone as Sultan. He did not, however, go to Arabia but left Husein and Munassar in charge of the Sultanate: the Secretariat Record shows clearly that the British Government considered them to be deputies to Awadh.

There appears to have been no serious disagreement between Awadh and his nephews until 1896, perhaps because they were still ignorant of the existence of the sale deed of 1878. The two nephews, having started the year 1896 with a violent quarrel between themselves and having appealed to Awadh, then joined forces and began to put forward claims to have inherited their father's share in the property and in the Government of the State. Awadh, urged on by the British Government, visited Mukalla. He deprived his nephews of their administrative functions and installed his own son, Ghalib, in their place. Husein and Munassar were, however, given money allowances and continued to live in the Sultanate. This arrangement lasted until late 1900 when Husein and Munassar again put forward their claims to share both in the sovereignty and in the property, and on November 5, 1900, in accordance with custom the dispute was referred to the arbitration of a "Mansab." (A mansab is a leading and respected Sayyid who is appealed to decide family and tribal disputes). Awadh appears to have returned to Mukalla early in 1901. It appears from the Secretariat file that this submission was made on the parties' own initiative, and in no way at the instigation of the British Government.

Although Husein and Munassar had joined in this submission, and the question of the Sultanate rights was undoubtedly within the submission, they were apparently unwilling to abandon their political

pretensions and continued to claim and to exercise rights of sovereignty in the State. Accordingly in September, 1901, the Resident,

Aden, went to Shihr and Mukalla and found Husein and Munassar in open rebellion against their uncle. His endeavours to bring about a settlement were unsuccessful, and eventually he informed them that they would have to leave Arabia. They apparently did so, but were later allowed by the Government of India to return for a time. Further endeavours to promote a settlement were equally unsuccessful and in July 1902, the Resident, doubtless in accordance with instructions of higher authority, arrived at Shihr in company with Awadh, and, under threat of bombardment, obliged Husein and Munassar to deliver up to their uncle the towns in their possession (Shihr and Al Ghail) and took the two nephews back with him to Aden. They were never allowed to return to the Sultanate. There is thus no doubt that they were dispossessed by an Act of State, and Sultan Awadh was put into undisputed possession of the lands and Government of the Sultanate by the same Act of State.

The arbitrator had not yet given his award, but, although the British Government was determined for reasons of State to prevent Husein and Munassar from disturbing the peace and good order of the Sultanate, it was equally anxious to ensure that they were fairly compensated for any loss of property rights. A time limit was fixed for the conclusion of the arbitration and the award was eventually delivered at the beginning of May 1903. An Arabic copy of the award signed by the arbitrator and witnesses and by Sultan Awadh is in the Secretariat Record and an agreed translation was admitted at the trial (Ex. 1). The arbitrator states that he had before him the following documents, *inter alia* – the partnership deed of 1873, the sale deed of 1878, and Abdullah's letter of 1888. The effect of the award may be thus summarized:

(*a*) the sale of Abdullah's one-third share to Awadh was declared valid and effective;

(*b*) the claim of his heirs, including Husein and Munassar, to have inherited their father's one-third was therefore rejected, but they were declared entitled to receive the unpaid balance of the purchase price, namely $140,000;

(*c*) Husein and Munassar's claim to share in the chiefship and government of the Sultanate was also rejected;

(*d*) the heirs were entitled to be compensated for their shares in the Hadhramaut properties which were not included in the sale. These shares were valued at $70,000;

(*e*) Awadh's claim for Rs. 24,00,000 representing monies remitted from India for the maintenance of the Government etc. during Abdullah's and the nephews' time, and his claim for an account of their stewardship were both dismissed;

(*f*) The heirs were awarded $50,000 "as a matter of sympathy and mercy."

There were two main issues on the arbitration, first, the authenticity of the sale-deed and of Abdullah's letter, and secondly, the effect of the sale-deed, if authentic, under Muslim law. The Mansab considered both issues with scrupulous care, and the whole award, which is of considerable length, impresses us as being the production of a man of learning and integrity, anxious to give a just decision on difficult and complex questions. Awadh, as has been said, accepted the award and, at the instigation of the Government of India, paid into the National Bank of India at Aden Rs. 2,14,500 (representing M.T. $162,500) on August 1, 1903. See Ex. 3. This represented the shares of Husein, Munassar and Husein's mother of the total sum of M.T. $260,000 awarded. The Bank placed the money to the credit of an account entitled "The Political Resident, Aden." Husein's mother (Sultanah Salma) died shortly afterwards. When Husein and Munassar refused to accept the award the money was invested in India Government paper, the account being styled "The Sultan of Shihr and Mukalla's Nephews Trust."

It is not necessary for us at this point to go in detail into the protestations made by Husein and

Munassar that they had withdrawn their authority to the arbitrator as early as 1901 (Ex. 30 and p. 86 of the Secretariat Record). They refused even to accept a copy of the award, and sought the permission of the Government of India

to sue the Sultan in the Courts of British India. This permission was refused and they then turned their attention elsewhere.

In 1904 they left Aden for Hyderabad, where they sought to get a fresh adjudication on their claims. Awadh's opposition and the consequent correspondence with the Government of India were probably responsible for the ensuing delay and it was not until December 1909 that the Nizam's Government decided to refuse them permission to sue in the ordinary courts of the State in respect of the private and personal property of Awadh, but permission was given them to institute claims in respect of the jaghirs and mukhtars in the Revenue and Finance Departments (Ex. 51). Husein and the heirs of Munassar then petitioned the Revenue Department, alleging that the jaghirs and mukhtars, which had been confirmed to Awadh and Saleh, were first held jointly by these two and their father Abdullah and that Saleh had then taken his one-third share and separated; they therefore claimed, as heirs to Abdullah, one-half of the remaining two-thirds, and arrears of profits (Ex. 38). By that time Munassar was dead, Awadh died early in 1910 and their heirs were substituted as parties. (Ghalib succeeded Awadh as Sultan). In due course Husein died (1924–1925) and his heirs were substituted. The heirs of Awadh in their answer to the petition denied that Abdullah had had any interest in the jaghirs and mukhtars: they also relied on limitation and on the arbitral award, which they said covered the Hyderabad properties. The petitioners replied, *inter alia*, that the award was invalid and had not been accepted by Husein and Munassar.

It is important to remember that the Hyderabad proceedings were not proceedings in a court of law and therefore cannot afford any basis for res judicata. Inquiries were held and reports made by different persons and, sometime in 1924, a commission of three was appointed to examine the claims. It is reported in 1926 (Ex. 21 (*d*)); the Nizam accepted the opinions of the majority and issued orders accordingly, (Ex. 21 (*e*) and Ex. 21 (*f*)). There can be no doubt that these were administrative decisions. The attitude of the Hyderabad Government appears to have been that the Nizam's authority to dispose of the jaghirs and mukhtars as he thought best was not ousted or restricted by either the sale deed or the arbitral award, even if these two documents, or either of them, purported to deal with these grants. Nevertheless, the Commission firmly rejected the contention that Abdullah had had any claim to the jaghirs or mukhtars in his capacity as an heir to Omer I: they also rejected the contention that, although these properties were regranted to Awadh and Saleh only, the intention of the Nizam was that Abdullah should have a beneficial one-third interest. They came to this conclusion in spite of the fact that, when these properties were divided between Awadh and Saleh the former took a two-thirds share. But, although rejecting the legal claims, the Commission advised and the Nizam agreed that there was a moral obligation on the possessor of the jaghirs to maintain and support the descendants of Omer I. The Commission accordingly recommended allowances to be paid to the claimants out of the income of the jaghirs. Eventually, in June, 1932, the allowance to the respondents (or those under whom they claim) was fixed at Rs. 5,250 a year, with arrears payable from 1922: this allowance was charged upon the jaghirs and mukhtars held by Awadh and his heirs. In 1948 or 1949, jaghirs and mukhtars were abolished by statute and, by way of compensation, the State Legislature granted to the heirs of Abdullah a commuted allowance of Rs. 2362.8 annas a quarter payable until 1960. It is agreed that the total payments which the respondents and their predecessors have received or will receive in respect of these allowances amount in all to Rs. 1,52,771.6.0.

We can now return to events in Aden. By 1924, Ghalib, the elder son of Awadh, had been succeeded as Sultan by the second son, Omer bin Awadh, whom we shall refer to as Omer II. On January 24 of that year, Omer II wrote to the British Agent, Aden, complaining that the heirs of Abdullah had repudiated the award by their proceedings in Hyderabad and therefore forfeited their rights in the Fund. He asked

that the Fund should be paid to the heirs of Awadh or reserved pending the decision of the Nizam's Executive Council (Ex. 14). The effect of this letter will be further

considered with reference to the respondents' alleged repudiation of the award. We do not know what reply was sent to this, but in October, 1926, Omer II again applied for payment out to him. This time the Government of Bombay replied to the effect that Omer II should produce the written consent of the other heirs of Awadh to his receiving the amount then in the Fund on their behalf as head of the family. This consent was apparently never obtained and in 1932 the Government contemplated filing an interpleader suit in the Bombay High Court (Ex. 55). It is not clear whether these proceedings were ever begun; it is clear that no determination on the claims was ever made by the High Court.

The next step of importance is that, on April 7, 1942, the heirs of Husein and Munassar applied to the Chief Secretary, Aden, for payment out of the Fund to them (Ex. 16). It will be recalled that neither Husein nor Munassar, nor any of their heirs, had ever previously expressed willingness to accept the arbitral award, and that this application was made ten years after the decision on their claims in Hyderabad. The Government of Bombay replied that their intention was to have the trust transferred to the Government of Aden and to provide by legislation for the manner of determining the disposal of the Fund. This was eventually done and Ordinance No. 11 of 1945 was passed after Aden had become a separate Colony. Before then the heirs of Husein and Munassar had again laid claim to the Fund in a letter addressed to the Chief Secretary, Aden, on January 16, 1945 (Ex. 18).

We can now consider Mr. Nazareth's preliminary point, which was, briefly, that the Supreme Court had no jurisdiction to entertain the respondents' claims or, at least, the majority of such claims, because they were not made within the period of six months limited by s. 6 of the Ordinance, and that the amounts awarded to the respondents in respect of such statute-barred claims should go to the appellants. Respondents Nos. one, two and three by their cross-appeal adopted the limitation argument as regards the claims of the remaining respondents, but contended that the amount of those claims should be added to their own shares. The arguments on this point were not pressed with any enthusiasm after we had indicated that the share of any claimant otherwise entitled, who was disqualified from taking his share by a technicality, would be treated as undisposed of under s. 7 of the Ordinance and that our report to the Governor would include a strong recommendation that equity should be done. However, as the objections to the jurisdiction were not formally withdrawn we must deal with them.

The Financial Secretary, Aden, commenced these proceedings by filing his interpleader suit on July 11, 1952, under the provisions of s. 4 of the Ordinance. Section 5 and s. 6 of the Ordinance read as follows:

> "5. (1) The Judge of the Supreme Court shall, with such assistance as he may require from the pleader referred to in s. 4, and after such examination as he may deem necessary of all the documents relating to the case in the possession of the Government, order such notice in writing to be given to each and every person, Government or body corporate who or which may, in his opinion, have a claim to any part of the Fund, or any interest in the disposition thereof.
>
> "(2) The Judge of the Supreme Court shall cause such notice to be advertised and served in such manner as he deems necessary and the law of service of process allows to each and every such person, government or body corporate and in particular he shall cause notice of the interpleader suit to be published in three successive issues of the Colony and Aden Protectorate *Gazettes* as soon as practicable after the institution of such interpleader suit.
>
> "6. The Supreme Court shall, not earlier than six months after service or publication of all the notices referred to in s. 5, proceed to hear and determine all claims to the Fund made by persons before the expiration of such period of six months, and the findings and orders of the Supreme Court in respect of claims shall, subject to the law governing appeals to the High Court of Judicature at Bombay and to

His Majesty in Council, be final."

On July 15, 1952, by direction by the Judge of the Supreme Court, a notice was issued headed:

> "The Financial Secretary of Aden, Plaintiff verses The Heirs of Husein bin Abdullah and Munassar bin Abdulla, Defendants."

After recitals, it stated that the court would hear the parties on a date to be determined by the judge, being a date "not less than six months after the date of this Notice," and it required all persons claiming to be the heirs of Husein and Munassar and all other persons claiming a share in the Fund to enter appearance in the Supreme Court at Aden on September 15, 1952. The notice was clearly defective in that the period of not less than six months prescribed by s. 6 is to run not from the date of the notice but from "the service or publication of all the notices referred to in s. 5", i.e. the period does not begin to run until the latest date on which service or advertisement is completed as ordered. Orders were made for advertisement and posting of the notice and on September 15, 1952, the Registrar of the Supreme Court certified that they had been complied with. Claimants had therefore until March 15, 1953, in which to notify the courts of their claims. All the appellants entered appearance and lodged their claims within this period. On September 15, 1952, the learned judge noted,

> "A number of people have attempted to enter appearance by writing letters. This is not entering an appearance. The letters are directed to be filed separately by the Registrar."

One of such letters or petitions appears to be that included at p. 11 of the Record of Cross-Appeal. It is dated August 28, 1952, and is from the present first Respondent, Saif the son of Husein. He claims therein to hold a power of attorney from the other heirs of Husein and from the heirs of Munassar and to be authorised to represent them in the Supreme Court of Aden. The petition asks for extension of time for entering appearance by three months, the petitioners being then all in Hyderabad. Apparently no reply was sent to this, nor is it clear whether these parties ever did formally enter an appearance. On January 15, 1952, Mr. Mansoor informed the court that he was being asked to represent other claimants who had been trying to enter appearance by means of letters and telegrams. The learned judge then made the following order

> "I will set May 13, 1953, as the final date for written statements. After this no claimants will be heard."

This date was eventually extended to August 28, 1953, on which date all the respondents filed their "claim-petition." On February 24, 1953, Mr. Mansoor had filed his retainer signed by Respondent No. 1 on behalf of himself and all the other heirs of Husein and the heirs of Munassar; but on July 18, 1955, the respondents other than Nos. one, two and three wrote to Mr. Mansoor alleging that they had never authorised Respondent No. one to give a retainer on their behalf, nor had they ever executed any power of attorney in favour of Respondent No. one for the suit or otherwise. On the same day they informed the Supreme Court that a Mr. A. M. N. Dedanwalla was retained to act for them in the suit.

On these facts Mr. Nazareth argued:

(*a*) no claim on behalf of any of the respondents was made before the expiry of the statutory six months;

(*b*) even if Respondent No. one's petition of August 28, 1952, is treated as a claim it can only be considered as made on behalf of himself and Respondents Nos. two and three, since the other respondents have repudiated his authority; and

(*c*) the Supreme Court was acting without jurisdiction in extending the statutory period of six months.

His third argument may be accepted, though it is necessary to distinguish between informing the court of the existence of a claim and giving formal particulars of it. Sub-section (1) of s. 5 is badly drafted and it is not clear what the expression

"such notice in writing" is intended to refer to. However, the section clearly requires the judge to inform himself, in the first instance, of all likely claimants and then to give notice to them of the interpleader suit. Where we think, with respect, the learned judge erred was in his refusal to take any notice of claims until the claimant had entered a formal appearance. It must have been obvious from the government records that all the heirs of Husein and Munassar were potential claimants (and indeed the title of the interpleader suit implied this). It was, therefore, the learned judge's duty, in the first place, to find out, if he could, who those heirs were and for that purpose he should have taken into consideration the letters and telegrams received. Who sent them and to whose claims they related we do not know since they are not included in the appeal record (except the letter of August 28, 1952, from Respondent No. one) for the very good reason that the objection to the jurisdiction is raised for the first time in this court. In this state of affairs we will certainly not assume that the letters and telegrams which we have not seen did not notify the court of the existence of the respondents' claims. The letter of August 28, 1952, clearly did so. An objection to the jurisdiction of the court may properly be taken for the first time on appeal; but, if the objection depends on the existence of a certain set of facts which might, if the objection had been taken in the court of trial, have been shown by evidence not to exist, the absence of such evidence from the appellate court's record will normally be considered to be due to the objector's failure to make his objection at the right time: accordingly the court will not make any presumption against the party who might have called the evidence, but will, on the other hand, presume that the evidence could and would have been called, and will accordingly overrule the objection. See *Banbury v. Bank of Montreal* (1), [1918] A.C. 626, 679, 705, 714; *Westminster Bank Ltd. v. Edwards* (2), [1942] A.C. 529, 539, and *Colonial Bank of Australasia v. Willam* (3) (1875), L.R. 5.P.C., 417, 442. For these reasons we are of opinion that Mr. Nazareth failed to establish his objection.

We can now turn to the consideration of the first of the substantial issues in this matter namely, whether Abdullah had any beneficial interest in the jaghirs and mukhtars which had been granted to his father, Omer I, and confirmed to Awadh and Saleh, and, if so, whether such interest was included in the sale of his "one-third share" to Awadh in 1878 and/or in the property covered by the arbitral award in 1903. It does not seem necessary for the purposes of this appeal to draw any distinction between jaghirs and mukhtars: both were crown grants of usufructuary rights in land for the lifetime of the grantee in return for services rendered. These grants were in theory inalienable during the lifetime of the grantee without prior sanction of the Nizam's Government. The grantee's heirs did not succeed automatically and the granting of a jaghir on the death of a holder to any person, who might or might not be the heir of the deceased, was within the sole discretion of the grantor. The jaghirdar had only a life-tenure and each successor got a fresh estate. A jaghirdar had during his life the right of managing his estates, enjoying the revenue from them and other privileges: see *Sarwarlal v. State of Hyderabad* (4) (1954), A.I.R. Hyd. 227. It would seem also that the jaghirdar was expected to apply the revenues of his estate to the support and advancement of needy members of his family. This being the strict legal view of the nature of the rights of a jaghirdar or mukhtardar, it is not surprising that the Commission appointed in 1924 advised that Abdullah had no legal claim to a share in the jaghirs and mukhtars which had been regranted to Awadh and Saleh. But in their opinion the legal aspect was not the only material one. They ended their report as follows:

> "This opinion is based entirely on legal consideration; but as the sons of Mohammed Abdullah, and Ali are all descendants of one person Omer Bin Awadh, therefore, it is the moral obligation of the possessor of the Jagirs to maintain and support them. If, for these or for the members of the families, some amount has been fixed as a maintenance to those who deserve, it will not be away from the gracious favour of His Exalted Highness which he has been, all along, bestowing upon this family. This is a Royal Prerogative against which NO

Jaghirdar has got any right to contest.

> "This opinion of ours as per orders of the Farman should be submitted to the Honourable Members of the Executive Council."

This supports our view that the strict legal rights of the parties in Hyderabad are not the only relevant consideration. We think we have to look at the matter from a more practical point of view and, so far as possible, from the standpoint of Abdullah and Awadh from 1866 onwards. Ex. No. 60, a circular issued by the State Judicial Department in 1866 is interesting: it purports to prohibit the transfer of Crown grants without prior sanction "as if they were personal property" and condems "the practice in vogue until now." The transfer of jaghirs by mortgage or in any other manner is specifically declared to be invalid without Government sanction. Nevertheless, Ex. 61, a circular issued in 1902, and Ex. 62, a circular issued in 1905, show that the practice continued. The former is interesting as showing that it was not unlawful for jaghirdars to lease their grants at an annual rental. Leases "at nominal rents" or in consideration of large debts (mortgages) are declared unlawful. There is some evidence therefore that restrictions on the assignment of the profits of jaghirs were commonly ignored. It is significant that Omer I by his will made in or about the year 1861 purported to include his jaghirs and mukhtars in the property of which one-third was set apart as Wakf.

The Hyderabad Crown grants were initially rewards of the military prowess of Omer I, the founder of the dynasty, and it was natural that he and his family should, on achieving something like independent sovereignty, regard them as adjuncts of their own royal power. Whether or not Awadh and Saleh in 1866 consented to hold a one-third interest beneficially for Abdullah, we think it is most probable that, when the partnership agreement was made in 1873, the jaghirs and mukhtars would have been within its terms. Equally, when the sale-deed was made in 1878, one would expect that they would again be made to follow the sovereignty. And this is not merely a matter of speculation; for, if our theory is correct, it explains something for which otherwise no explanation appears, that Saleh, before his death in 1880, was the beneficial owner, not of one-half, but only of one-third, of the jaghirs and mukhtars. There is no record of any sale of a one-sixth interest by Saleh to Awadh; and such a transaction is inherently improbable. We are driven towards the conclusion that, as the parties themselves regarded the matter, Abdullah had, at least after 1873, a one-third beneficial interest in the Crown grants, but sold that interest in 1878 to Awadh. We must approach the present issue with these points in mind.

As to whether the deed of sale executed by Awadh and Abdullah in 1878 specifically referred to jaghirs and mukhtars it is impossible on the evidence before us to give a precise answer. As we have said, the original deed is missing and neither of the two translations produced at the trial was admitted in evidence, although, as we have said, in our view they should have been so admitted. However, as they were referred to in the course of the argument and Mr. Channan Singh contended that they showed that the jaghirs and mukhtars were not included, we think we should briefly state that in our opinion it is possible to come to a reasonably clear conclusion, even without reference to the Arabic original. Ex. 25, a translation sent from Hyderabad. has the expression

> "grounds, mukhtars etc. including everything that may be called property or thing of value in Hyderabad."

The underlining is ours. The translation at p. 95 of the Secretariat Record has the words: "lands, gardens etc. and whatever is called property in Hyderabad." (Again our underlining). *Prima facie* it would seem that mukhtars were specifically mentioned and that in one case the word was left untranslated, and in the other case translated as "gardens." The word translated as "lands" and "grounds" may or may not have been "jaghirs." We are informed from the bar that "jaghir" is a Persian word, while "mukhtar" is Arabic. In Aden, where Arabic is commonly understood, "garden" might appear to be a reasonably good

translation of “mukhtar.” Alternatively, the word might stand in original form, as one generally understood; but how would a translator from Arabic translate “jaghirs,” even if familar with the

Persian original? He could hardly be expected to do better than “grounds” or “lands.” We think it highly probable that the words so translated was in fact “jaghirs.”

Whatever the legal position may have been, it seems probable that Awadh and Saleh, the jaghirdars, did consider that Abdullah had an interest in the profits of the jaghirs: this seems the most probable explanation of the fact to which we have already referred, that when the jaghirs were divided between them, Awadh took two-thirds and Saleh only one-third. If this was in fact the position as between the brothers, then we think that, whether or not the jaghirs were specifically mentioned in the sale-deed, they came within the scope of the expression “whatever is called property in Hyderabad.”

The same argument applies to the arbitrator’s award. He refers to the deed of partnership and the deed of sale, both of which were before him: he finds the latter to be genuine and valid, and finds as a fact that Abdullah sold to Awadh his one-third share

> “in all the aforesaid properties in accordance with the deed of partnership which exists between them and of all that which bears the name of property in the direction of India, Hyderabad, Deccan, Bombay etc., such as specie, gold, silver and immovable properties as mentioned in the letter of vow excluding the property which is at Hadhramaut.”

In face of this, which is part of the award now accepted as valid by the respondents, we think it is quite impossible for them to contend that the arbitration did not extend to whatever interests Abdullah may have had in the profits of the jaghirs, whether this interest derived from inheritance or from the partnership deed.

The next questions to be considered are the nature and effect of the payment by Awadh of Rs. 2,14,500 into the National Bank of India to the credit of the Political Resident. The learned trial judge was satisfied that on payment of the money into the Bank Awadh

> “divested himself of all property therein in favour of his nephews upon whose behalf the money was henceforth held by the British authorities”

and that

> “the status of the British authorities in holding the money became, in English legal parlance, that of a ‘Trustee’.”

He held, accordingly, that the respondents, as the legal successors in title of Husein and Munassar, were entitled, not only to the original sum of money deposited, but also to the interest accrued thereon as a result of the investments made on their behalf by the “Trustee.”

Mr. Nazareth contended, first, that the money was deposited by Awadh as security for the performance of the award. He referred us to a passage in a letter dated July 10, 1903, from the Secretary to the Government of Bombay to the Secretary of the Foreign Department of the Government of India (Ex. 37) in which it was stated that Awadh had accepted the award and “was prepared to deposit money in Bombay or Aden as security for his bona fides.” Secondly, and in the alternative, he contended that the Political Resident held the money as bailee, agent or trustee of Awadh, to pay it to the heirs of Abdullah on fulfilment of a condition, namely, the acceptance of the award by the heirs of Abdullah. What exactly he meant by acceptance of the award is not clear, but presumably it would mean no more than that they should receive the money as paid under the award and give a receipt accordingly. It must be remembered that even before the money was deposited, Awadh was aware that Husein and Munassar were going to try to take legal proceedings elsewhere. As Awadh would wish to plead the award in bar of the proceedings, it was of great importance that he should be able to prove that he had paid the moneys due

under it. It is quite possible that, if the money had been received as he intended, the proceedings in Hyderabad might have failed altogether. Mr. Dunlop stresses in his opinion that the money had not been received (Ex. 41). One would expect therefore that Awadh's instructions to the Political Resident would be that the fund was not

to pass immediately to the heirs of Abdullah, but if the heirs "accepted the award," in the sense indicated above, then, and then only, the Political Resident should hold the money as trustee for them. On behalf of the respondents, however, it was argued that on payment of the money to the Political Resident, an unconditional trust was created in favour of the heirs of Abdullah. It was stressed that when the money was transferred to the Government of Bombay to be invested in trustee securities, the Fund was styled "The Sultan of Shihr and Mukalla's Nephews Fund": see Exs. 8, 9 and 10 in particular.

The nature and effect of the payment must be determined in the light of the circumstances existing at the time when the payment was made. The Government of India had accepted the arbitrator's award as final and the Political Resident, Aden, was so notified in a telegram dated July 22, 1903, (Ex. 12). A copy of this telegram, together with a copy of the award, was sent to Awadh, though it is evident that he was already aware of the contents of the award. It is also evident that the Government of Bombay intended to exert pressure on Awadh, if necessary, to carry out the terms of the award, for, in the letter of July 10, 1903, (Ex. 37) referred to above, the Secretary to the Government of Bombay stated that the Governor in Council would "propose to see that the money awarded are (sic) paid." On July 27, 1903, Awadh wrote to the Political Resident (Ex. 2) informing him that

> "the money due to the heirs of the late Abdullah bin Omer according to the decision of the Mansab is ready and we are prepared to pay it to the Government or to whoever Government orders us to pay."

He then went on to detail how the money should be divided among the heirs. On August 1, 1903, he sent the money to the National Bank of India, apparently on the instructions of the Political Resident, under cover of the following letter (Ex. 3).

> "As per the Resident's instructions I beg to send you per bearer Rs. 2,14,500/- two lacs fourteen thousand and five hundred only, being the amount of M.T. dollars 1,62,500/- One lac sixty two thousand and five hundred only at the rate of Rs. 132/- per 100/- dollars. The amount being the shares of my nephews Munasser bin Abdulla and Hussein bin Abdulla and Hussein's mother, as per the Munsaf's decision and agreed to by the Government of India. Kindly receive the same and deposit it in their name. The said sum may not be disposed of without the order of the Political Resident, Aden."

On the same day the bank issued a receipt in the following terms: (Ex. 4).

> "Received from H.H. The Sultan of Mukalla, the sum of Rs. 2,14,500/- Two lacs, fourteen thousand and five hundred only equal to $162,500/- a/c Rs. 132/- per $100/- for credit of the Political Resident, Aden on account of Munassar bin Abdulla and Hussain Bin Abdulla."

At this time Husein and Munassar had made it clear, at least to government, that they would not accept the award or the money: see the letter dated May 27, 1903, from Husein to the Political Agent, Aden (Ex. 32). It is most improbable that Awadh would have paid the money without ensuring that he should have the full benefit of its having been paid and received in terms of the award. It is clear from Awadh's letters to the Political Resident and the Bank (Exs. 2 and 3) that the money was deposited for the purpose of discharging his obligations under the award. In view of those circumstances, it is impossible to believe that Awadh intended to deprive himself of all power to recall the money if Government did not succeed in persuading Husein and Munassar to "accept the award." We think that the instructions which he actually gave entirely accord with this view. We do not consider it necessary to decide in what capacity the Political Resident held the money, whether as bailee, agent or trustee. As between the parties it was clearly not a payment by way of security. Government from its own point of view desired an assurance that Awadh would perform his obligations under the award and may well have regarded his payment to the Political Resident as affording security to government that this would be done, but we cannot see that

the word “security” can be applicable in any other sense. We

think that in whatever capacity he was acting, the Political Resident held the money on behalf of Awadh with authority (and, be it noted, irrevocable authority) to pay it to the heirs of Abdullah, but only on the condition that they should accept the award and receive the money in full discharge of Awadh's obligations under it. It follows that until the heirs of Abdullah indicated that they were willing to receive the sum of Rs. 2,14,500/- as money due under the award, the Fund as a whole, including any accretions thereto, belonged to Awadh or his heirs.

It is apparent that the award must be the basis of the respondents' claim. They take under it, or not at all. On behalf of the appellants it was submitted that Husein and Munassar had revoked the authority of the arbitrator before he made his award, and that the award is, therefore, a nullity. It is common ground that Mohammedan law according to the Shafei school applied to the submission to arbitration, and that, according to that law, either party may revoke a submission before the arbitrator has published his award: Howard's Minhaj et Talibin, 1914 edition, p. 501. We do not believe that Husein and Munassar did revoke the arbitrator's authority before the award was made. It is true that in 1901 they complained to Government that the Mansab was not fully competent to assess the value of the Indian properties, being unfamiliar with such matters. See pp. 86 and 87 of the Secretariat Record. But this never amounted to a revocation of his general authority under the submission, and is not shown to have been communicated to him. It is also true that on April 28, 1903, Munassar wrote to the Political Agent, Aden (Ex. 31) stating that they had cancelled the authority of the arbitrator, that they both wrote to the Political Resident on May 3, 1903, (Ex. 30) alleging that they had cancelled the arbitrator's authority in 1901, and that Husein made a similar allegation in a letter to the Political Agent dated May 27, 1903 (Ex. 32). It will also be noted that on May 26, 1903, they refused to receive a copy of the award, evidently fearing that if they did so it might be considered that they had accepted the award; see Ex. 29. Thereafter, they persisted in their repudiation of the award until at least 1942.

So far as we can ascertain, it seems probable that the award was signed about May 5, 1903, though it was not dated. It is highly probable that Husein and Munassar had either seen a draft or knew what the arbitrator intended to decide before they wrote the letter of April 28, 1903, but this is not really material, since they did not purport to withdraw his authority as at that date, but alleged then that they had done so in 1901. There is nothing else in the evidence to suggest that they ever in fact revoked the authority in 1901, and nothing at all to suggest that they communicated to the arbitrator any revocation of his authority. Any revocation would, we think, be inoperative unless communicated to him. We cannot believe that the arbitrator would have continued with the arbitration if his authority had been revoked in 1901, as Husein and Munassar alleged. In his award the arbitrator recited that Husein and Munassar had freely executed a "deed of authority" in which they undertook to accept his decision and carry it into effect, but he made no reference to revocation of this authority. Moreover, if the arbitrator's authority had been revoked as early as 1901, we think the government would have been so informed. Had they believed that the authority had been revoked they would, we think, have taken an entirely different attitude. They would not willingly have lent their countenance to invalid arbitration proceedings, but would probably themselves have fixed as an Act of State a sum which Awadh was to pay by way of compensation. Their interest was to secure peace and a settled line of succession. An award not generally recognised as valid could only have been contrary to such interest. Finally in Husein and Munassar's petition to the Viceroy dated February 8, 1903, (Ex. 28) in which they set out their grievances, no mention is made of withdrawal of the arbitrator's authority; indeed the arbitration proceedings are deliberately concealed. As matters turned out, the award was the complete answer to their petition. They may well have suspected that this would be so, and it may have been because the petition omitted this

essential factor in the situation, and was therefore wholly misleading, that the Aden Government refused to forward it. We do not think the award was invalid through revocation of the arbitrator's authority.

The respondents now accept the award as binding. In Howard's Minhaj et Talibin at p. 501 it is stated that once an arbitrator has pronounced his decision "no-one's approval is necessary for the execution of the judgment." Presumably an ordinary award would be enforced either by the Kathi's Court or by the executive authority. But, having regard to Awadh's special position as a ruler, the award in the present case could not have been enforced against him by judicial process in his own dominions. On the other hand, he had already taken by executive action everything which the award gave him. His only further interest was to prevent the taking of legal proceedings against him in other jurisdictions. For this purpose he could not apply personal pressure to Husein and Munassar, as they were not within his dominions. He did, however, have the assistance of the British Government, which prevented proceedings being taken in the British Courts, and the Hyderabad Government disallowed proceedings except in relation to the Crown Grants. For the reasons we have given the award could not have been enforced against him by any court within or outside his dominions, but it could be used by him by way of defence. Nevertheless, we think that the award was as binding on the consciences of the parties to the submission and their heirs as a judgment of a competent court would have been, though it was not capable of enforcement by judicial process. Were it not for the dispute as to the arbitrator's authority, we think both sides would now accept that view. The only issue is whether the award is valid at all.

We turn now to the proceedings taken in Hyderabad by Husein and Munassar and their heirs. As we have said, the proceedings did not come before the ordinary courts of law, but were conducted before the Revenue and Finance Departments of the Nizam's Government. They were administrative and not judicial proceedings, so that no question of res judicata can arise. Although the legal claim of Husein and Munassar's heirs to a share in the Crown Grants was dismissed, the Nizam granted them, by royal grace, a permanent allowance charged on the Crown Grants held by the appellants. There can be no doubt that the proceedings instituted and prosecuted by the heirs of Husein and Munassar led directly to the grant of the allowance. Since, as we have said, any interest which Abdullah had in the Crown Grants was one of the matters in dispute submitted to arbitration and covered by the award, and the award held that Abdullah's interest had passed to Awadh, the institution of proceedings by the heirs of Abdullah for a share of the Crown Grants was a breach of the obligations flowing from the submission to arbitration and the award. As a result of that breach they obtained allowances which, on our view of the facts, they should not have received. The Fund was available to them, and by providing it Awadh had fully performed his obligations under the award.

To summarize, by refusing to accept, or be bound by, the award and by instituting and prosecuting the proceedings in Hyderabad, the heirs of Husein and Munassar had acted unconscionably, and in breach of their predecessors' agreement and moral obligation to observe and be bound by the award. If it was possible to "repudiate" the submission and award, they had done so, and had persisted in that attitude for many years.

It is contended for the appellants that this entitled Awadh's heirs in 1924 to treat the contract as rescinded and to receive back the Fund from government. They rely on the line of authorities starting with *Hochster v. De la Tour* (5) (1853), 2 E. & B. 678 and culminating in *Heyman v. Darwins Ltd.* (6), [1942] A.C. 356, [1942] 1 All E.R. 337. On January 24, 1924, Sultan Omer II wrote to the British Agent, Aden, alleging that the heirs of Sultan Abdullah had forfeited their rights to the Fund and asking that it be refunded to "us," meaning thereby the heirs of Sultan Awadh. It is said that from that date the heirs of Abdullah have had no right to receive any of the Fund. Government's attitude was wisely non-committal. The immediate objection to the appellants' submission is that Awadh had received under the award benefits which he could not return to Abdullah's family and therefore could not claim to treat it as set

aside. The respondents, as we thought, put their case too high in claiming that Awadh had taken under the award all the properties which Abdullah had sold to him. In truth, he took all those under the deed of sale itself, and was already

lawfully in possession with a perfect title before the submission. The award did no more than declare in favour of his title, which was wrongfully impugned by Abdullah's heirs. But, as regards other property not comprised in the deed of sale, the position was different. The deed expressly excludes from its operation property left to Abdullah by Omer I

> "in Hadhramaut, Shiban, Khutun, Houra and Wadiul Ain, consisting of out standings, cash, gold, silver, jewels and properties, houses, date trees, wells, lands, household furniture and everything which may be called property in the said places."

The award gives to Awadh the interest of Abdullah's heirs in all the immovable property so described in the following terms:

> "I decided in their favour towards the properties which are at Hadhramaut and the ports $70,000 seventy thousand M.T. in consideration of the share of their father Abdulla Bin Omer viz.: the one-third of the properties which are on the sea shore and one-fifth share of the property at Hadhramaut after the deduction of the one-third part of the Chiefship of Hadhramaut as valued by experts settling all their claims to the various kinds of palm trees, alcob, streams, wells, houses, and lands and in short all the goods and wealth which their father had spent excluding what belongs to the chiefship such as houses and the other which are not to be valued and which belongs to the chiefship."

It is submitted that Awadh did not take this property "under the award," because he was in possession of it from the time when the British Government forcibly removed Husein and Munassar, and had thereafter a de facto title conferred or confirmed by government. We think this cannot be supported. It seems clear that, when government first intervened in support of Awadh, it did so in the belief that his title to the Sultanate and Sultanate properties under the deed of sale was valid, as the award subsequently declared. Government may have put him in possession of the Hadhramaut properties as Sultan; but there is no reason to infer any intention to give him title to private property which belonged to Husein and Munassar. On the contrary, it seems clear, as we have said, that while it was politically necessary that they should leave Arabia, Government was anxious that they should receive proper compensation for any property they might lose there. Government still maintained the same attitude even after the award. See the letter of October 10, 1903, from the Chief Secretary, Bombay, to the Political Resident, Aden (Ex. 36). We think that Awadh's title to Abdullah's share of the Hadhramaut properties, as opposed to his initial possession of them, depended on and sprang from the award. It is reasonable to suppose that, if Awadh had not been prepared to perfect his title by arbitrating and observing the award, the support of government might have been withdrawn. We are therefore satisfied that Awadh took substantial benefits under the award. We are satisfied also that it would have been impracticable to restore those benefits to Abdullah's family in 1924 or thereafter, and indeed, it has never been suggested that that should be done. The appellants' case now is that it was never necessary to restore such benefits. They submit that it is only in cases where a party seeks to have a contract held void ab initio for reasons such as misrepresentation that resitutio in intergrum is required; but, where one party repudiates a valid contract and the other accepts the repudiation, the latter is excused from further performing the contract and may retain any benefits he has previously obtained under it. This may be good law in England or in Aden, though the benefits would of course diminish, or even preclude, a judgment for damages. But we think other principles govern this case. We are not dealing here with anticipatory breach of an English contract and we think the rules governing such matters ought not to be applied by way of analogy. On the view which we take of the nature and legal effect of this award, and applying what we believe, admittedly on very little authority, to be the relevant Shafei law, we consider that a "repudiation" of the award would be wholly ineffective for the purpose of bringing it to an end, even if "accepted" by the other party. We

think the award would cease to operate only if the parties came to a distinct and clear subsequent agreement to that effect,

and this would be considered in law to be a satisfaction of the award, rather than an anulment of it. There was never such an agreement here in fact. If the "repudiation" and "acceptance" could at all be considered a sufficient substitute for such an agreement, it would, we think, be an essential implied condition of the annulment of the award that both parties should be restored to the position in which they stood before the award was made. In this case that was impossible, or at least it was never contemplated. We are therefore of opinion that Awadh's heirs were not entitled in 1924 or at any time to treat the award as rescinded. They remained, subject to matters still to be discussed, liable to pay to Abdullah's heirs the sum of Rs. 2,14,500 awarded, and thus could never claim repayment of the whole Fund. The principal ground of appeal therefore fails.

Since the heirs of Awadh are not entitled to the whole of the Fund, it becomes necessary to consider the allowances which were and are being paid, as we have said, under compulsion of an Act of State by the Government of Hyderabad, and to which the heirs of Abdullah were not justly entitled. The amount of these has been agreed at Rs. 1,52,771.6.0., or Shs. 229,157.10. It is also necessary to consider the costs and expenses incurred by Awadh's heirs in resisting the proceedings in Hyderabad, to which they should never have been subjected. The Supreme Court assessed these at the modest sum of Rs. 30,000 or Shs. 45,000/-. These two figures are not now questioned. The question is whether they should be deducted from the apparent share of the heirs of Abdullah and added to that of the heirs of Awadh. The learned trial judge approached the matter in this way. He found as a fact that Awadh's heirs would never have had to pay the allowances or incur the costs if Abdullah's heirs had not made the claim in Hyderabad against Awadh. This is unquestionably right. He also found, and we agree, that the costs were necessarily incurred. He held that in making the claim Abdullah's heirs had broken the contract contained originally in the submission and crystallized, if one may so express it, by the award, and that for this breach of contract the heirs of Awadh were entitled to damages. He felt some doubt whether he had jurisdiction to award such damages in the proceedings then before him. He apparently thought that, if he did not decide the matter, the heirs of Awadh would be able to recover judgment in a separate action. He rightly thought that amicable settlement was out of the question, that no better evidence would ever be available, and that a prompt decision would be in the best interests of all parties. He decided to assume jurisdiction, as a reasonable exercise of the court's inherent powers, assessed the damages at Shs. 274,157.10, the sum of the two figures mentioned above, and ordered that that amount be paid out to the defendants, subject to a deduction for costs.

One's first reaction to this is that it was an eminently sensible and just decision; but there are difficulties. In the first place the learned judge, in trying this interpleader suit, was exercising a special statutory jurisdiction conferred by s. 4, s. 5, s. 6 and s. 7 inclusive of the ordinance. It is true that in s. 5 it is provided that notice is to be given not only to those who appear to "have a claim to any part of the Fund", but also to those having "any interest in the disposition thereof." If these words were read literally they might cover the whole population of Aden. But under s. 6 the duty of the court is to hear and determine claims made to the Fund itself. It appears to us that, while a claim by an assign of one of the heirs might properly have been allowed, a claim by a mere creditor of one of them would have had to be disallowed. This was in fact done in one case. If one heir were a creditor of another, we think their shares could not have been adjusted in this suit to effect payment of the debt – much less could an issue as to its existence have been tried. We think that, as long as the matter was treated as a question only of damages for breach of contract, it was collateral to the questions which could properly be tried in this suit, and in the circumstances it could not be proper to allow joinder of claims outside the ambit of the Ordinance. We think there is no jurisdiction to award in this suit damages for breach of contract as such, and that the

inherent powers of the court could not be invoked. The general power to make

> "all such orders as are necessary for the proper disposal of all matters in issue between the parties"

cannot avail in a suit where the matters allowed to be put in issue are limited by statute. We should greatly regret this conclusion, more particularly because it appears to us that any separate suit brought hereafter for damages would almost inevitably be barred by limitation; but we think the learned judge's object can be achieved by a method other than the one which he adopted.

We have no doubt whatever that the heirs of Abdullah ought not to be allowed to enjoy both the sum of Rs. 2,14,500 given to them by the award and the allowances which they obtained by flouting the award. It would be contrary to all equitable principles to allow them to approbate and reprobate in this way. It is common ground that our aim should be to decide this matter in accordance with justice, equity and good conscience. We think there is at the lowest an obligation on the heirs of Abdullah, before enforcing after fifty-four years their claim under the award, to compensate the heirs of Awadh for their previous conduct, inconsistent with the award, in receiving the allowance and forcing Awadh's heirs to incur costs. So far as the allowances are concerned, this was a clear case of unjust enrichment: but from the point of view of Awadh's heirs the costs are on the same footing. They suffered wrongful loss as regards both. We think two of the maxims of equity are in point, that "he who seeks equity must do equity" and that "he who comes into equity must come with clean hands." We think there is an analogy here with the case of *Lodge v. National Union Investment Co. Ltd*. (7), [1907] 1 Ch. 300, where it was decided that the plaintiff, who had mortgaged securities to secure a loan irrecoverable at common law, as having been made in breach of the Moneylenders Act, 1900, must submit to repay the loan as a condition of obtaining an order in equity for the return of the securities. Even if the courts in England would not, if the case were to be decided on English law, apply the maxims to this unusual situation, we think it must be remembered that the rights of the parties here are to be determined by Muslim law, and that the broad grounds of justice, equity and good conscience need not be confined by the strict rules of English equity in a case such as the present, where legal rights are to some extent obscure, but the moral aspect is beyond argument. An example of this principle is found in *Sheo Ratan Singj v. Karon Singh* (8) (1924), 46 All. 860. We conclude that, though damages could not be awarded, the heirs of Abdullah must, as a condition of enforcing their claim, account for the sum of Shs. 274,157.10.

We have held that the Fund as a whole belonged solely to Awadh or his heirs, at least until such time as the heirs of Abdullah were willing to receive the sum of Rs. 2,14,500 due under the award. Initially they were unwilling to do so and it is for them to prove a change of attitude. In the circumstances they could hardly do so by evidence other than documentary. The point is important in relation to the income of the fund, which now amounts to about three-quarters of the total. The heirs of Abdullah contend that they demanded payment by the letter of April 7, 1942, addressed to the Chief Secretary, Aden. The appellants contend that this letter should not be treated as a proper demand, because in para. 11 it states that the claimants

> "will make separate representations with regard to the payment to them of the amounts due to them under their other claims."

They say that this indicates that the money would not be received in terms of the award, but conditionally on the heirs of Abdullah being allowed to prosecute other claims to the property dealt with under the award. In consequence they contend that no proper demand was made until 1953, or alternatively 1945. It is unnecessary to consider the details of these later demands, since we are of opinion that the letter of April 7, 1942, was a sufficient demand for the present purposes. Paragraph 11 appears to us in all probability to relate back to para. 5, which deals with the sum of Rs. 1,00,000 paid by Abdullah to

Government to be paid by them to Nakeeb Omer bin Saleh al Kasadi, the previous ruler of Shihr and Mukalla whom Awadh and Abdullah had deposed and succeeded in the Sultanate. This fund had existed as a

separate account in the hands of the Government prior to the creation of the present Fund – see letter of the Accountant-General, Bombay, dated November 24, 1903, (Ex. 7) – and they have nothing to do with one another. Nor is the Nakeeb's Fund in any way concerned in the disputes between Awadh's heirs and Abdullah's. If Abdullah's heirs had any claim to it, they could properly pursue such claim without being in any breach of their obligations to observe the award. Accordingly we think that the letter of April 7, 1942, must be considered, qua this Fund, to be an unconditional demand for payment. We are prepared to ignore in favour of the heirs of Abdullah the period which must have elapsed before the demand was received.

We are accordingly of opinion that on April 7, 1942, the heirs of Husein, Munassar and Sultanah Salma became entitled to receive from the Fund a sum of Rs. 2,14,500, or Shs. 321,750/- but only subject to accounting at that date for such part of the sums of Shs. 229,157/10 (Rs. 1,52,771-6-0) and Shs. 45,000/- (Rs. 30,000) as are properly attributable to any period prior to April 7, 1942. As regards the latter sum, no exact apportionment between the periods before and after the critical date could, in view of the way it was assessed, ever be made, but most of the expenditure was probably incurred long before. We therefore direct that Shs. 37,500/-(Rs. 25,000) be treated as deductible on April 7, 1942, and the balance of Shs. 7,500/-(Rs. 5,000) as deductible at a later stage, as will appear below. As regards the sum of Shs. 229,157.10., the proportion thereof received by the heirs of Abdullah prior to April 7, 1942. should be precisely ascertainable, and we shall order an inquiry to determine the amount, if necessary, i.e. if the figures cannot be agreed by the parties. For the moment, and for the sake of clarity, we will assume the amount to have been Rs. 80,000 or Shs. 120,000/-. Then on April 7, 1942, the heirs of Abdullah would become entitled to part of the Fund, namely, a principal sum of Shs. 321,750/ – (120,000+37,500)=Shs. 164,250/-. The heirs of Awadh would remain entitled to the whole of the balance of the Fund as a principal sum. From that date onwards the interest, accretions and any losses of the Fund would be shared in proportion to the two principal sums until payment of the realized proceeds of the Fund into court.

Theoretically, Abdullah's heirs should account for allowances received after 1942 as and when received, but this would involve extremely complicated accounting and would make little practical difference. We therefore direct that, after ascertainment of the apparent shares of the two families in the Fund in court, the balance of the allowances plus the remainder of the costs and expenses (i.e. Shs. 7,500/-) be deducted from the apparent share of Abdullah's family and added to that of Awadh's. The resulting figures will represent the shares in the Fund payable to the two families, subject to costs.

Under that head the first consideration is the costs ordered to be paid to the Financial Secretary, Aden, and the Registrar. We do not altogether understand why the Registrar should have incurred any costs at all. We presume that he must have paid for advertising for claims or something of that kind. In our view such costs would more properly have been paid by the Financial Secretary to the Registrar as necessary disbursements in launching the suit. Again, we think that all these costs should have been ordered to be paid as between solicitor and client. In Aden party and party costs of proceedings in the Supreme Court are usually very low. Whether or not there is any express provision therefor in any Ordinance or Rules, we think there can be no doubt that the court has power in a proper case to order taxation as between solicitor and client, so as to afford the party something amounting to, or approaching, an indemnity. The Financial Secretary ought clearly to have in this case all costs properly incurred. We therefore order that his costs, including costs heretofore treated as costs of the registrar, be taxed as between solicitor and client and paid out of the Fund.

We think it must be conceded that all the claimants now before the court and also the original first Defendant were fully justified in claiming shares in the Fund, and also that the appellants were justified in bringing, and the respondents in opposing, this appeal. We do not think the learned judge took any different view. He ordered that each party (other than the Financial Secretary and the Registrar) should bear

his own costs of the suit, signifying, as we believe, his view that each side had succeeded in part and failed in part. That was true in the court below and is also true here; but we think the more appropriate order below and also here is that the costs of all parties (other than R. S. Chenoy, a creditor whose claim was dismissed in limine) of the suit, appeal and cross-appeal be taxed as between solicitor and client and paid out of the Fund. We grant certificates for two counsel for any party so represented either here or below. These costs and the costs of the Financial Secretary will be deductions from the gross amount of the Fund in court and the shares of the two families will abate proportionately. We direct that all bills of costs for taxation in either court be lodged within forty-two days from this date, on pain of disallowance in toto. If this were not done, ascertainment of the shares might be indefinitely delayed.

The share of Awadh's heirs may be paid out after ninety days from this date, if no application has by then been filed for leave to appeal to Her Majesty in Council. If such application has been made, that share must remain in court pending further order of the Supreme Court. The share of Abdullah's heirs, when finally ascertained, is to be transferred to a separate account in the Supreme Court for the following reasons.

The learned judge states in his judgment:

> "The parties have agreed that this judgment shall be limited to a decision upon the rival claims of the two branches of the family (that is, of the plaintiffs on the one hand and the defendants on the other), and that any minor adjustments which may be necessary between the rival branches inter se can be settled by their respective Counsel out of Court."

The respondents, however, have not been able to maintain their former solidarity and as part of their cross-appeal have asked this court to determine their shares inter se. We naturally refused to do so. They also raised the question whether the heirs (unnamed) of Sultanah Salma are entitled to dower. Since all the respondents except the fourth, who did not appear, desire to have these questions determined, and they appear to be within the scope of the original suit and would have been determined then if the parties had so desired, we order that the matter be remitted to the Supreme Court of Aden to determine these issues and to make all necessary consequential orders. The point taken before us as to jurisdiction is not to be reopened. The costs of the further proceedings will be in the discretion of the court, but must not become a charge on any part of the share of Awadh's heirs, who are neither to blame for the further litigation nor interested in it. If an appeal should go forward to Her Majesty in Council the further proceedings should be stayed pending its disposal.

The appeal and cross-appeals are allowed in part. The decree of the Supreme Court of Aden is set aside and a decree to the following effect will be substituted therefor:

(i) Inquire as to the total cash value of the Fund, including all income accrued due but unpaid, as on April 7, 1924;

(ii) Inquire as to the total amount of the allowances (including arrears) paid to the Heirs of Husein and Munassar out of the income of, or in respect of, the jaghirs and mukhtars prior to April 7, 1924;

(iii) Order that a sum of Shs. 321,750/-, subject to a deduction of the amount certified under para. (ii) hereof and to a further deduction of Shs. 37,500/-, be deemed to have been the principal share of the Heirs of Husein and Munassar and Sultanah Salma in the Fund as on April 7, 1942, and order that the remainder of the Fund as certified under para. (i) hereof be deemed to have been the principal share of the Heirs of Awadh at that date, and order that all subsequent income, accretions and losses of the Fund be appropriated to the said two principal shares accordingly;

(iv) Order that the monies paid into court by the Financial Secretary Aden, be divided in proportion to the

two principal shares aforesaid and that there be deducted thereafter from the share of the Heirs of Husein and Munassar and added to the share of the Heirs of Awadh a sum equal to Shs. 229,157.10

less the amount certified under para. (ii) hereof, and that there be deducted and added in like manner a further sum of Shs. 7,500/-;

(v) Declare that subject as hereinafter provided the appellants as Heirs of Awadh and the respondents as Heirs of Husein and Munassar are entitled to receive respectively the amounts ascertained as aforesaid and together constituting the fund in court;

(vi) Order that the costs of the Financial Secretary, Aden (including therein as disbursements all costs heretofore deemed to be costs of the Registrar, Supreme Court, Aden) and of the Government of Mukalla, the first defendant in the interpleader issue, and of the appellants and respondents, of the suit be taxed as between solicitor and client if the relative bills of costs are duly lodged for taxation within forty-two days after the date of the judgment of the Court of Appeal; provided that, if the bill of costs of any party be not so lodged, such party shall bear his own costs of the suit; and Order that upon any such taxation the costs of two counsel may be allowed;

(vii) Order that any costs taxed as aforesaid and any costs of this appeal and cross-appeals taxed in the Court of Appeal be paid forthwith out of the Fund and that the amounts payable to the appellants and respondents do abate proportionately;

(viii) Order that if within 90 days from the date of the judgment of the Court of Appeal any application be made for leave to appeal to Her Majesty in Council no payment otherwise than in respect of costs be made out of court pending further order of the Supreme Court;

(ix) Order that if no such application be made within the said period the monies payable to the appellants be paid to them or as they may direct, and the monies payable to the respondents be transferred to a separate account in court and to the credit of the proceedings hereinafter referred to;

(x) Inquire as to the proportions in which the respondents or any one or more of them are entitled to the said transferred monies or any part thereof; provided that for the purpose of such inquiry each of the respondents shall be deemed to have made in due time a claim to that portion of the Fund to which he may be held entitled; provided further that if it appears that any person other than a respondent is entitled to any part of such monies, the same shall be certified as undisposed of within the meaning of s. 7 of the Ordinance; and order payment accordingly; provided further that if any appeal be brought to Her Majesty in Council this inquiry shall be stayed pending final disposal of such appeal;

(xi) Order that the costs of such further proceedings be reserved to further consideration, but be made payable, if at all, only by some one or more of the respondents or out of the monies transferred to separate account as aforesaid;

(xii) Liberty to apply.

The costs of all parties of the appeal and cross-appeals will similarly be taxed as between solicitor and client and paid out of the fund in the Supreme Court, but subject to the same condition that, if the bills of costs are not duly lodged within forty-two days, the parties concerned will have to bear their own costs. We certify for two counsel.

A draft of the order to be made by this court is to be submitted to the President. There will be liberty to all parties to apply generally.

Appeal and cross-appeals allowed in part.

For the appellants:
JM Nazareth, QC, Akbar Ali Khan and *AE Kazi*
AE Kazi, Aden

For the first, second and third respondents:
Chanan Singh
Channan Singh & Handa, Nairobi

For the eleventh, twelfth and fourteenth respondents:
MH Mansoor
MH Mansoor, Aden

For the fifth, sixth, seventh, eighth, ninth, tenth, thirteenth, fifteenth, sixteenth, seventeenth, eighteenth and twentieth respondents:
KA Hussain Gandhi
KA Husain Gandhi, Aden

The fourth and nineteenth respondents did not appear and were not represented.

Oriental General Stores Ltd v Bhailalbhai Rambhai Patel and others
[1957] 1 EA 77 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	23 March 1957
Case Number:	81/1956
Before:	Sir Newnham Worley P, Briggs and Bacon JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Connell, J

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[1] Fraud – Transfer of business – Circumstances resulting in – Whether transfer effected in law and in fact – Whether fraud or intent to defraud material – s. 3 *of the Fraudulent Transfer of Businesses Ordinance* (*K.*).

Editor's Summary

The appellant sued four persons, the three respondents and one N. D. Patel, for amounts due under two promissory notes signed by N. D. Patel in favour of the appellant. N. D. Patel admitted liability but the respondents successfully defended the suit. N. D. Patel was the sole proprietor of a business known as Bhasker & Co. and the promissory notes were made in respect of liabilities incurred in connection with that business. No notice of the transfer of the business by N. D. Patel to the respondents within the meaning of s. 3 of the Fraudulent Transfer of Businesses Ordinance had ever been given. Another firm had been registered on or about January 11, 1956, as Universal Steelwares with N. D. Patel and the respondents as partners. Its registered address was the same as Bhasker & Co. and it carried on the same type of business. On January 17, 1956, N. D. Patel filed a notice of cessation of business in respect of

Bhasker & Co. which stated that the firm had ceased to be carried on as from January 12. By a notice of change filed on March 24, 1956, it was notified that N. D. Patel had retired from Universal Steelwares as from January 15, 1956. The question in issue was whether the business known as Bhasker & Co. had been transferred to Universal Steelwares within the meaning of s. 3 (1) of the Ordinance. The learned trial judge held that it had not. It was argued for the appellant that there had been a transfer of virtually the whole of the business of Bhasker & Co. during January, 1956. The respondents claimed that though there might have been a transfer in fact there was no transfer in law.

Held–

(i) the object of the Ordinance is to protect commercial creditors against removal of assets beyond their reach when such removal is effected by transferring to a third party the business operated by the debtor.

(ii) what constitutes a business is a question of mixed law and fact to be answered on the footing of the definition of the word "business" in s. 2 and the particular circumstances in any given case.

(iii) an intention to defraud is not a necessary factor.

(iv) on the evidence the goods transferred by Bhasker & Co. to Universal Steelwares early in 1956 represented approximately eleven twelfths of Bhasker & Co.'s stock-in-trade and taking into account that Universal Steelwares took over also the premises, furniture and equipment, vehicles and other items, the property of Bhasker & Co., the total of these transactions amounted in reality to the transfer both in fact and in law of the business of Bhasker & Co.

(v) where a transfer within the meaning of s. 3 has taken place, pending the prescribed completion of the published notice, the transferee is liable for all the liabilities incurred in the business by the transferor and the respondents were jointly liable with N. D. Patel on the promissory notes.

Appeal allowed.

Judgment

Bacon JA: read the following judgment of the court: In the suit out of which this appeal arose the appellant company sued four persons, namely one Natubhai D. Patel and the respondents, in the Supreme Court of Kenya on two promissory notes for Shs. 1,697/10 and Shs. 2,000/- respectively, each dated December

20, 1955, and made by the above-named N. D. Patel in favour of the appellant. It was sought to establish the liability of N. D. Patel as maker of the notes and that of the respondents, by virtue of s. 3 of the Fraudulent Transfer of Businesses Ordinance Cap. 286), as transferees of a business or portion of a business without due notice there-under. N. D. Patel admitted liability before the Supreme Court and judgment was entered against him. The respondents, however, successfully defended the suit. We allowed the appeal and now give our reasons.

The material part of s. 3 of the Ordinance is as follows:

> "(1) Whenever any business or any portion of any business is transferred, with or without the goodwill or any portion thereof, the transferee shall, notwithstanding any agreement to the contrary, become liable for all the liabilities incurred in the business by the transferor, unless due notice in accordance with this section shall have been given and shall have become complete at the date of the transfer."

The business in question was carried on under the style of Bhasker & Co., and dealt in hardware, building materials and so on. At the hearing of the appeal it was common ground that in October, November and December, 1955, its sole owner was N. D. Patel, he having acquired it from the first respondent and his then partner Gurbachan Singh under an agreement made on the previous September 23. It was also common ground that N. D. Patel made each of the promissory notes in respect of liabilities incurred by him in the business, that the notes were dishonoured when duly presented for payment, and that no notice of transfer of the business or of any portion thereof by N. D. Patel to the respondents within the meaning of s. 3 of the Ordinance was ever given. Each of the promissory notes became due on March 22, 1956, and the suit was commenced a week later.

Another trading concern known as Universal Steelwares was registered by N. D. Patel and each of the respondents under the Registration of Business Names Rules, 1951, the date of commencement being stated as January 11, 1956, and those four persons being named as the partners. The date of filing does not appear on the exhibit but the filing admittedly occurred on or about the last mentioned date. The "nature of business" was registered as "General merchants, iron and steel and timber". It was not in dispute that in fact at the material time it carried on the same kind of trade as had Bhasker & Co. The "address of the principal place of business" was stated as "Plot No. 2742, Hasrat Road, Nairobi", which statement was identical with that of the place of business of Bhasker & Co. made on its original registration in May, 1953.

By a "notice of cessation of business" filed by N. D. Patel under the above-mentioned Rules on January 17, 1956, it was notified that Bhasker & Co. had ceased to be carried on as from January 12.

By a "notice of change", also filed under those Rules, it was notified that N. D. Patel had retired from Universal Steelwares as from January 15, 1956, and that the respondents, the continuing partners, would carry on that firm. The notice was signed by the four persons concerned. It is, however, significant that whereas the signatures were dated January 15, and the subject matter related to that same date, the notice was not filed until March 24. Before us it was not contended that N. D. Patel in fact remained as a partner in Universal Steelwares for more than a week at most; the appellant company contended that he so remained for only a day or two.

The whole issue before the Supreme Court and before us was whether the business known as Bhasker & Co., or any portion thereof, was transferred by its owner N. D. Patel to Universal Steelwares (owned for a day or a few days as from January 11) 1956, by N. D. Patel and the respondents, and thereafter by the respondents alone, within the meaning of sub-s (1) of s. 3 of the Ordinance. The learned trial judge

held that no such transfer took place.

Before us Mr. Nazareth for the appellant submitted that on the true construction of the section and on the established facts there was within its meaning a “transfer” not merely of a portion of the business but of virtually the whole of it during January,

1956. Mr. Cochrane for the respondents agreed with Mr. Nazareth that the object of the Ordinance is to prevent the secret transfer of a business or part thereof so that its assets or some of them are, so to speak, lost without trace and thus no longer available to meet liabilities to creditors, but submitted that the obligation to give the prescribed notice to the public only arises when there is a joint intention on the part of transferor and transferee to "transfer" within the meaning of the provision. As to the object of the Ordinance, he submitted that no question could here arise of defeating it, since N. D. Patel had tried to persuade creditors of Bhasker & Co. to accept some of its stock in lieu of money. As to joint intention, he argued that here there was an intention merely to transfer some assets in the course of business, but not to transfer any part of "the business" in the sense in which that expression is used in the Ordinance. In a word, Mr. Cochrane argued that, though admittedly there were transfers in fact, there was for present purposes no transfer in law. He did not, however, contend that it is necessary to shew an intent to defraud in order to bring a transaction within the mischief of the Ordinance.

In our view the Ordinance plainly has the object and effect of protecting commercial creditors against removal of assets beyond their reach without due notice given, whenever such removal is effected by means of transferring to a third party the business (or part thereof) operated by their debtor. What constitutes the "business" is a question of mixed law and fact to be answered on the footing of the definition of the word "business" in s. 2 and of the particular circumstances of any given case. The factual aspect called for a commonsense examination of the structure, nature, activities and assets of the concern in question. No definition of a "transfer" within the meaning of the Ordinance should be attempted: whereas, for example, in innumerable instances the sale of ten or twenty thousand pounds' worth of assets would be no more than a normal trading transaction, a comparatively trifling sale or gift might well in other circumstances amount to such a "transfer". An intent to defraud is not a necessary factor: neither the long nor the short title of the Ordinance is to be construed as indicating the contrary; the expression "fraudulent transfer" in this instance means a transfer which, but for the Ordinance, would have the effect of defrauding the protected class of persons, that is to say of depriving the creditors of assets against which they should have recourse and of giving them no compensating redress against the transferee. Whether the transfer is or is not effected by way of committing a fraud in the ordinary legal sense – and whether on the part of the transferor or of the transferee or both – is, as we have said, immaterial. It is also, of course, immaterial whether or not the transferor's insolvency supervenes; the Ordinance is in this respect complementary to the law relating to the alienation of assets prior to bankruptcy, or to the liquidation of an insolvent company. Finally it is to be noted that, where a transfer within the meaning of s. 3 takes place, pending the prescribed completion of the published notice the transferee is liable for all, not merely a proportion of, the liabilities incurred in the business by the transferor.

Turning, then, to the facts of the instant case the question is whether one or more of the factual transfers by Bhasker & Co. to Universal Steelwares was or were a "transfer" within s. 3. In posing the question in that exact form we have in mind what in our opinion must always be the proper approach to an inquiry as to a series of transactions allegedly caught by that section; it should be conducted on the footing that, whereas anyone of them alone, or even a number of them taken together, may not suffice to bring the matter within the section, yet there may well come a time when various associated dealings, though individually unobjectionable, must be held collectively to amount to a "transfer" of a "portion" of the "business" concerned. It is the sum total of what has occurred which matters. Every business is composed of an aggregation of distinct items, which in many cases are extremely numerous. Moreover, the size of the business as a whole does not necessarily indicate the number of items into which its entire

property can be split. To point to the apparent insignificance of each of a series of transactions is not by any means necessarily to escape the operation of the Ordinance; all the questionable transactions must be examined and, if found to be related inter se, must be put to the crucial test: did they amount

to the transfer of the business itself or of any portion thereof, as opposed to a mere series of commercial operations conducted by virtue of the normal purpose and right of those who controlled the business?

To these general remarks, however, we must add one qualification. We think that Mr. Cochrane is right in stressing intention as relevant at least in one way. It is possible to imagine a case where the transferor might divest himself of all, or substantially all, the assets of his business in such a way that, from his point of view, he might be said to be transferring the business itself or part of it; yet from the point of view of the transferee the transaction might appear to be a perfectly normal purchase of stock and in no sense an acquisition of a business or part thereof. If such a situation were to arise, it might well be that there would not be a transfer within the meaning of the Ordinance, for it seems unreasonable that the transferee should be held liable for the debts of a business which he is unconscious of having acquired either in whole or in part. But, on the view which we took of the facts of this case, nothing of that kind arises for consideration now.

With respect, we think that the learned trial judge misled himself in the first place by looking for fraud. After reciting a number of matters pointing to the taking over of the business of Bhasker & Co. by Universal Steelwares he said this:

> "But there is no suggestion of fraud in the case: at any rate it is not pleaded."

Again, the learned judge elsewhere referred to it not having been, in his view, the respondents' intention "to take on the business of Bhasker & Co.", but rather "to protect themselves by securing a transfer in fact of substantial assets" of that concern; and in another place he spoke of the respondents having done what they did "to get themselves paid off." We do not think that the motive of self-protection can in any way assist a transferee to avoid liability under s. 3 of the Ordinance; on the contrary, it will no doubt be the compelling factor in the majority of cases in which persons take transfers of business assets, and the whole virtue of the Ordinance would be gone if it were to be held that acting under the instinct of self-preservation tended to defeat its provisions.

Thirdly, the matters upon which the learned judge relied for his decision included the fact that Bhasker & Co.'s banking account continued to be operated by the first respondent and Gurbachan Singh until February 1, 1956. With respect, he appears to have overlooked the fact that throughout January the account shewed a substantial though diminishing overdraft, which circumstance would doubtless cause the bank to refuse to allow the customers to shift the responsibility.

Another fact relied on was the existence of two invoices of Bhasker & Co. which purported to shew sales on March 6 and 27, 1956, to a concern known as Stone Brothers. It appeared to us, however, that those transactions – effected in the name of Bhasker & Co. long after notice of the cessation of its business had been filed – were merely by way of clearing off remnants of stock which Universal Steelwares had not taken over; the invoice-forms of Bhasker & Co. were the last two which, according to their serial numbers and dates, were ever used, and the larger of the two transactions related to the same description of goods as appears on an uncompleted invoice-form addressed to Universal Steelwares on February 29 in which no quantity or price is stated. The goods transferred by Bhasker & Co. to Universal Steelwares in early 1956 represented, in terms of selling-value, approximately eleven-twelfths of Bhasker & Co's stock-in-trade, the remainder being the goods sold to Stone Brothers in March; for admittedly no invoice of Bhasker & Co. shewing any further sale in January, February or March to anyone other than Universal Steelwares and Stone Brothers was proved. In our view the irresistible inference from all the evidence is that Universal Steelwares took over virtually the whole of Bhasker & Co.'s stock-in-trade as

and when it was required and checked.

Apart, however, from what we respectfully describe as weaknesses in the reasoning of the judgment, there was, we think, an overwhelming body of evidence shewing that the sum total of the numerous transactions between the two concerns as from

early January, 1956, amounted in reality to the transfer, both in fact and in law, of the business of Bhasker & Co. There were transferred to Universal Steelwares not only almost all the stock-in-trade but also the premises, the furniture and equipment, the vehicles, the telephone account, and even the signboard, which was re-painted with the name of the transferee. In addition to all that, when during January Bhasker & Co.'s banking account was overdrawn, Universal Steelwares paid into it their cash takings to the tune of Shs. 2,454/-. There was clearly, we think, a transfer of not merely a portion but the whole of the "business" of Bhasker & Co. within the meaning of the Ordinance. Per contra, there was no appreciable evidence of the survival of Bhasker & Co. as a going concern. As a business it was merged in the respondent's firm.

We have the following observations to add. Since no issue of fraud arises under the Ordinance we have refrained from considering the facts from that aspect. But we are far from saying that no fraud occurred. In all probability the dates on the invoices passing from Bhasker & Co. to Universal Steelwares in January and February, 1956, record nothing more than the times at which parcels of Bhasker & Co.'s former stock-in-trade were checked, given an agreed value and appropriated to the overall consensus, arrived at very early in January, to the effect that the business of Bhasker & Co. should be swallowed by Universal Steelwares and Bhasker & Co.'s outside creditors, such as the appellant, left in the lurch. N. D. Patel's fleeting and no doubt nominal partnership in Universal Steelwares was doubtless part of the same screen put up to hide the truth.

Accordingly the appeal succeeded. The judgment and decree of the Supreme Court must be set aside and judgment entered: (1) for the appellant against the original first defendant Natubhai Dahyabhai Patel and against the respondents (*a*) for Shs. 3,697/10, (*b*) for interest thereon at eight per cent. per annum from March 29, 1956, to September 17, 1956, (*c*) for the appellant's taxed costs of the suit up to September 17, 1956 (when the original first defendant admitted liability and judgment was originally entered against him), and (*d*) for interest on that decretal amount at six per cent. per annum from September 18, 1956, until payment; (2) for the appellant against the respondents (*a*) for the appellant's taxed costs of the suit from September 18, 1956, onwards, and (*b*) for interest on the amount of such last-mentioned costs at six per cent. per annum from September 27, 1956, until payment. The appellant is to have its taxed costs of the appeal, and we certify for two counsel.

Appeal allowed.

For the appellant:
JM Nazareth, QC, and *CH Patel*
CH Patel, Nairobi

For the respondents:
MN Cochrane
Shapley, Barret, Allin & Co, Nairobi

Raichand Lakhamshi and another v Assanand & Sons
[1957] 1 EA 82 (CAN)

Division: Court of Appeal at Nairobi

Date of judgment:	1 March 1957
Case Number:	55/1956
Before:	Sir Newnham Worley P, Sir Ronald Sinclair V-P and Briggs JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Rudd, J

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[1] Judgment – Inherent powers of the court – Power to recall a judgment before it is perfected.

[2] Landlord and Tenant – Error in judgment of Resident Magistrate – Failure to give parties opportunity to be heard before altering judgment – Landlord and Tenant (*Shops & Hotels*) (*Temporary Provisions*) *Ordinance*, s. 10 (*K.*).

Editor's Summary

The appellants, landlords of a shop in Nairobi, gave the respondents, who were contractual tenants, notice to quit expiring on December 31, 1954. On January 20, 1955, the respondents applied to the Resident Magistrate's Court for a new tenancy under Part II of the Landlord and Tenant (Shops and Hotels) (Temporary Provisions) Ordinance. On June 3, 1955, the magistrate delivered judgment granting a new tenancy at a rental of Shs. 1,215/- a month as from January 1, 1955 to December 23, 1956. The respondents on July 2 filed an appeal, one of the grounds being that the learned magistrate had exceeded his jurisdiction in making the new rent retrospective from January 1, 1955. On June 11 the respondents paid to the appellants Shs. 7,290/- being rent from January to June under the judgment. The appeal was heard by the Supreme Court on December 21 and was dismissed as incompetent as no formal order expressing the judgment of June 3 had been drawn up, but in doing so the court pointed out that the judgment was erroneous in that it ordered the new rent to be paid from January 1, 1955, instead of from "the relevant date" as prescribed by Ordinance No. 57 of 1954. This date was one month from the date of the Magistrate's judgment i.e. July 3, 1955. On December 29 the magistrate signed and sealed a formal order in which he ordered a new tenancy as from July 3, 1955. The respondents then sent the appellants a cheque for rent for the period July to December calculated on the basis of the formal order and deducting the amount overpaid for the period January to June. This was returned. The appellants then sued for the full amount of rent due under the terms of the judgment and the respondents paid into court the amount they alleged to be due – Shs. 3,405.40. The appellants claimed that the magistrate had no jurisdiction to correct his judgment being functus officio, that no such correction could be made without giving the parties an opportunity to be heard and that the overpayment was made under a mistake of law and was irrevocable. These propositions were rejected by the Supreme Court which ordered payment only of the amount in court and awarded costs to the defendants, to be set off against the decretal amount.

Held–

(i) although the magistrate's error in his judgment was attributable to a mistake of law, the tenants' mistake was an erroneous assumption as to what the contents of the order would be and that this was a mistake of fact.

(ii) the courts, including subordinate courts, in Kenya have the same inherent power as the courts in England to recall a judgment before it is perfected by a formal decree or order and, while the

resident magistrate should have given all parties notice of his intention to amend the judgment in this case, his mistaken view of the law was so clearly wrong that had he given notice and reheard the case the result would have been a foregone conclusion.

(iii) the formal order amending the judgment was ex facie valid and effective until it was either amended on an application for review or reversed or varied on appeal. The appellant took no steps to get the order set aside or amended and neither the Supreme Court nor the Court of Appeal could do otherwise than treat it as a valid and subsisting order expressing the decision of the magistrate. That being so and

the trial judge having correctly decided that the respondents paid the excess rent under a mistake of fact his decision was clearly correct in law.

Appeal dismissed with costs.

Cases referred to:

(1) *Re Harrison's Share under a Settlement*, [1955] 1 All E.R. 185.

(2) *Ali bin Khamis v. Salin & Ors.*, E.A.C.A. Civil Appeal No. 18 of 1954 (unreported).

(3) *Malkarjun v. Narhari* (1900), 27 I.A. 216.

(4) *Moon Motors Ltd. v. Kiuan Wou*, [1952] 2 Lloyds' Rep. 80 (referred to in "Re Harrison" above).

Judgment

Sir Newnham Worley P: read the following judgment of the court: At the conclusion of the hearing, we dismissed this appeal with costs and now give our reasons for so doing.

The appellants are the landlords of a shop situated in Bazaar Street, Nairobi, of which the respondents were in occupation in 1954 as contractual tenants at a rent of Shs. 379/- p.m. The contractual tenancy was terminated by a notice to quit expiring on December 31, 1954. On December 24, 1954, the Increase of Rent (Restriction) Ordinance, 1949, ceased to apply to business premises but on the same day, there came into force the Landlord and Tenant (Shops and Hotels) (Temporary Provisions) Ordinance 1954 (Ordinance No. 57 of 1954). On January 20, 1955, the respondents applied to the Resident Magistrate's Court, Nairobi, for a new tenancy under Part II of that Ordinance. on June 3, 1955, the learned magistrate, Mr. Gillespie, delivered judgment granting a new tenancy at a rental of Shs. 1,215/- a month "as from January 1, 1955, to December 23, 1956." There were to be other conditions which are not material to this appeal. The tenants considered the proposed rental too high and on July 2, 1955, filed an appeal in the Supreme Court, one of the grounds of appeal being that the learned magistrate had exceeded his jurisdiction in making the new rent retrospective in effect to January 1, 1955.

Meanwhile, on June 4, the landlords' solicitors had demanded from the tenants Shs. 7,290/- being the rent due for January to June under the judgment and this demand was satisfied by the tenants on June 11.

The appeal came on for hearing before the learned Chief Justice of Kenya on December 21, 1955, when it was dismissed as incompetent because no formal order expressing the decision of June 3 had been drawn up. But in dismissing the appeal the court pointed out that the judgment appeared to be erroneous in so far as it ordered the new rent to be payable as from January 1, 1955, instead of from "the relevant date" as prescribed by s. 10, sub-s. (2) (*b*) and sub-s. (3) (*a*) of Ordinance No. 57 of 1954. It is common ground in this appeal that this error did exist and that the relevant date for the beginning of the new tenancy and the new rental was one month from the date of the magistrate's judgment i.e. July 3, 1955. Until that date the tenants' former tenancy is to be treated as having continued, as a special variety of statutory tenancy, at the previous rental. On December 29, 1955, the same Resident Magistrate, Mr. Gillespie, signed and sealed a "Formal Order", which, after reciting the tenants' application, the landlords' reply, the judgment of June 3 and the judgment of the Supreme Court on the abortive appeal, then ordered "in accordance with Ordinance No. 57/55" the grant of a new tenancy and, *inter alia*, that the rent should be Shs. 1,215/- a month commencing from July 3, 1955.

Fortified by this order the tenants' solicitors on December 30, 1955, sent to the landlord a cheque for Shs. 3,405.40 for balance of rent due, computed as Shs. 37.90 rent due from July 1 to July 3, 1955, Shs. 8,383/- rent due from July 3, 1955, to January 31, 1956: less Shs. 5,016/- overpaid in respect of the period January 1 to June 30, 1955. The cheque was refused and returned the next day, and on January 5, 1956, the landlords commenced proceedings in the Supreme Court claiming Shs. 8,426.60 as rent due from July 3, 1955, to January 31, 1956, at Shs. 1,215/- p.mb

The tenants in their defence referred to the original judgment of June 3, 1955, and to the formal order and pleaded that the only rent due from them was Shs. 2,311.90 from January 1, 1955, to July 3, 1955, at Shs. 379/- p.m. and Shs. 8,383/- from July 3, 1955, to January 31, 1956, at Shs. 1,215/- p.m. less rent already paid, Shs. 7,290/-, leaving a balance due of Shs. 3,405.40. Alternatively, they claimed to set-off the sum of Shs. 5,016/- as overpaid by them in respect of rent from January 1, 1955, to June 30, 1955, under the erroneous judgment of the resident magistrate. They brought the amount of Shs. 3,405.40 into court. The landlords replied that they had no knowledge of the "Formal Order" but that, in any event, the learned magistrate had no jurisdiction to correct his judgment being functus officio; and, further, that no such correction could be effectively made without the parties affected thereby being given an opportunity to be heard (which had not been done). They further contended that the over-payment was made under a mistake of law and, as such, was irrevocable at law or otherwise.

Both these propositions were rejected by the learned trial judge who decreed the suit for the plaintiff-landlords for Shs. 3,405.40 only but awarded costs to the defendant-tenants, such costs to be set off against the decretal amount. In his judgment Rudd, J., appears to have accepted the view, expressed by the learned Chief Justice in giving judgment on the abortive appeal, that the magistrate could correct the error in his judgment if and when he drew up his final order: at any rate Rudd, J., expressed the view that any provision in a formal order erroneously ordering the new rent to be payable from January 1, 1955, would be null and void for want of jurisdiction.

On the second point he was of the opinion that the over-payment was made on the basis of a mistake of fact as to the decision of the resident magistrate, the real decision being embodied in the formal order and not in the judgment. From that decision the landlords appealed to this court.

The instant case is yet another example of the trouble that so often is caused by the deplorable practice of advocates in Kenya of not extracting a formal order or decree consequent on a judgment. They should bind to their hearts the words of Jenkins, L.J., delivering the judgment of the Court of Appeal in *Re Harrison's Settlement* (1), [1955] 1 All E.R. 185 at p. 188:–

> "Although the judgment dates from the day of its pronouncement, it is not perfected until drawn up, passed and entered, and anyone who acts on it beforehand must take such risk as there is that it will not be drawn in the form in which it was heard to be pronounced."

If the landlords' solicitors had obtained the formal decree before making their demand on June 4, 1955, they would have been in a very different position. It is true that the magistrate's error in his judgment was attributable to a mistake of law: but the effective act of the court is the formal order expressing the decision, and the tenants' mistake was an erroneous assumption as to what the contents of the order would be, if and when it was drawn up. We agree with Rudd, J., that this was a mistake of fact.

On the other limb of the argument, Mr. Mandavia contended that the learned magistrate had no jurisdiction to amend his judgment once he had pronounced it. He contended, quite correctly, that this was not a "slip" which could be corrected under s. 99 of the Civil Procedure Ordinance and referred to Kenya O. XX r. 6 (1) which provides that a decree shall agree with the judgment. But he was on weak ground there for the proceedings in the Resident Magistrate's Court were not a suit which resulted in a decree. However, it would not generally be doubted that where proceedings result in an order, that order should agree with the judgment. The real question in issue is whether, under the Kenya Code, a court retains sufficient control of a case before the decree or order is drawn up to enable it to correct mistakes, whether of fact or law, in the judgment so that they do not appear in the formal decree or order.

Mr. Mandavia cited the judgment of this court in Civil Appeal No. 18 of 1954, *Ali bin Khamis v. Salim & Ors.* (2) (unreported), and the following passage from the judgment of the Privy Council in *Malkarjun v. Narhari* (3) (1900), 27 I A. 216 at p. 225:

> "In doing so the court was exercising its jurisdiction. It made a sad mistake it is true; but a court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken the decision, however wrong, cannot be disturbed."

We do not think these cases are of any assistance to him as neither of them dealt with the position where no formal order or decree had been issued.

The position in England was made perfectly clear by the judgment of the Court of Appeal in *Re Harrison's Settlement* (1) (*supra*), from which we will cite three extracts:

> "We think that an order pronounced by the judge can always be withdrawn, or altered or modified, by him until it is drawn up, passed and entered. In the meantime it is provisionally effective, and can be treated as a subsisting order in cases where the justice of the case requires it, and the right of withdrawal would not be thereby prevented or prejudiced." (p. 188)
>
> "When a judge has pronounced judgment he retains control over the case until the order giving effect to his judgment is formally completed. This control must be used in accordance with his discretion exercised judicially and not capriciously." (p. 192)
>
> "It is important to remember that, in the ordinary way, the recall of an imperfected order results in a re-hearing at which all parties can present such further arguments as they may be advised having regard to the matter, whatever it may be, which is sought to cast doubt on the correctness of the order as orally pronounced." (Ibid.)

It is relevant also to note that the same principle was applied by the Court of Appeal on appeal from a county court judge: vide the reference on p. 190 of the report to the case of *Moon Motors Ltd. v. Kiwan Wou* (4), [1952] 2 Lloyds' Rep. 80.

It is evident that the power to recall a judgment is one of the inherent powers of a court. In Kenya, as regards both the Supreme Court and the subordinate courts, inherent powers are saved by s. 97 of the Civil Procedure Code. We think, therefore that the courts in Kenya have the same inherent power as courts in England to recall a judgment before it is perfected by a formal decree or order. Such a power is beneficial because, as was pointed out in *Harrison's* case (1), it avoids the absurdity and consequential expense of the court having to pass a decree which it knows to be wrong, but which could only be upset by means of an appeal, or, in Kenya, by the alternative procedure of an application for review. If the courts in Kenya exercise the discretion to recall judicially and ensure that all parties affected are given an opportunity to be heard, it is unlikely that any injustice or hardship will be caused.

This brings us to Mr. Mandavia's objection that, if the power to alter the judgment exists, it was wrongly exercised in the instant case because he was not given the opportunity of being heard. That is in principle a valid objection and we agree that the learned resident magistrate should have given all parties notice of his intention to amend the judgment. But we are satisfied that, in the instant case, there is no substance in the objection: the magistrate's mistaken view of the law was so clearly wrong, once it was pointed out to him, that even if he had given notice and re-heard the case, the result would have been a foregone conclusion.

There was, however, another strong reason for dismissing this appeal. Whether or not the learned

magistrate had power to amend his judgment he did so and the formal order embodied that amendment. Ex facie that order was valid and effective unless and until it was either amended on an application for review or reversed or varied on appeal. The appellant took no steps to get the order set aside or amended and neither the Supreme Court nor this court could do otherwise than treat it as a

valid and subsisting order expressing the decision of the Resident Magistrate's Court. That being so, and the learned judge having correctly decided that the respondents paid the excess rent under a mistake of fact, his decision was clearly correct in law.

Appeal dismissed.

For the appellants:
GR Mandavia
GR Mandavia, Nairobi

For the respondents:
DN Khanna and *AR Kapila*
DN & RN Khanna, Nairobi

Sheikh Brothers Limited v Arnold Julius Ochsner and another
[1957] 1 EA 86 (PC)

Division:	Privy Council
Date of judgment:	14 January 1957
Case Number:	41/1955
Before:	Lord Oaksey, Lord Cohen, Lord Keith of Avonholm and Mr LMD de Silva
Sourced by:	LawAfrica
Appeal from:	E.A.C.A. Civil Appeal No. 17 of 1954 on appeal from H.M. Supreme Court of Kenya – de Lestang, J

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[1] Contract – Mistake as to fact essential to the agreement – Mutual mistake – Circumstances in which promisor is in different position from promisee – Indian Contract Act, 1872, *s.* 20 *and s.* 56.

Editor's Summary

The parties had entered into a license agreement under which the appellant had granted the licensee a license to cut, decorticate, process and manufacture all sisal growing on a certain area of land, and the licensee undertook to produce an average minimum quantity of fifty tons of processed sisal each month. It was subsequently ascertained that the area concerned was quite incapable of producing such a quantity and after some dispute arbitrators were appointed to decide whether the license agreement was void either under s. 20 of the Indian Contract Act because of mutual mistake or under s. 56 of the same Act because of impossibility. The arbitrators ultimately held that the agreement was void under s. 56 and that there was a mutual mistake of fact under s. 20 and that therefore no compensation was payable under

para. 3 of that section. The appellant's application to the Supreme Court to set aside the award was dismissed as was their appeal to the Court of Appeal. The appeal to the Privy Council was argued on the grounds:–

(1) the mistake was not as to a matter of fact essential to the agreement;

(2) even if the license was void under s. 20, s. 56 was also applicable and therefore on a finding of fact by the arbitrators that the appellant did not know but that the respondents might with reasonable diligence have known of the impossibility, compensation was payable under the third paragraph of the section;

(3) there might be repugnancy between s. 20 and s. 56 of the Act and therefore the latter section must prevail.

Held–

(i) it was the very basis of the contract that the sisal area should be capable of producing an average of 50 tons a month throughout the term of the license and the mistake was as to a fact essential to the agreement.

(ii) the third paragraph of s. 56 applies only where an agreement otherwise valid is rendered void by impossibility of performance; mutual mistake within s. 20 of the Indian Contract Act having been found to exist at the date of the license agreement it followed that the license agreement was neither a contract within s. 10 of the Act, nor an agreement enforceable by law, and therefore quite apart from s. 56 it was a

void agreement; there was no repugnancy between s. 20 and s. 56 as s. 56 only applies where there is, apart from any question of performance, an enforceable agreement; that a further reason for holding that no repugnancy existed was in the third paragraph of the section in which the words "or with reasonable diligence might have known" imply circumstances in which the promisor is in a different position from the promisee with the result that the case is to be treated as one of unilateral not mutual mistake.

Appeal dismissed.

Cases referred to in judgment:

(1) *Bell v. Lever Bros.*, [1932] A.C. 161.

Judgment

Lord Cohen: This appeal raises questions as to the effect of s. 20 and s. 56 of the Indian Contract Act on a license agreement made between the appellant and the first respondent on December 9, 1950.

Section 20 and s. 56 are in the following terms:

"20. Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement the agreement is void.

"Explanation – An erroneous opinion as to the value of the thing which forms the subject matter of the agreement is not to be deemed a mistake as to a matter of fact.

Illustrations–

. . . . . .

"56. An agreement to do an act impossible in itself is void.

"A contract to do an act which after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

"Where one person has promised to do something which he knew or, with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

Illustrations.

"(*a*) A. agrees with B. to discover treasure by magic. The agreement is void.

. . . . . .

"(*c*) A. contracts to marry B., being already married to C., and being forbidden by law to which he is subject to practise polygamy. A. must make compensation to B. for the loss caused to her by the non-performance of his promise."

. . . . . .

The Court of Appeal for Eastern Africa, affirming the decision of the Supreme Court of Kenya, held that the license agreement was entered into under a mutual mistake as to a matter of fact essential to the agreement and was accordingly void under s. 20 but that it was also void under s. 56 since the agreement contained an obligation to do an act impossible in itself. They held, however, that as the agreement was void under s. 20, the appellant could not recover compensation under the third paragraph of s. 56

although the conditions required by that paragraph to found a claim for compensation undoubtedly existed. It is from this decision that this appeal is brought.

By the license agreement, after reciting that the appellant was the lessee of an estate of about 10,000 acres of which 5,000 acres or thereabouts (therein and hereinafter referred to as the sisal area) were planted with mature sisal, and that upon the treaty for the license it had been agreed that by way of security for the fulfilment of his obligations under the license agreement the licensee would deposit with the appellant the sum of Shs. 50,000/- and that that sum had been duly deposited, it was amongst other things provided as follows:

By cl. 1 the appellant granted the licensee a license to cut, decorticate, process and manufacture all sisal then or at any time thereafter growing upon the sisal area.

By cl. 2 the duration of the license was fixed at five years from January 1, 1951, subject to determination as thereinafter mentioned.

Clause 3 contained a number of undertakings by the licensee. It is sufficient for the purpose of this judgment to state the following:

> "(A) that he will continuously and in a proper and efficient manner cut decorticate process and manufacture all mature sisal now or hereafter growing on the Mature Sisal Area:
>
> "(B) that he will deliver all sisal fibre and tow produced by him on the said premises to the Company or to such agents of the Company as it shall from time to time direct for sale:
>
> "(C) that he will as from the first day of April One thousand nine hundred and fifty-one manufacture and deliver sisal fibre in average minimum quantities of fifty tons per month: PROVIDED ALWAYS that for the purposes of this clause deliveries shall be calculated on the thirty-first day of December in each year to the intent that excess deliveries in any calendar month during such year shall be credited towards any shortfall in any calendar month during the same year:
>
> . . . . . .
>
> "(E) that he will not cut any sisal on the said premises other than mature sisal which for the purpose of this clause shall mean sisal leaves which branch out from the top of the sisal pole at an angle of not less than forty-five degrees."

Clause 4 contained the following undertaking by the appellant:

> "(A) that it will in respect of each delivery of sisal line fibre made to it or its duly authorised agent by the Licensee and certified by the Sisal Inspector as fit for export pay to the Licensee the sum of Shillings five hundred per ton such payment to be made on or before the expiration of seven days from the date of the consignment note in respect of such delivery:"

Clause 5 contained provisions as to the division of the proceeds of sale as between the appellant and the licensee. It is sufficient to say that subject to the deduction by the appellant of a sum equivalent to Shs. 100/- per as development charges and to certain provisos which their Lordships need not set out in detail the proceeds were to be divided as follows:

> "(i) in respect of sisal line fibre and sansivers fibre sixty per cent. to the Company and forty per cent. to the Licensee:
>
> "(ii) in respect of tow fifty per cent. to the Company and fifty per cent. to the Licensee:
>
> "(iii) in respect of flume tow twenty-five per cent. to the Company and seventy-five per cent. to the Licensee."

Clause 6 provides as follows:

> "If during any year of the said term ending the thirty-first day of December the Licensee's deliveries of line fibre shall fall below the aggregate of the average minimum monthly quantity hereinbefore provided for then the Company shall be entitled without prejudice to any other remedies it may have hereunder to be paid out of the moneys representing the Licensee's deposit a sum equivalent to the amount it would have received in the same year if the Licensee had cut and delivered the aggregate of the average minimum monthly quantities hereinbefore provided for PROVIDED that if any subsequent year of the said term ending the thirty-first day of December the Licensee's deliveries of line fibre shall exceed the aggregate of the average minimum monthly quantities hereinbefore provided for the Company shall make up the Licensee's deposit by refunding a sum equivalent to the price realised in respect of such excess but not exceeding the amount deducted therefrom in respect of the deficiency in any previous year's deliveries."

Clause 8 provided for the automatic determination of the license if the price of sisal fibre fell below £40

per ton.

Clause 9 provided for the suspension of the licensee's obligation to deliver minimum monthly quantities of sisal in certain events such as drought and fire.

Clause 11 so far as material is in the following terms:

> "Subject to the provisions of clauses 9 and 10 hereof if the licensee shall fail for a period of three consecutive calendar months to cut and deliver the average minimum monthly quantities of sisal provided for and by reason of such failure the loss sustained by the company shall exceed the sum of shillings one hundred thousand or . . . then it shall be lawful for the company at any time thereafter to re-enter upon the said premises or any part thereof in the name of the whole and thereupon the licence hereby granted shall cease and determine but without prejudice to any right of action or remedy of the company in respect of any antecedent breach by the licensee of any of the agreements on his part herein contained."

Clause 12 is an arbitration clause.

In their lordships' opinion this agreement provided for something of the nature of a joint adventure and was entered into on the basis that the sisal area was capable of producing sisal over the period of the agreement at the average rate of 50 tons per month.

Pursuant to a right reserved to him by cl. 3 (N) of the license agreement the first respondent on or about May 1, 1951, assigned to the second respondent his rights and obligations under the license agreement with effect from January 1, 1951.

The cutting and manufacture of sisal under the license agreement was carried on by the respondents or one of them until January 31, 1952, when possession of the premises the subject of the license agreement was resumed by the appellant at the request of the second respondent without prejudice to the rights and remedies of the appellant under the license agreement.

On November 27, 1952, the appellant and respondents signed an agreement of submission of disputes between them to two arbitrators pursuant to cl. 12 of the license agreement. The arbitrators were asked to decide as preliminary points whether the license agreement was void either.

(A) under s. 20 because of mutual mistake or

(B) under s. 56 because of impossibility.

It is clear from the pleadings that the mutual mistake alleged was that both parties believed contrary to the fact that the leaf potential of the sisal area would be sufficient to permit the manufacture and delivery of the minimum quantities of 50 tons per month throughout the term of the license. It is also clear that the impossibility alleged was that the leaf potential of the sisal area made it impossible to produce the said minimum quantities over the said term.

The arbitrators held that there was no mutual mistake since there was only an error of judgment as to the leaf potential and error of judgment is not the equivalent of mistake. They decided the issue of impossibility in favour of the respondents but they then went on to consider the application of the third paragraph of s. 56 and held that the first respondent had he exercised reasonable diligence before agreeing to the terms of the license might have known that it would be impossible to produce from the sisal area the stipulated minimum quantities of sisal and accordingly must pay compensation.

The respondents applied to the Supreme Court of Kenya to remit or set aside this interim award. The application came before De Lestang, J., who held that the erroneous belief as to the leaf potential of the sisal area was a mistake of fact on a matter material to the agreement and remitted the application to the arbitrators to deal with on this footing. So directed, the arbitrators decided that the mistake was mutual.

They adhered to their opinion that the agreement was void under s. 56 but in view of their decision under s. 20 they held that compensation was not payable under the third paragraph of that section. The appellant then appealed to the Supreme Court for an order that the arbitrators' award be set aside or remitted, alleging that the mistake was not mutual and was not as to a matter of fact essential to the agreement and that in any event

there was a case for compensation under the third paragraph of s. 56. The matter again came before De Lestang, J., who dismissed the application with costs.

The appellants appealed to the Court of Appeal for Eastern Africa who, as their Lordships have already said, affirmed the decision of the Supreme Court.

Before their Lordships two points were argued on behalf of the appellant

(1) that the mistake was not as to a matter of fact *essential* to the agreement

(2) that even if the license was void under s. 20, s. 56 was also applicable and therefore on the finding of fact by the arbitrators that the appellant did not know but the respondents might with reasonable diligence have known of the impossibility, compensation was payable under the third para. of the section.

Mr. Foot supported his argument on the first point by a reference to the judgment of Lord Atkin in *Bell v. Lever Bros.* (1), [1932] A.C. 161. Mr. Foot said that the mistake relied on was a mistake as to quality and that such a mistake, to quote Lord Atkin at page 218,

> "will not affect assent unless it is the mistake of both parties, and is as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be."

He submitted that applying this citation assent was not affected in the case before your Lordships. He also relied on passages in Halsbury's Laws of England 2nd Ed. Vol. 23 at pp. 135, 6, where the learned author draws a distinction between a case of mutual mistake as to the existence of the subject matter or of some fact or facts forming an essential and integral element of the subject matter (see para. 189) and one where the contract is for the sale of the subject thereof absolutely and not with reference to any collateral circumstances (para. 190). Mr. Foot submitted that the facts in the present case were analogous to the latter case and not the former.

Their Lordships are unable to agree. Having regard to the nature of the contract which as their Lordships have already said seems to them to be a kind of joint adventure and to the provisions in particular of clauses 3 (*c*), 4 (*a*), 5, 6 and 11, their Lordships think that it was the very basis of the contract that the sisal area should be capable of producing an average of 50 tons a month throughout the term of the license. It follows that the mistake was as to a matter of fact essential to the agreement.

Their Lordships turn to the second point. The respondents did not argue that the facts did not establish an agreement to do an act impossible in itself so that it is unnecessary for their Lordships to consider the meaning of the phrase "an act impossible *in itself*." The point taken by the respondents was that the third paragraph of s. 56 applied only where an agreement otherwise valid was rendered void by impossibility of performance. Their Lordships agree with the Court of Appeal of Eastern Africa that this argument is well founded.

The structure of the Act is worthy of note. It is divided into chapters. Chapter II into which s. 20 falls is headed "Of Contracts, Voidable Contracts and Void Agreements." Section 10, the first section of the chapter, provides that all agreements are contracts if they are made by the *free consent* of parties competent to contract for a lawful consideration and with a lawful object and are not hereby expressly declared void. Section 14 defines *free consent* and provides *inter alia* that consent is free when it is not caused by, *inter alia*, "5, mistake subject to the provisions of s. 20 . . ."

Mutual mistake within s. 20 having been found to exist at the date of the license agreement it necessarily follows that the license agreement is not a contract within s. 10. Neither can it be an

agreement enforceable by law. Therefore quite apart from s. 56 it is a void agreement, see s. 2 (*c*).

True it falls within the language of the first paragraph of s. 56, but that section comes under Chapter IV which deals not with the formation of contracts but with performance and it seems to their Lordships reasonable to construe s. 56 as applying only to agreements which apart from questions of performance are enforceable agreements.

It was suggested that there might be repugnancy between s. 20 and s. 56. The third paragraph of s. 56, it was submitted, clearly covered a case of mutual mistake where neither the promisor nor promisee knew of the impossibility but it was found that the promisor might with reasonable diligence have known of it. If in such a case compensation were not payable, the argument went on, there must be repugnancy between s. 20 and s. 56 and therefore the latter section must prevail. (See Maxwell on the Interpretation of Statutes 10th Ed., page 162.)

Their Lordships have already given one reason for holding that no repugnancy exists, viz. that s. 56 only applies where there is, apart from any question of performance, an enforceable agreement. Another reason for rejecting this argument is to be found in the third paragraph itself. There are under that paragraph two possibilities (1) A. the promisor knows of impossibility, B. the promisee does not, then no question of mutual mistake can arise. (2) A. did not know, but with reasonable diligence ought to have known, of the impossibility. B. did not know of it, then, says Mr. Foot, there is mutual mistake. That is literally true but their Lordships agree with Jenkins, J.A., that here also the words "or with reasonable diligence might have known" imply a set of circumstances in which the promisor is in a different position from the promisee. In other words the case is to be treated as being one of unilateral not mutual mistake.

For these reasons their Lordships will humbly advise Her Majesty to dismiss the appeal. The appellant must pay the costs.

Appeal dismissed.

For the appellant:
Dingle Foot, QC, JT Woodhouse and *L Collins*
TL Wilson & Co, London

For the respondents:
HJ Phillimore, QC, and *RI Threlfall*
Field Roscoe & Co, London

Haji Mohamed Durvesh v Villain and Fassio
[1957] 1 EA 91 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	1 March 1957
Case Number:	87/1956
Before:	Sir Newnham Worley P, Briggs and Bacon JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Aden – Knox-Mawer, Ag.-CJ

[1] Practice – Issues framed and plaintiff's evidence given – Submission of no case – Amendment of issue because court considered onus placed upon wrong party – Interlocutory Order continuing hearing with leave to both parties to call evidence – Whether defendant entitled to call evidence – Civil Procedure Rules, (*A*), *Rule* 172.

Editor's Summary

The appellant, as holder of certain bills of lading, sued the respondents, who were the shipowners, for failure to deliver the goods comprised in the bills. The goods were originally the property of an Italian company and the bills were in the possession of one, Rabie, who appeared at one time to have been sole director and administrator of the Italian company. He, purporting to act on behalf of the company, endorsed the bills for value to the appellant. The shippers refused delivery, alleging that Rabie had stolen the bills from the company, that before the endorsement the company had been declared bankrupt by an Italian court of competent jurisdiction and that Rabie thereafter had no authority to act for the company and that the same court had declared the bills null and void.

Issues were framed, the first being whether the plaintiff proved that the company sold the bills of lading to the plaintiff and received the value thereof. After the plaintiff had given evidence the respondents' counsel submitted "no case". The case

was adjourned for judgment but when it was called the court asked for further argument on the question whether the onus had been wrongly laid on the plaintiff, decided that it had and that the issue should have been whether the defendants proved that although the plaintiff had produced the bills, they were nevertheless not obliged to deliver the goods to him. The court ordered that, in view of this amendment, the hearing be continued and gave leave to both parties to adduce further evidence.

The appellant appealed against this order contending that, since the respondents had submitted that there was no case to answer, they were now precluded from giving evidence and that the issues should not have been amended.

Held – on the view which the court took of the case it was clearly right to amend the issues and it was essential, having done so, to give both parties the right to adduce further evidence.

Appeal dismissed.

Judgment

Briggs JA: read the following judgment of the court: This was an appeal by leave from an interlocutory ruling and order of the Supreme Court of Aden. The appeal was dismissed with costs and we now give our reasons.

The appellant, as holder of certain bills of lading, sued the respondents, who were the shipowners, for failure to deliver the goods comprised in the bills. The goods were originally the property of an Italian company which we will call "Clartex" for the sake of brevity. They shipped the goods to "order". The bills were in the physical possession of one Elie Rabie, who appears at one time to have been sole director and administrator of Clartex. On August 16, 1955, Rabie, purporting to act on behalf of Clartex, endorsed the bills for value to the appellant, who is not shown to have had notice of any irregularity. The shippers refused delivery and alleged *inter alia*,

(i) that Rabie had stolen the bills from Clartex on July 29, 1955;

(ii) that Clartex was declared "bankrupt" by an Italian court of competent jurisdiction on August 11, 1955, and its property was vested in trustees, and thereafter Rabie had no authority to act on behalf of Clartex;

(iii) that the same court on August 12, 1955, had declared the bills null and void.

The appellant's counsel did not, it seems, propose issues at the inception of the trial, but the defendants' counsel did, and the court substantially adopted these. After a preliminary issue not now material, the first issue framed by the court was

> "Does the plaintiff prove that as alleged by paragraph 4 of the plaint Clartex Fabrics Company s.p.a. sold ten bills of lading to the plaintiff and received the value thereof?"

It is clear that, assuming this issue to have been properly framed, the plaintiff, if he failed on it, must fail altogether, and the other issues would never arise. This was conceded by the appellant's counsel before us.

The appellant gave evidence saying that he had bought the bills from Rabie in Bombay and paid him. He said he had not known Rabie previously, and added

> "I had no idea that this Elie Rabie had no authority to seal the bills or that there was anything wrong in any way."

By “seal” he presumably meant “affix the company’s rubber stamp and sign by way of endorsement”. He also said that he could not now trace Rabie. The appellant’s case was closed and the respondents’ counsel submitted “no case”. He argued that the appellant’s whole case depended on a sale to him by Clartex, which was denied, and that the onus of proving this had been placed on the appellant and had not been discharged. After full argument the case was, according to the court’s note, “adjourned for judgment on notice”; but when the parties appeared on notice the court asked for further argument on the question whether the onus had not been wrongly laid on the plaintiff. After argument the court decided that it had, and that the issue quoted above should have been framed as follows:–

> "Does the defendant company prove that although the plaintiff has produced the bills of lading in respect of these goods, they are nevertheless not obliged to deliver the goods to him?"

This would enable the plaintiff to rest on his rights as holder, relying on a title presumably regular until displaced by evidence from the defendants. In view of this amendment, which was clearly permissible under r. 172 of the Civil Procedure Rules, the court ordered that the hearing be continued and gave leave both to the defendants and to the plaintiff to adduce further evidence.

The appellant appealed against this order, contending that, since the respondents had submitted that there was no case to answer, they were now precluded from giving evidence and that judgment should have been given for him. He also said that the issues should not have been amended.

The learned judge had never ruled on the submission of "no case", and even if he had ruled against it, he would still have had a discretion to allow evidence to be called by the defendants, though this is not a usual or a convenient course. If he had not observed that the onus had been wrongly laid on the plaintiff, it seems that he would in all probability have given judgment for the defendants, for the plaintiff had probably not proved that Rabie had the necessary authority to act for Clartex at the date of the sale, and had certainly not proved that Clartex had received the money. To that extent the order may have been in the appellant's favour.

It is obvious that the defendants' case was conducted on the basis of, and in reliance on, the issue framed. And where issues have been framed it is essential that the parties should be able to rely on them in this way. It is entirely reasonable, that the court, having said in effect, "Unless the plaintiff proves fact X, judgment will be given for the defendant", should later say

> "I have now decided that fact X ought to be presumed, unless disproved by the defendant, so the defendant (and the plaintiff) must be allowed to give evidence on that basis".

It would be wholly unreasonable in the same circumstances to say that, although X has not been proved by the plaintiff, yet, since the defendant has submitted "no case", he must not now give evidence and judgment will be for the plaintiff. Equally it would be quite wrong if the court, while realizing that the onus had been wrongly laid, were to give judgment against the plaintiff on the footing of failure to prove facts which it was not in law his duty to prove.

It was clearly right that on the view which the court took of the case, it should amend the issues. And it was absolutely essential that, having done so, it should give to both parties the right to adduce further evidence. The only mistake which has been made is that the formal order omits to state that the plaintiff as well as the defendants may adduce such further evidence. The order must be varied to correct this. Otherwise, the ruling and order will stand and the action must proceed.

Appeal dismissed.

For the appellant:
EP Nowrojee
MH Mansoor, Aden

The respondents did not appear and were not represented.

For the respondent:
E Westley Nunn, Aden

Terence John Image v R
[1957] 1 EA 94 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	7 January 1957
Case Number:	279/1956
Before:	Sir Ronald Sinclair V-P, Briggs and Bacon JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Forbes, J

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[1] Criminal law – Manslaughter – Negligence – Misdirection.

Editor's Summary

The appellant had been convicted of manslaughter arising out of a car accident when he was driving his car on a dusty road behind a lorry and while admittedly on his wrong side of the road collided with a car coming in the opposite direction, a passenger in which was killed. He was sentenced to six months imprisonment and disqualified from driving. At the trial the prosecution based its case on the allegation that the accused had deliberately attempted to pass the lorry when the dust was such that he could not have seen whether the road was clear. The defence was that the dust was so thick that the accused temporarily lost his sense of direction and accidentally drove on the wrong side of the road. The judge directed the jury that if they did not find that the accused had attempted to pass the lorry but that his accidental diversion from course in the dust was due to his having driven closer to the back of the lorry as was in the circumstances safe, they might convict, but suggested that in that case the negligence might not justify a finding of manslaughter but only of dangerous driving. He did not direct them that such a finding could not justify a finding of manslaughter. The judge also directed the jury to disregard the evidence of two witnesses whose evidence related to the distance the accused's car was behind the lorry, and while this evidence did not assist as regards the issue of an attempt to pass, it was material on the issue of negligence by driving too close behind the lorry.

Held–

(i) in view of the direction to the jury, it was not possible to ascertain whether the verdict was arrived at on the basis of a deliberate attempt to pass or on the basis of an accidental diversion caused by driving dangerously close to the lorry.

(ii) there was misdirection of the jury which might have affected the verdict.

Appeal allowed, conviction quashed and sentence and disqualification set aside.

Judgment

Briggs JA: read the following judgment of the court: The appellant was convicted of manslaughter by

the Supreme Court of Kenya and sentenced to six months imprisonment with hard labour. He was also disqualified from driving a motor vehicle for a period of four years. We allowed his appeal, quashed the conviction and set aside the sentence of imprisonment and disqualification. We now give our reasons.

The appellant was driving his motor car along a dusty road behind a lorry. Either because he deliberately drew out to pass the lorry, or because he temporarily lost his sense of direction owing to the dust raised by the lorry and in consequence drew out accidentally, he was on the wrong side of the road and there came into head-on collision with a Citroen car, one of the passengers of which died of injuries thereby received. It was not disputed that an attempt to pass the lorry would in the circumstances have been an extremely dangerous act and would have justified a conviction for manslaughter. The prosecution at all times based its case only on a deliberate attempt to pass. Although on a charge of manslaughter by negligent driving it is not customary to give in the charge particulars of the negligence alleged, and no such particulars were given in this case, we think that at the trial the prosecution should always make clear what particular acts or omissions are relied on as constituting negligence, and they did so in this case.

The learned judge instructed the jury that, if they did not find that the appellant had attempted to pass the lorry, but found that his accidental divergence from course in the dust was due to his having driven closer to the back of the lorry than was in

the circumstances safe, they might convict. He suggested that in that event the negligence involved might not justify a finding of manslaughter, but only of dangerous driving. He did not, however, direct them that negligence of that nature could not justify a finding of manslaughter. Had he done so, we should have assumed that the jury had obeyed his direction, and must accordingly have found a deliberate attempt to pass. As it is, we have no means of knowing whether the verdict of manslaughter was arrived at on that basis, or on the basis of an accidental divergence caused by driving dangerously close to the lorry, the jury having taken a more serious view of the negligence so found than the learned judge himself would have considered proper. It is at least possible that the jury acted on the latter basis. If it did so, the following points arise.

As we have said, the Crown relied only on a deliberate attempt to pass, but it went further. In his closing address Crown Counsel asked the jury to find that the defence's allegation of an accidental divergence was untrue, and indeed impossible. The main question to which defence counsel had therefore to address himself was whether there had been an accidental divergence. His case was that there had, and that it had been caused by a sudden, unexpected and wholly abnormal increase in the dust cloud raised by the lorry. He did not address at any length on the question how far behind the lorry his client had been driving, and it might well have been bad tactics to do so. There was, however, a considerable volume of evidence on which he might have done so, had he thought it necessary.

If the jury was to consider whether the appellant was driving dangerously close to the lorry, all evidence going to show how far behind it he was must have been directly important. The learned judge directed the attention of the jury to certain evidence which suggested that he was about eighteen yards behind it just before the accident. That might have been less than a safe distance. There was, however, other evidence which indicated that he was much further away, and some of that evidence pointed to his having been as much as eighty yards behind at the relevant time. This could hardly have been considered dangerously close. The learned judge in effect directed the jury to disregard this other evidence. He said,

> "I do not think I need trouble you with the evidence of the two P.W.D. workmen. Their evidence has little significance except that they confirm that there was a large cloud of dust . . ."

We are not suggesting that their evidence must have been, or even ought to have been, believed; but it was by no means such that the jury must have rejected it. We think that the learned judge's direction must have been based on the view that this evidence did not assist as regards the issue of an attempt to pass. This may or may not be so. But on the issue of negligence by driving too close behind the lorry it was most material, and we think the direction to disregard it was in the circumstances a misdirection which may have affected the verdict. On this basis we were of opinion that the conviction could not stand.

There remains the question whether the learned judge should have instructed the jury that they might convict on the basis of negligence by driving too close to the lorry. We do not wish to lay down any general rule that only those kinds of negligence expressly alleged by the prosecution may be put to a jury. The varieties of negligence and the circumstances in which they may arise are too numerous and too different to allow of such a generalization. But in this case the Crown had not merely confined itself to a single hypothesis as regards the facts constituting negligence; it had expressly rejected the alternative hypothesis which the learned judge invited the jury to consider. We think the practical effect of this was to divert the attention of the defence from this aspect of the case in such a way that the appellant was in effect induced not to attempt to defend himself against a conviction on that basis. We therefore think that it was unfair to him that the court should put the alternative hypothesis to the jury, at least without

warning the defence that that aspect of the case must be considered. If such a warning had been given, we think that counsel for the defence would have laid considerable stress in his final speech on those very

passages of the evidence which the learned judge later advised the jury to disregard and, had he done so, it would, we think, have been apparent that such a direction could not properly be given.

It is, of course, possible that the jury in fact found that the appellant had deliberately tried to pass the lorry. There was evidence on which they could so have found; but it was not of such compelling strength as to enable us to say that they must have made that finding, and, if they did not, the conviction was unsatisfactory from all points of view, for we agree with the learned trial judge's view that, if the appellant was negligent only in driving too close behind the lorry and so allowing himself to be blinded by dust and diverge accidentally, the negligence was not so grave as to warrant a conviction of manslaughter.

Appeal allowed.

For the appellant:
HC Oulton
Gledhill & Oulton, Nairobi

For the respondent:
DD Charters (Crown Counsel, Kenya)
The Attorney-General, Kenya

Wladyslaw Bilous v Vera Bilous
[1957] 1 EA 96 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	6 February 1957
Case Number:	52/1956
Before:	Sir Ronald Sinclair V-P, Briggs JA and Connell J
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Goudie Ag.-J

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[1] Evidence – Indian Evidence Act, 1872, *s.* 91 *and s.* 92 *– Admissibility of oral evidence to establish circumstances of execution of document.*

[2] Sale of land – Conveyance to wife of farm purchased by husband and wife – Whether wife is trustee for husband of his share in the land.

Editor's Summary

The parties were husband and wife who agreed to purchase a farm for the price of Shs. 60,000/- of which

Shs. 6,000/- were paid as a deposit, each providing Shs. 3,000/- from their own money, the balance being secured by a mortgage to the vendor. The wife instructed her advocate that the conveyance of the property was to be in her name alone but that the husband would join in the mortgage on terms that he would be liable as a principal. This was done without any authority from the husband and the conveyance and mortgage were duly engrossed and sent to the vendor, who was in Canada, for execution. The agreement had provided for possession to be given to the purchaser on execution and when the conveyance and mortgage were returned the husband and wife attended at their advocate's office, where the husband, when he discovered that he was not a party to the conveyance, protested vigorously. As a different member of the firm of advocates had taken the matter over he was unaware of the husband's position, but on the wife's evidence the husband only signed on the understanding that there was to be another deed drawn up, suggested by the advocate, so that they should hold the farm as tenants in common. At this time matrimonial difficulties had arisen and the husband lived on the farm and the wife was living with friends. The husband made many improvements at his own expense on substantial matters, obtaining the approval of his wife who paid the mortgage interest. After a reconciliation, when the parties lived together on the farm for a short time, the wife left and sued in September, 1955, for a declaration that the farm was her property, an injunction for trespass, accounts, damages and costs. The trial judge held that the evidence of the advocate concerned and of the husband regarding

the circumstances surrounding the execution of the documents was inadmissible, being excluded by s. 91 and s. 92 of the Indian Evidence Act. He held that although the husband was not a party to the conveyance he was not a "stranger" to it as he was a party to the mortgage and as no evidence could be given as to that without indirectly affecting the conveyance, the two must be treated as one and no evidence could be given about either. On this basis he excluded evidence showing that a constructive or resulting trust had sprung up in favour of the husband, and also evidence showing that the wife and the advocate, acting on her instructions, had induced the husband to sign the mortgage by promising him that he should have the half-share which justly belonged to him. The judgment of the trial judge made an order for an account of the income making allowance for the improvement and the Shs. 3,000/- damages and mesne profits for wrongful occupation and costs. The court did not call upon the advocate for the appellant but invited counsel for the wife to attempt to support the judgment.

Held–

(i) the trial judge's findings were based on a series of grave misdirections.

(ii) the wife was trustee for her husband of a half share in the equity of redemption.

(iii) since the husband was not a party to the conveyance s. 92 could not prevent him from showing how it came to be executed.

Appeal allowed.

Judgment

Briggs JA: read the following judgment of the court: This was an appeal from a judgment of the Supreme Court of Kenya. We allowed the appeal, but have now to set out our reasons for doing so and the details of the order to be made. The parties are husband and wife and are Polish nationals resident in Kenya. They married in 1952 and in 1953 they decided to start farming. Both were in employment, but they had little means beyond their salaries and some small savings.

On September 16, 1953, they agreed to buy the fifty-acre farm at Nakuru of a Mrs. Hall who then was living in Canada. The agreement provided for a purchase price of Shs. 60,000/- of which Shs. 6,000/- was paid on execution. It is not in dispute that of this sum the parties provided Shs. 3,000/- each from their own monies. The balance was to be satisfied by execution of a mortgage for Shs. 54,000/- at six per cent. per annum. Possession was given to the purchasers on execution. The agreement was signed on Mrs. Hall's behalf by her solicitors in Nairobi. The parties lived with friends near the farm and worked on it in their spare time and at weekends.

At this period the parties quarrelled and, although there have been periodic reconciliations, they have apparently been at arms' length for most of the time since then This no doubt explains what subsequently happened. The wife had instructed Mr. Walker of Messrs. Stacey, Walker and Couldrey with reference to the conveyance and mortgage to be executed. Without any authority from her husband she instructed Mr. Walker that the conveyance was to be to her alone, but that her husband would execute the mortgage, in form as a surety, but on terms that he should be liable to the mortgagee as if he were a principal. Mr. Walker presumably either was told or assumed that the husband agreed to this, for he prepared the conveyance and agreed the draft mortgage accordingly and they were duly executed by Mrs. Hall in Canada. When they were returned and ready for execution by the "purchasers", Mr. Couldrey had taken the matter over from Mr. Walker, but was unaware of the husband's position. The parties called on him

and, on learning what had been done, the husband protested most vigorously. All this the wife later admitted in evidence. She contradicted herself and prevaricated about what happened at that interview, but made the following further admissions,

> "Mr. Couldrey said if my husband signed some arrangement could be made about it later . . . I understood there was to be some other document so that it should be shared officially later . . . I was quite willing to make out a deed

> transferring half of the property to him . . . He thought I had swindled him by having it put in my name . . . Mr. Couldrey suggested we should be made tenants-in-common . . . It was after Mr. Couldrey offered to make some arrangement that my husband signed. I did not object to this. Mr. Couldrey could have made the offer so that my husband would sign. I had no objection to this . . . I saw the advocate on behalf of my husband and myself. My husband trusted me . . . I regarded the farm as half and half even after documents signed . . . I do not know when I first took the attitude that my husband was only entitled to Shs. 3,000/-. Mr. Walker advised me this. I did not think on my own account this was all to which he was entitled."

In view of these admissions, and in spite of other evidence which the wife gave contradicting some of them, the further history of this matter appears well nigh incredible.

After the conveyance in January, 1954, the husband lived on the farm and made numerous improvements at his own expense. He also bought equipment. On substantial matters, such as the sinking of a well and the purchase of a tractor, he consulted the wife and obtained her approval. She paid the mortgage interest, but it does not appear that, either in this way or otherwise, she has put into the farm any more than the husband has, if as much. She was living apart from the husband at her own expense and there were some suggestions that he might pay her some "rent" in respect of her half-share, but these were abortive. The farm books were open to her inspection at any time. Matters went on in this way for several months. In November, 1954, the parties were reconciled and lived together on the farm, but soon after there was a further quarrel and the wife left, perhaps in circumstances amounting to constructive desertion by the husband, but this issue is not before us.

In September, 1955, the wife sued for a declaration that the farm was her property, an injunction for trespass, accounts, damages and costs. She submitted to return the Shs. 3,000/- initially paid by the husband. The defence was of course that the husband was beneficially entitled to a one-half share of the farm, and he counter-claimed for a declaration of trust and an order for transfer or a vesting order.

The trial was considerably confused by a constant succession of objections to evidence by both counsel, many of them of such a nature as to indicate insufficient appreciation either of the issues involved or of the law applicable to them. The learned judge deferred his decision on most of these objections. After the evidence of the parties had been taken the court suggested that Mr. Couldrey should be called as a court witness, and both counsel agreed. At this stage the husband's counsel was replaced by a new one. After lengthy argument on admissibility and other legal matters, in the course of which the husband's counsel stressed the need for Mr. Couldrey's evidence, the learned judge took time to consider his decision as to admissibility of the oral evidence. In it he held that no oral evidence was admissible to "vary or explain" the contract, the conveyance or the mortgage, such evidence being excluded by s. 91 and s. 92 of the Indian Evidence Act. The court held that none of the exceptions or provisos to s. 92 applied, that although the husband was not a "party" to the conveyance he was not a "stranger" to it and s. 99 did not assist him, and that, since he was a party to the mortgage and no evidence could be given regarding that without affecting indirectly the conveyance, the two must be treated as one and no evidence could be given about either. On this basis he excluded evidence showing that a constructive or resulting trust had sprung up in favour of the husband, and also evidence showing that the wife and the solicitor acting on her instructions had only induced the husband to sign the mortgage by promising that he should have the half-share which justly belonged to him.

The learned judge then proceeded to hold that, since the husband under Kenya law obtained no direct equitable interest in the land by virtue of the sale-agreement, he could now have no rights against the wife for anything more than the money he advanced. The word "benami" was brought into the argument

by counsel, and the learned judge held that it had nothing to do with the case. In this, and perhaps in this alone, he was right.

After a month's delay the case was set down for further hearing. It is perhaps not surprising that the husband's counsel said that in view of the ruling given he was instructed not to address further; but the wife's counsel addressed on the facts and asked the court to make full findings. Judgment was reserved. The learned judge made an order for delivery of possession to the wife and a declaration that as against the husband she was solely entitled to the property. He ordered an account of the income, but making allowance for cost of improvements and the Shs. 3,000/-. He gave damages and mesne profits for wrongful occupation and costs. The judgment proceeds to deal with the case as it would have appeared to the learned judge if he had held all the oral evidence to be admissible. He accepts the evidence favourable to the wife and rejects the evidence favourable to the husband and on this footing finds that his decision would in any event have been the same.

We are obliged to speak of the "evidence favourable to the wife" and "favourable to the husband", because it is quite apparent that the learned judge has not accepted the wife's evidence as such. He has selected the odd sentences which are in her favour and wholly ignored the much more important, and indeed more lengthy, passages which completely admit the truth of the husband's case. We can only presume that the learned judge's view of this case was obscured by his findings that the husband was "overbearing and unreasonable" and "virtually drove the plaintiff from her home". This may or may not be true. It is not in issue in this case. In any event it would not justify her attempt to obtain for herself an interest in land which was obviously his. The learned judge's findings were based on a series of misdirections of the gravest kind and could not be allowed to stand.

On the husband's appeal we found it unnecessary to hear his counsel, and invited counsel for the wife to attempt to support the judgment. He did not attempt to support the learned judge's reasons in toto, but submitted that his conclusion was correct in law. It was admitted that the agreement showed conclusively that the husband had, as against the wife, the right to acquire beneficially a half-share in the land, and that he never abandoned that right at any time before the conveyance. It was also admitted that, since he was not a party to the conveyance, s. 92 could not prevent him from showing how it came to be executed and in what way it was an invasion of his rights. The mortgage is dated one day later than the conveyance and was in fact executed after it. It was submitted for the respondent that by signing the mortgage the husband waived any rights which he might have had against the wife in respect of the land, and that this was so, whether or not the wife or Mr. Couldrey had induced him to sign by a promise that his rights would be respected and preserved. Mr. McAllan did not appear in the court below, and we sympathize with his difficulties in doing his best with a hopeless case on appeal; but it is clear that the alternatives before the husband were either to refuse to sign the mortgage, in which case the conveyance would not have been handed over and neither he nor his wife would have got the property, or to sign and allow the property to become vested in her subject to the mortgage and subject to his rights. It is unnecessary to infer any intention on his part to waive those rights, and it is quite apparent that in fact he did not intend to do so. Apart from any undertaking or assurance given to him, there was no waiver.

It was submitted that s. 92 precluded him from giving evidence to support his claim. But his evidence did not contradict or vary the conveyance or the mortgage. He claims an equitable interest which is entirely apart from the "legal estate" with which those documents deal. It so happens that in this instance the property vested in the trustee is not now in fact a "legal estate"; it is an equity of redemption; but that is quite immaterial and cannot affect the position of the cestui-que-trust. He claims something to which the conveyance and mortgage do not in any way refer, either positively or negatively.

It was suggested that systems of registration of title or registration of deeds such as apply in Kenya

are in some way incompatible with the recognition of trusts, or at least of trusts arising by operation of law. From the inception of the Torrens system in Australia this view has consistently been rejected wherever the trust is one which

affects the registered proprietor directly, and not merely by virtue of his having notice of its existence. This court must give effect to the husband's equitable rights.

The order of this court will be that the appeal be allowed and that the judgment and decree of the Supreme Court be set aside. In lieu thereof a decree will be entered whereby the plaintiff's claim will be dismissed with costs and the counterclaim will be allowed with costs. Under the counterclaim there will be a declaration that the plaintiff holds the equity of redemption in respect of the farm as to one-half thereof as trustee for the defendant, and consequently it will be ordered that the plaintiff do forthwith transfer to the defendant the said one-half share in the said equity of redemption, to hold the same with the plaintiff as tenants in common, provided always that the defendant shall as a condition of such transfer agree that as between himself and the plaintiff he will thereafter be liable as a principal for one-half of all capital monies and interest due or to become due under the existing mortgage. The defendant's costs of the transfer and agreement abovementioned will be included in his taxed costs of the counterclaim. The decree will also give liberty to the parties to apply to the Supreme Court as they may be advised. The respondent must pay the appellant's costs of this appeal.

We should perhaps add that the wife's counsel asked us at least to sustain the order for accounts made by the Supreme Court. We are unable to do so. The account ordered was one of profits alleged to have made by virtue of the husband's being wrongfully in possession of the land. We have held that his possession was not wrongful. It is possible that the settlement of accounts as between co-owners may present some little difficulty, and at some future time one or other of them might become entitled to have those accounts taken; but there is no claim in this suit for such an account by either party and it would be quite wrong to order such an account to be taken in these proceedings.

Appeal allowed.

For the appellant:
Mrs L Kean

For the appellant:
Sirley & Kean, Nairobi

For the respondent:
HB McAllan
Geoffrey White & Co, Nakuru

Motibai Manji v Khursid Begum
[1957] 1 EA 101 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	21 January 1957
Case Number:	84/1956
Before:	Sir Newnham Worley P, McKisack CJ (U) and Bacon JA

Sourced by: LawAfrica

Appeal from: H.M. High Court of Uganda – Keatinge, J

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[1] Sale of land – Mailo land in Buganda – No Consent of Governor – Whether agreement unlawful and void – The Buganda Land Law (*Revised*) 1951, *s.* 2 (*d*) – *Land Transfer Ordinance s.* 2 (*U*).

Editor's Summary

An agreement had been entered into by the appellant and the respondent whereby the latter had agreed to transfer to the appellant her absolute ownership in one undivided moiety of the land and buildings known as Plot 78, South Street, Kampala, in exchange for the transfer by the appellant to the respondent, free from encumbrances, of

> "her absolute ownership in one moiety of the land and buildings thereon known as Bunamwaya Estate."

The South Street property was held on a Crown lease and was valued at Shs. 75,000/-: Bunamwaya Estate was mailo land in Buganda and the appellant's interest therein was for the remainder of a lease said to be for ninety-nine years executed in 1926. It was valued at Shs. 70,000/-, and the appellant was to pay the respondent Shs. 5,000/- for equality of exchange. The appellant and respondent were both Asians and non-Africans. The lessor of the mailo land was an African. The claim for specific performance of the agreement was dismissed on the ground that the agreement contravened the provision of s. 2 of the Land Transfer Ordinance in that it was made without the consent of the Governor in writing and was therefore unlawful and void.

Held–

(i) the consent of the governor in writing is required to a transfer of mailo land even where the transferor and transferee are non-Africans.

(ii) the governor's consent was never given. The first application for consent contained a substantial misdescription of the subject matter and the consent of the land officer was given before the agreement was drawn up, and when subsequently, after realising that this consent was defective, the parties obtained the consent of the ministers of the Lukiko to the transfer of the mailo land and the land officer again endorsed his consent, this was done long after the institution of the suit.

(iii) as the agreement was prohibited by law and void ab initio nothing subsequently done could convert it into an enforceable contract.

Appeal dismissed.

Cases referred to:

(1) *Said Mohamed Murtadha v. Reginam*, 21 E.A.C.A. 190.

(2) *Shantilal Nathabhai Patel v. Registrar of Titles*, 16 E.A.C.A. 46.

(3) *Patterson and Anor. v. Kanji*, E.A.C.A. Civil Appeal No. 83 of 1955 (unreported).

Judgment

Sir Newnham Worley P: read the following judgment of the court: This is an appeal from a decree of the High Court of Uganda dismissing with costs the appellant (plaintiff's) suit for specific performance of a contract relating to certain mailo and other land in Buganda. We have already dismissed the appeal with costs and now give our reasons.

It is alleged in the plaint that the respondent (defendant in the suit) by an agreement in writing dated January 30, 1954, agreed to transfer to the appellant her absolute ownership in one undivided moiety of land and buildings thereon known as Plot No. 78, South Street, Kampala, in exchange for the transfer by the appellant to the respondent free from encumbrances of

> "her absolute ownership in one moiety of the land and buildings thereon known as Bunamwaya Estate."

The South Street property is held on a Crown lease and was valued at Shs. 75,000/-:Bunamwaya Estate is mailo land in Buganda and the appellant's interest therein is for the remainder of a lease said to be for ninety-nine years executed in 1926. It was valued in the agreement at Shs. 70,000/- and to effect a quality of exchange the appellant was to pay the respondent Shs. 5,000/- when the conveyance was made.

The agreement itself was not produced in evidence, as it could not be found. Mr. Korde, an advocate of the High Court, testified that at the material time he was acting for both parties and on their instructions drew up an agreement in the terms pleaded. This was signed by the appellant and by one Jamal Din on behalf of the respondent and retained by Mr. Korde. It is not clear from the evidence whether the document was lost before or after the suit was instituted, but the point is immaterial since the respondent has not disputed Mr. Korde's evidence as to its terms and execution.

The appellant and respondent are both Asians and non-Africans: the lessor of the mailo land in question is an African.

The defence was that the agreement contravened the provisions of s. 2 of the Land Transfer Ordinance (Chapter 114 of the Laws of Uganda, 1951) in that it was made without the consent of the Governor in writing and was therefore unlawful and void. This proposition was accepted by the learned trial judge and it is from this determination that the appeal is brought.

Section 2 of Chapter 114 so far as material reads as follows:

> "No non-African or any person acting as his agent shall without the consent in writing of the governor occupy or enter into possession of any land of which an African is registered as proprietor (otherwise than by receiving rents and profits payable by non-Africans who have gone into occupation or possession with the consent of the governor) or make any contract to purchase or to take on lease or accept a gift inter vivos or a bequest of any such land or of any interest therein other than a security for money."

It will be convenient to note at this point the provisions of s. 2 (*d*) of the Buganda Land Law (Vol. VII of the 1951 Revision p. 1219) the relevant part of which reads:

> "The owner of a mailo shall not permit one who is not of the protectorate to lease, occupy or use his mailo except with the approval in writing of His Excellency the Governor and the Lukiko."

The learned trial judge states in his judgment that at the trial it was not seriously disputed on behalf of the plaintiff that the agreement or contract of January 30, required the consent in writing of the governor given under the provisions of s. 2 of the Land Transfer Ordinance. Before us, however, Mr. J. K. Patel for the plaintiff- appellant contended that that section has no application to the instant case where two non-Africans have made a contract to purchase or take on lease mailo land. According to his argument the last three lines of the section preceding the proviso should read

> "or make any contract with an African to purchase or to take on lease or accept from an African a gift inter vivos or a bequest etc."

In support of this argument, he prayed in aid the long title of the Ordinance, which is "An Ordinance to regulate the Transfer of Land by Africans" and the marginal note to s. 2 "Transfer of land by Africans." We think that both of these may be looked at as they are actual parts of the enactment of the Legislature: see s. 29 (2) of the Royal Instructions under the Uganda Order in Council, 1920 (Vol. VI of the Laws of Uganda, 1951, p. 113) and *Said Mohamed Murtadha v. R.*, (1) 21 E.A.C.A. 190 at p. 194. Mr. Patel accepts the learned trial judge's statement of the object of the ordinance, namely

> "the protection of Africans from possible fraud and to control the sale of mailo land to non-Africans as a matter of public policy,"

but he contends that a transaction between a non-African lessee of mailo land and a non-African purchaser does not fall within this mischief. The point was however decided against him by this court in *Shantilal Nathabhai Patel v. Registrar of Titles* (2),

16 E.A.C.A. 46. That case was decided under s. 3 of the Land Transfer Ordinance, 1944 which preceded s. 2 of Chapter 114 and was in identical terms except for the use of the term “non-native” where “non-African” is now used. That case decided that a non-African registered proprietor of a leasehold estate in mailo land (which is exactly the position of the present appellant) could not validly assign the unexpired term of his lease to a non-African without obtaining the consents required both under the Land Transfer Ordinance and the Buganda Land Law. It is true that in Shantilal’s case the court did not consider and apparently was not asked to consider the effect of the long title and the marginal note to s. 2 of the Ordinance but we are satisfied that this does not affect the correctness of that decision. The object being to protect the African owner by regulating transfers of mailo land, the Legislature, as Sir John Gray said, intentionally made the opening words of the section “No non-African . . . shall . . . occupy or enter into possession” as wide as possible so as to prevent evasion of the law by informal transactions. As to the marginal note, Murtadha’s case (1) citing the Privy Council is authority for the proposition that there can be no justification for restricting the contents of the section by the marginal note. The decision in Shantilal’s case is binding on us and applies to the instant case.

As an alternative, Mr. Patel put forward the proposition that, if the Governor’s consent was necessary under s. 2 of the Ordinance, then it was given in fact though belatedly and, when given, had retroactive effect. The evidence however shows very clearly that, in fact, the Governor’s consent to the agreement was never given. Mr. Korde’s evidence is that, before he prepared the Agreement for Sale, Bunamwaya Estate was surveyed and a plan prepared (Ex. 2) and it was agreed that the specific five acres marked A on the plan with the house standing thereon was to be conveyed to the respondent. But on March 29, 1954, Mr. Korde sent to the land officer (as the governor’s delegate) an application for His Excellency’s consent to the transfer of a Crown lease, as required by s. 14 (*a*) of the Crown Lands Ordinance (Chapter 117), the proposed transaction being described as the transfer of one undivided moiety of the land and the consideration stated as Shs. 70,000/-. The “lessor’s” consent (i.e. the consent of the African owner) was attached but no mention was made of the fact that it was mailo land. On April 2, 1954, a land officer endorsed consent on the application on behalf of the governor.

At a later stage, however, the appellant’s advisers apparently realised that this consent was defective, for on September 27, 1954, they obtained the consent of the Ministers of the Lukiko to the transfer of “one undivided moiety” of the mailo land in suit to the respondent and on October 25, 1955, the land officer endorsed on this “The consent of the Governor under the Land Transfer Ordinance is hereby given.” This, however, did not cure all the defects. Incidentally, it was long after the institution of the suit, the original plaint having been filed in January, 1955. At the trial the acting Registrar of Titles said that he thought the consent on the latter application (Ex 7) was given because the consent on the earlier one (Ex 3) was given by mistake. He further said that (as one would expect) consent to the transfer of mailo land is never given without first ascertaining whether the Lukiko Ministers agree. Mr. Patel concedes that the agreement as such has never been put before the governor for his consent, nor has the Governor’s consent ever been obtained to the assignment of the Crown lease of the South Street property. He contends that it was for the respondent to obtain this latter consent; that may be so, but the omission to obtain it must be laid at the door of Mr. Korde who was acting for both parties at the material time and, apparently, up to the time the plaint was filed.

In our view, it is quite clear that the Governor’s consent to the agreement has never been obtained for on each occasion there was a substantial misdescription of its subject matter and also a failure to submit for the Governor’s consideration the agreement as a whole. We think that the learned judge correctly held that the agreement was prohibited by law and was therefore void ab initio. That being so, nothing done

subsequently could convert it into an enforceable contract. It must also be borne in mind that a breach of the provisions of s. 2 of the Land Transfer Ordinance

is made a criminal offence by s. 4 and it could not be contended that the Governor by a subsequent consent could expunge liability for a criminal act.

Mr. Patel informed us (though Mr. Wilkinson did not wholly agree) that it is not the practice of advocates in Uganda to seek the Governor's consent to agreements of the kind here in question, the practice being merely to seek prior consent to any transfer contemplated by any such agreement. Such a practice, if it exists, cannot however, affect the proper construction of the section, and, if the practice is inconsistent with this judgment, those concerned must consider whether the practice or the law is to be altered. They may find some assistance in the judgment of this court in *Patterson and Anor. v. Kanji*, (3) E.A.C.A. Civil Appeal No. 83 of 1955 (unreported) which dealt with an analogous situation in Tanganyika.

Appeal dismissed.

For the appellant:
JK Patel
Korde & Esmail, Kampala

For the respondent:
PJ Wilkinson
PJ Wilkinson, Kampala

Hassanali R Dedhar v The Special Commissioner and Acting Commissioner of Lands

[1957] 1 EA 104 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	30 January 1957
Case Number:	8/1956
Before:	Sir Ronald Sinclair V-P, Sir Kenneth O'Connor CJ (K) and Briggs JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Rodwell, Ag. J

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[1] Landlord and tenant – Crown lease – Breach of covenant by lessee to erect building of approved design by specified date – Relief against forfeiture – Principles to be applied – Crown Lands Ordinance, s. 83 (*K.*).

Editor's Summary

The appellant owned a town plot at Eldoret on a Crown lease dated February 18, 1947. The lease required him to erect "a building of approved design" before November 1, 1948, and that the design must be approved both by the local authority and the respondent or his nominee. No building had been erected at the time of the hearing of this appeal. The appellant had purchased several plots in 1946 and in September, 1950, the respondent wrote to the appellant enquiring about his failure to build on Plot No. 19 (adjoining the plot in issue) and the appellant replied that he was building on his plots one by one, had just completed the building on Plot No. 3 and had submitted plans for building on Plot No. 19. The appellant received no reply to his letter and, not unreasonably, assumed that the respondent was prepared to accept his proposals. He completed his building on Plot No. 19 by the end of 1953, but the plot in issue remained undeveloped although he had early that year given instructions for plans to be prepared. In November, 1953, the respondent again wrote to the appellant threatening *inter alia* forfeiture proceedings but the appellant was on safari and was unable to reply until early in January, 1954, when he informed the respondent that the plan was being prepared. On January 19 the respondent wrote that he intended to apply forfeiture. On January 27, 1954, the appellant wrote to the respondent stating that the plan had been submitted to the Eldoret Municipal Board and on the same date the respondent served a notice of breach of covenant upon the appellant. The respondent also wrote to the appellant that he was unable to consider any plans in view of the forthcoming proceedings for forfeiture, thus making it impossible for the appellant to carry out his obligation to build.

Held–

(i) the principles on which relief should be granted are as set out in s. 14 of the Conveyancing Act. 1881 (being the English law at the date the Crown Lands Ordinance came into force), and that equity leans against forfeiture.

(ii) taking judicial notice that building conditions in Crown leases are not always strictly enforced, the appellant's breach of covenant was wilful but not obstinate.

(iii) the appellant had done his best to remedy his default and the respondent's own attitude prevented the appellant from doing so.

Creery v. Summersell, [1949] Ch. 751; *Gregory v. Wilson*, 68 E.R. 687, and *Nokes v. Gibbon* (1857), 26 L.J. Eq. 433, distinguished. *Hyman v. Rose*, [1912] A.C. 623, applied.

Appeal allowed. Order that relief be granted on condition that the appellant submit plans within one month, commence building within two months after their final approval and complete the building within one year.

Cases referred to:

(1) *Creery v. Summersell*, (1949) Ch. 751.

(2) *Gregory v. Wilson*, 68 E.R. 687.

(3) *Nokes v. Gibbon* (1857), 26 L.J. Eq. 433.

(4) *Matthews v. Smallwood*, [1910] 1 Ch. 777.

(5) *Hyman v. Rose*, [1912] A.C. 623.

(6) *Commissioner of Lands v. Shamdass Horra*, Kenya Supreme Court Civil Case No. 504 of 1952 (unreported).

January 30. The following judgments were read.

Judgment

Briggs JA: This is an appeal from a judgment and decree of the Supreme Court of Kenya. The appellant is one of two lessees under a Crown lease of a town plot in Eldoret dated February 18, 1947, and in October, 1947, he acquired by purchase the half share of his co-lessee. The lease is subject to special conditions, of which the first requires the erection of "a building of approved design" before November 1, 1948, and the second provide that the design must be approved both by the local authority and by the respondent or his nominee. No such building has yet been erected. Section 83 of the Crown Lands Ordinance (Cap. 155) provides as follows:

> "83. If the rent or royalties or any part thereof reserved in a lease under this Ordinance shall at any time be unpaid for the space of thirty days after the same has become due, or if there shall be any breach of the lessee's covenants, whether express or implied by virtue of this Ordinance, the Commissioner may serve a notice upon the lessee specifying the rent or royalties in arrear or the covenant of which a breach has been committed, and at any time after one month from the service of the notice may commence an action in the Supreme Court for the recovery of the premises, and, on proof of the facts,

the Supreme Court shall, subject to relief upon such terms as may appear just, declare the lease forfeited, and the Commissioner may re-enter upon the land.

"In exercising the power of granting relief against forfeiture under this section the court shall be guided by the principles of English law and the doctrines of equity."

On January 27, 1954, the respondent served notice on the appellant, and in 1955 he filed suit claiming a declaration that the appellant's title was forfeited, an order empowering him to re-enter on the land, and costs. The defence was confined to a prayer for relief in terms of the section. The Supreme Court refused relief and gave judgment in the terms prayed. The appellant appeals. At the conclusion of the hearing we were of opinion that relief ought to be granted, and we heard counsel in chambers on the form of order which might on that basis be made. We then reserved judgment.

I should perhaps observe first that the lease is in part in the form of a grant, and is described as a grant in the pleadings. If it were in law a grant, it would seem that

s. 83 would not apply to it; but I have no doubt that it is in law a lease and has properly been treated as such by both parties. Accordingly s. 83 does apply.

The plot in question and a number of others were sold by public auction in 1946 and the appellant acquired an interest in a number of such plots, including Plot No. 19, Section XV, which adjoins the plot now in issue. Plot No. 19 was apparently subject to the same special conditions as this plot and it seems that on September 4, 195O, the respondent wrote to the appellant enquiring about the appellant's failure, up to that date, to build on Plot No. 19. The appellant replied on September 9,

> "I would like to clear that building plans have already been submitted and I am waiting for their return, duly passed, to start the construction of the premises as approved.
>
> "When I purchased several plots in 1946, the supply position of main building materials was acute and as soon as I found it somewhat eased I started the construction of the building next to my present shop premises on Plot No. 3, Section XV, Eldoret, which I completed only at the end of the last year.
>
> "As you know, I cannot undertake to erect buildings on all the plots at a time, and accordingly I am attending to the building erection on my vacant plots one by one.
>
> "I have completed a double storey building as referred per above, Plot No. 3, and have already submitted plans for approval for even bigger venture in respect of the above Plot 19 and in these circumstances I do not think you will be harsh enough to proceed with the intended proceedings under s. 66 of the Crown Lands Ordinance (Cap. 140) as referred."

Section 66 of Cap. 140 of the 1926 edition of the Kenya laws is in the same terms as s. 83 of the present Ordinance. This court is, I think, entitled to take judicial notice that building conditions in Crown leases are not always strictly enforced, in that late performance is sometimes condoned, provided that there is a bona fide intention to build in due course. No reply was sent to the appellant's letter, and he apparently assumed, perhaps not justifiably, but still not altogether unreasonably, that the respondent was prepared to accept his proposals. They of course covered the plot now in issue. The appellant proceeded with his scheme of developing successive plots and had completed the building on Plot No. 19 by the end of 1953, but this plot remained undeveloped. He had, however, given instructions to an architect early in 1953 to prepare plans for this plot and clearly intended to build in due course.

It appears that later in 1953 he contemplated selling this plot, since solicitors acting for a potential purchaser made enquiries of the respondent on November 3, 1953, concerning non-compliance with the building condition, presumably to ascertain whether time had been formally extended or whether the appellant was in default. This brought matters to a head. Unfortunately the appellant was on safari at the time and was unable to reply promptly to the respondent's letters, which *inter alia* threatened forfeiture proceedings; but on January 4, 1954, he wrote as follows:

> "I here below beg to clear the position as required:
>
> "1. A plan for the erection of the premises on the above plot is under preparation, and will be submitted for approval, as soon as it is ready, without delay.
>
> "2. I develop one plot each year from the number of plots I possess, and you will realise that I cannot erect buildings on all the plots at a time. The above plot will be developed this year.
>
> "3. I have already erected three premises in Section XV, but so far there is no sign of drains and proper Tarmac road to enhance the activities and interests in this section.
>
> "I was out on safari and consequently could not reply you earlier than this for which it is hoped you will excuse me."

On January 19 the respondent replied that he intended to apply for forfeiture, and on January 27 he served notice, as I have stated. On the same day the appellant wrote that the plan had already been submitted to the Eldoret Municipal Board and that

work would begin as soon as it was returned. On February 15 the respondent wrote:

> "I regret that I am unable to consider any plans submitted by you in respect of the above plot for, as stated in my Notice of Termination 34438/28 dated January 27, 1954, I intend commencing an action in the Supreme Court for the recovery of this land, within one month of the date of the service of that notice."

It is thus clear that the respondent made it impossible for the appellant thereafter to carry out his obligation to build, and I think we must in the circumstances assume in favour of the appellant that, had he not been so prevented, he would probably have performed that obligation during 1954.

In April, 1954, the respondent requested the appellant to surrender his lease, and the appellant was at first willing to do so, but later declined to. It may be that he had by then been advised that relief against forfeiture might be obtainable. This does not appear to me to have any importance except that it explains the long delay before the suit was filed.

The learned trial judge rightly held that the lease had become liable to forfeiture under s. 83. He then considered the principles on which relief should be granted and referred to s. 146 (2) of the Law of Property Act, 1925, and s. 14 of the Conveyancing Act, 1881. He was in doubt whether the English law as it stood in 1915 when the Ordinance was passed, or as it is to-day, should be applied, but considered that since there had been no material change, the question was academic. I think it will appear that there have been very material changes, and I have no doubt that the "English law" to be applied is the law in force at the time when the Ordinance came into force. If the intention were otherwise one would expect to find words such as "applicable from time to time" or "for the time being in force." I think it is also clear that the words "English law" include any relevant statute law. Otherwise one would expect to find the standard phrase "the common law of England and the doctrines of equity." I think therefore that the principle to be applied is to be found in the following words from s. 14 of the Conveyancing Act, 1881:

> ". . . The lessee . . . may apply to the court for relief, and the court may grant or refuse relief, as the court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section and to all the other circumstances thinks fit . . ."

And with them must be remembered the basic principle that equity leans against forfeiture.

The learned judge, however, relied strongly on dicta from *Creery v. Summersell* (1), [1949] Ch. 751, *Gregory v. Wilson* (2), 68 E.R. 687, and *Nokes v. Gibbon* (3) (1857), 26 L.J. Eq. 433, the effect of which is that the jurisdiction to grant relief against forfeiture should be sparingly exercised and should not be exercised where there is an active obligation and a wilful and obstinate failure to perform it. He held that the appellant's failure to build had been both wilful and obstinate and concluded,

> "this is not a case where I can exercise my discretion in favour of the defendant and grant him relief against forfeiture."

I emphasize the use of the word "can" as indicating that the learned judge might well have felt disposed to grant relief had he not considered that the authorities obliged him to refuse it.

The impressive argument addressed to us by Mr. Nazareth for the appellant was almost entirely on the point that the learned judge was wrong in law in applying to this case the principles enunciated in the three cases to which I have referred. He submitted that *Gregory v. Wilson* (2) and *Nokes v. Gibbon* (3) were both decided before the passing of the Conveyancing Act, 1881, and that in any case subject to the terms of s. 14 of the Act they could no longer be authoritative. He reminded us that before 1881 the Courts of Equity granted relief only in cases of non-payment of money, accident or surprise, and cited Woodfall (25th Edn.), 1004–5, § 2147–9, and Foa (6th Edn.), 735–6. He pointed out that under the

statute of 1881, relief could not be given to under-lessees or to assignees of leases, whether under a lawful or a prohibited

sub-lease or assignment, and that the amending Act of 1892 was in very special terms which fully justified the interpretation later given by the courts, to the effect that in the special (and formerly excepted) cases of under-lessees and assignees of leases the discretion must be exercised "sparingly." He submitted, however, that this class of cases was exceptional and anomalous, and in no way cut down the wide and unqualified discretion given by the Act of 1881 in a case such as the present one. He cited *Matthews v. Smallwood* (4), [1910] 1 Ch. 777, and in particular those passages therefrom referred to in *Creery v. Summersell* (1), [1949] Ch. 751 at p. 764 et seq. He suggested that the learned judge at first instance had wholly failed to observe this distinguishing point, or that the principles, admittedly correct, laid down in *Creery v. Summersell* (1) were in no way applicable to this case. He proceeded to cite *Hyman v. Rose* (5), [1912] A.C. 623, as laying down the principles under which in ordinary cases the discretion should be exercised. The attention of the learned judge was drawn to that case, but he appears not to have observed that the principles there stated are in direct contradiction of those laid down generally before 1881 and retained for the special class of cases outside the Act of 1881 by *Matthews v. Smallwood* (4) and *Creery v. Summersell* (1). Mr. Nazareth very properly drew our attention to the statement in Halsbury's Statutes (2nd Edn.), Vol. 20, 743, based on *Creery v. Summersell* (1) and submitted that in the unqualified form in which it there appears, it is simply wrong. He referred finally to 20 Halsbury (2nd Edn.), 260, § 293 and 294, for a correct summary of the law as it stood in 1915 in a case such as this.

As an interesting side-note to this argument Mr. Nazareth referred to *Commissioner of Lands v. Shamdass Horra* (6), Kenya Supreme Court Civil Case No. 504 of 1952, unreported, a case in which the Supreme Court of Kenya gave relief to the sub-lessor against forfeiture for a prohibited sub-lease, thereby applying, as it seems to me, the law in England in force after 1925, for I am unable to see that the law of England as it stood in 1915 would have justified such a course. It is not, however, necessary for present purposes to consider this decision.

The appellant contends that the law applicable to this case is as explained in *Hyman v. Rose* (5), [1912] A.C. 623 at p. 631:

> ". . . the discretion given by the section is very wide. The court is to consider all the circumstances and the conduct of the parties. Now it seems to me that when the Act is so express to provide a wide discretion, meaning, no doubt, to prevent one man from forfeiting what in fair dealing belongs to someone else, by taking advantage of a breach from which he is not commensurately and irreparably damaged, it is not advisable to lay down any rigid rules for guiding that discretion. . . . If it were otherwise the free discretion given by the statute would be fettered by limitations which have nowhere been enacted."

I do not propose to discuss in detail the merits of Mr. Nazareth's submissions of law. They completely satisfy me, and furthermore they have satisfied Mr. Gledhill, who admitted for the respondent that he was unable to oppose them. It is therefore now common ground that the two principles of a "sparing" exercise of the jurisdiction and refusal to exercise it if the breach is "wilful and obstinate," which the learned judge relied on, ought not to have been applied. His discretion was thus exercised on a wrong principle, and the matter must be reconsidered by us as res integra.

Mr. Gledhill rightly stressed that the respondent, as representing the Crown and the public, has an interest to see that vacant town plots are promptly and properly developed. I accept that a breach of an obligation so to effect development is much more than a technical invasion of his rights, and must in proper cases lead to forfeiture. But Mr. Gledhill, in my view again rightly, declined to stress the probability that, if forfeiture occurred, the respondent might profitably resell the land, or to claim for him

any special interest on that basis. I think this attitude was eminently proper and fair-minded. On the merits generally Mr. Gledhill pointed out that it was not clear that the respondent, when he received the letter of September 9, 1950, was aware that this particular site remained undeveloped. With regard to the refusal to pass plans, he stressed that the commissioner, if he intends to ask for forfeiture, may prejudice

his case by passing any plans submitted to him. He further pointed out that the commissioner is not obliged, as a lessor is in England, to give the lessee an opportunity to make amends. Giving all due weight to these matters, I am still of opinion that relief should be given against forfeiture in this case. I accept that the breach was "wilful," but I do not think it is correct to say that it was "obstinate." Indeed, the appellant did his best to remedy it as soon as the respondent made complaint, and it was the respondent's own act which prevented him from doing so. I think the respondent's legitimate interest to see the land properly developed as soon as possible need not be adversely affected by granting relief in this case. There is no evidence of a general difficulty in enforcing compliance with these conditions, which might lead the court to take a stricter view. I am unimpressed by the argument that the Crown under s. 83 is in a worse position than an ordinary landlord under s. 114 of the Indian Transfer of Property Act. The court may have powers beyond the wording of the Act. If it has not, the Act, as now applied to Kenya, requires amendment.

The appellant expressed his willingness, if granted relief, to submit to terms, and, having regard to what was said to us in chambers, I propose that the following order be made:

Order that this appeal be allowed, and that the judgment and decree of the Supreme Court be set aside, and that a decree in the following terms be substituted therefor:

It appearing that by reason of a breach of Special Condition No. 1 the lease became liable to forfeiture, but this court being of opinion that relief under s. 83 of the Crown Lands Ordinance ought to be granted, and upon the defendant by his counsel expressing his willingness within one month from the date of this order to submit proper building plans in accordance with Special Condition No. 2 of the lease, and to commence building in accordance with the provisions of the lease within two months after final approval of such plans, and to prosecute building operations with due diligence, and to complete such operations in accordance with such provisions not later than one year from the date of final approval of the plans, it is ordered:

(1) That all proceedings in the suit be stayed, with liberty, however, to the plaintiff to apply to the Supreme Court to reinstate the proceedings if the defendant shall not proceed with or complete the passing of plans or the erecting of the building in the manner aforesaid;

(2) That he defendant do pay to the plaintiff his costs of the suit to date to be taxed;

(3) That either party be at liberty to apply as he may be advised.

I would further order that the respondent do pay the appellant's costs of this appeal, and as a matter of abundant caution I would give liberty to apply generally to this court also.

With regard to the costs in the Supreme Court, it is provided by statute in England that a party seeking relief against forfeiture must pay the costs of the lessor entitled to forfeit. I think this rule should be applied in Kenya as part of the "English law" relevant to this subject.

Sir Ronald Sinclair V-P: I am in complete agreement with the judgment which has just been read and have nothing to add. An order will be made in the terms proposed.

Sir Kenneth O'Connor CJ (K.): I also agree.

Appeal allowed.

For the appellant:
JM Nazareth, QC and *SC Gautama*

Shah & Gautama, Nairobi

For the respondent:
J Gledhill
Gledhill & Oulton, Nairobi

Vishram Dhanji v Lalji Ruda
[1957] 1 EA 110 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	1 March 1957
Case Number:	51/1956
Before:	Sir Newnham Worley P, Sir Ronald Sinclair V-P and Briggs JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Corrie, J

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[1] Contract – Betrothal of infant children by Hindu parents according to rites of community – Whether parent can recover damages for breach of contract of marriage by betrothed child – Indian Contract Act, 1872.

Editor's Summary

The respondent's son and the appellant's daughter in 1938, being each only a few months old, were betrothed in India according to the rites and customs of the Hindu community. Following the betrothal certain ornaments and clothing were given by the respondent to the appellant for the prospective bride according to Hindu custom. It was common ground that the Indian Contract Act applied to this contract. The proper law to be applied was the law of India and if the contract was valid by its proper law it would be enforced in Kenya, provided that it was not an illegal contract in Kenya. When she was 12 the appellant's daughter was informed of the betrothal and had then indicated that she did not wish to marry the respondent's son and when she was 15 the respondent was informed, either by her or by her father that the betrothal was broken off. The respondent sued for damages for breach of contract and the Supreme Court awarded special and general damages and ordered the return of certain ornaments to the respondent. At the time the proceedings were instituted the girl had been married to another suitor for twelve months.

Held –

(i) the suit was not maintainable.

(ii) to hold that a parent or guardian under such circumstances was entitled to recover damages would be to extend the remedies for breach of such contracts further than had ever been done by the courts in India.

(iii) (per Briggs, J.A.) an action in Kenya against the father of a prospective bride for breach of a

marriage contract made by him on her behalf based on the proposition that the father could compel his daughter to marry as he had agreed might not succeed as being contrary to public policy and contra bonos mores.

Appeal allowed, except for the order of the Supreme Court for the return of the ornaments to the respondent.

Cases referred to:

(1) *Mistry Amar Singh v. Hazara Singh,* 13 E.A.C.A. 18.

(2) *Purshottamdas Tribhovandas v. Purshotamdas Mangaldas* (1896), 21 Bom. 23.

(3) *Rose Fernandes v. Joseph Gonsalves* (1924), 48 Bom. 673.

(4) *Khimji Kuverji v. Lalji Karamsey* (1941), 65 Bom. 211.

(5) *Janak Prasad and another v. Gopi Krishna Lal and others* (1947), A.I.R. 34 Pat. 132.

(6) *Mulji Thakersey v. Gomti and Kastur* (1887), 11 Bom. 412.

(7) *Mohori Bibee v. Dhurmodas Ghose* (1902–3), 30 I.A. 114.

(8) *Nawab Khwaja Muhammad Khan v. Nawab Husaini Begam* (1909–10), 37 I.A. 152.

(9) *Abdul Razak v. Mahomed Hussein* (1918), 42 Bom . 499.

March 1. The following judgments were read.

Judgment

Sir Ronald Sinclair V-P: This is an appeal by the defendant from the judgment and decree of the Supreme Court of Kenya awarding to the respondent special and general damages for breach of a contract of marriage and ordering the return of certain ornaments to the respondent. At the conclusion of the hearing of the appeal we intimated that the appeal would be allowed generally but that a considered judgment would be given.

In 1938 the respondent’s son, Samji, was betrothed to the appellant’s daughter, Bachibai, in Cutch, India, according to the rites and custom of the Hindu community

to which both the appellant and the respondent belong. The children were then only a few months old. The respondent who has resided in Kenya since 1925, alleged that the contract was made between himself and the appellant when he was on a visit to India. The appellant on the other hand maintained that the betrothal was arranged by their respective wives without his knowledge while he himself was in Kenya. It is, however, immaterial whether the contract was made by the parties or by their wives. If it was made by the wives, it is clear that they were acting as agents for their husbands and that the contract was subsequently ratified by the husbands. Although there is no evidence as to where the contract was to be performed, there can be no doubt that the intention of the parties was that the law governing the contract was to be the law applicable in India to such a contract made between Hindus. The proper law of the contract was, therefore, the law of India and, if the contract was valid by its proper law, it will be enforced in Kenya provided it is not an illegal contract in Kenya: *Mistry Amar Singh v. Hazara Singh* (1), 13 E.A.C.A. 18. It is common ground that the Indian Contract Act applies to this contract.

Following the betrothal, certain ornaments and clothing were given by or on behalf of the respondent to the appellant for the prospective bride according to Hindu custom. Some years after their betrothal the children came to Kenya where they have apparently resided ever since. In January, 1953, when the appellant's daughter was a little over fifteen years of age, the respondent was informed either by the appellant or by his daughter that the betrothal was broken off. The reason was the daughter's unwillingness to marry the respondent's son. From the age of twelve when she was first informed of the betrothal, she had indicated that she did not wish to marry him. The plaint was filed on September 25, 1953, at which date it seems that Bachibai was still under sixteen years of age and thus incompetent to marry. By s. 3 (1) of the Hindu Marriage, Divorce and Succession Ordinance, Cap. 149, a Hindu girl is not capable of contracting a valid Hindu marriage until she reaches the age of sixteen years. The suit was heard early in 1956, by which time Bachibai had been married to another suitor for about twelve months. It was contended at the trial that the contract was subject to an implied condition relieving the appellant from responsibility in the event of his daughter refusing to fulfil the contract. The learned trial judge rejected that contention and held that the appellant was liable to the respondent in damages for breach of the contract. As special damages he awarded the sum of Shs. 204/- being the value of certain articles of clothing given by the respondent to the appellant's daughter, but subsequently worn out. He also ordered that certain ornaments which had admittedly been given by the respondent to the appellant's daughter should be delivered to the respondent. These ornaments had been produced by the appellant and were in the custody of the Supreme Court. As general damages the learned Judge awarded the sum of Shs. 4,000/- for loss of reputation and mental pain suffered by the respondent.

The first question which calls for decision is whether the suit was maintainable. Mr. Trivedi for the respondent contended that the appellant and the respondent contracted, not as agents for their children, but as principals, the consideration being the mutual exchange of promises, and that the appellant having broken his promise, he was liable in damages for its breach. The children, he said, were merely chattles who did not come into the picture at all. He referred us to a number of authorities including, in particular *Purshotamdas Tribhovandas v. Purshotamdas Mangaldas* (2), (1896), 21 Bom. 23, *Fernandes v. Gonsalves* (3) (1924), 48 Bom. 673 and *Khimji Kuverji* v. *Lalji Karamsey* (4) (1941), 65 Bom. 211. But none of the authorities to which he referred supports his contention that a father is entitled to recover damages for the breach of a contract entered into by him for the marriage of his minor child. *Purshotamdas Tribhovandas v. Purshotamdas Mangaldas* (2) was relied on by the learned trial judge. In that case the intended bridegroom sued the girl's father for damages for breach of promise, the contract having been made by the father of the plaintiff when he was a minor with the father of the girl when she

also was a minor. It was held that the plaintiff was entitled to recover damages and that the fact that the girl declined to enter into the marriage did not excuse the father from carrying out the

contract. That decision was given over sixty years ago when Hindu children were treated as chattels, and it may well be doubted whether it is good law to-day. In a recent case, *Janak Prasad and another v. Gopi Krishna Lal and others* (5) (1947), A.I.R. 34 Pat. 132, Shearer, J., said:

> "When a man and a woman, both of whom are sui juris, agree to marry, there is a contract, the promise of each being the consideration for the promise of the other. But when the parents of a minor boy and a minor girl arrange a marriage between them the position is very different. Whether a marriage takes place must depend on the will of the minors and not solely on their parents. Such an arrangement is an agreement only, a mere nudum pactum and not a contract."

In view, however, of the conclusion to which I have come on other aspects of the case, I do not find it necessary to decide whether, as contended by the appellant, the betrothal of minors arranged by their parents is either a mere agreement or a conditional contract depending for its fulfilment on the willingness of the children. The point to be noted in *Purshotamdas Tribhovandas v. Purshotamdas Mangaldas* (2), is that it was the bridegroom, not his father, who recovered damages. In *Fernandes v. Gonsalves* (3) and *Khimji Kuverji v. Lalji Karamsey* (4) also the successful plaintiffs were the prospective brides and not their parents who had entered into the contracts on their behalf. Mr. Trivedi was in fact unable to cite any case in which a suit for damages by a parent or guardian had succeeded. There is one case, *Mulji Thakersey v. Gomti and Kastur* (6) (1887), 11 Bom. 412, referred to in *Khimji Kuverji v. Lalji Karamsey* (4), in which the bridegroom and his father and brother recovered damages against the bride's mother. But the damages were awarded for loss of credit and reputation which the "joint family" had sustained. In the instant case there is no suggestion that a "joint family" existed; the respondent's claim for general damages was for loss of reputation and mental pain suffered by himself. If it is intended to claim on behalf of a "joint family", the existence of the "joint family" must be pleaded and proved.

In *Fernandes v. Gonsalves* (3) and *Khimji Kuverji v. Lalji Karamsey* (4) the nature of the action for breach of a contract made by parents for the marriage of their minor children was considered and the authorities were fully reviewed. It was held that a contract of marriage made on behalf of a minor by his guardian is enforceable at the instance of the minor, if the court finds that it was for his benefit. The grounds of the decisions in those two cases, are however, somewhat conflicting. In *Fernandes v. Gonsalves* (3), Taraporewala, J. said that it would be revolutionizing the manners and customs of the people in India if he were to hold that a contract of marriage could not be entered into by a natural guardian for a minor girl. He considered that the decision of the Judicial Committee of the Privy Council in *Mohori Bibee v. Dhurmodas Ghose* (7) (1902–3), 30 I.A. 114, that contracts of minors are void, not merely voidable, did not apply to a contract of marriage. He appears to have based his decision to some extent on the analogy of a contract of apprenticeship in England. In his judgment (1924) 48 Bom. 673 at p. 686, he said:

> "In India the court would be justified in applying the principles of contracts of apprenticeship in England in so far as to hold that the contract of marriage in India stands on the same footing as being one for the benefit of the minor and being one which the father can enter into on behalf of the minor."

The analogy is not a very close one. In England the deed or instrument of apprenticeship must be executed by the minor himself, since no one else has the right to bind him: (see Halsbury, 2nd edn., Vol. 17, p. 614). Nevertheless, the decision appears to be based on the principle that in India a father is the agent of his minor children for the purpose of entering into a contract of marriage on their behalf.

In *Khimji Kuverji v. Lalji Karamsey* (4), on the other hand it was said that, having regard to the

decision in *Mohori Bibee v. Dhurmodas Ghose* (7), if any of the contracting parties is a minor, under s. 11 of the Indian Contract Act, the contract is void. The facts of that case were that in 1926 the plaintiff, a Hindu girl then four years of age was betrothed to the defendant, then nineteen years of age and a

major. The mother of the girl (the father being dead) acted on her behalf and the defendant's father acted on his behalf. Subsequently the contract was ratified by the defendant. In 1938 the defendant married another girl. The plaintiff by her next friend then sued the defendant to recover damages for the breach of his promise to marry. The court found that the contracting parties were the plaintiff's mother and the defendant acting through his agent, his father, but held that in India a contract of marriage made by a parent or guardian on behalf of a minor is an exception to the common law rule that only the parties to a contract should be allowed to sue on it. In arriving at this conclusion the learned judges relied strongly on the following passage from the judgment of the Judicial Committee of the Privy Council in *Khwaja Muhammad Khan v. Husaini Begam* (8) (1909–1910), 37 I.A. 152 at p. 159:

> "Their Lordships desire to observe that in India and among communities circumstanced as the Mohomedans, among whom marriages are contracted for minors by parents and guardians, it might occasion serious injustice if the common law doctrine was applied to agreements or arrangements entered into in connection with such contracts."

Beaumont CJ**:** appears to have considered that a parent entering into such a contract on behalf of his minor child, though he is not strictly speaking acting as a trustee, is in a position analogous to that of a trustee.

Whether a parent entering into a contract of marriage on behalf of his minor child is treated as the agent or as the trustee of the child, it seems clear that in either capacity he could not on his own behalf recover damages for breach of the contract. In any event, if we were to hold that a parent was entitled to recover damages in such circumstances, we should be extending the remedies for breach of such contracts further than the courts in India have ever done. This I think it would be wrong to do. In my view the respondent's claim for general damages was not maintainable.

It is not in dispute that the ornaments presented by the respondent to the appellant's daughter should be returned to the respondent, and that part of the decree ordering their delivery to the respondent should stand.

As to the clothing presented by or on behalf of the respondent to the appellant's daughter, it was given to the girl to be worn by her and it is now worn out. In view of what I have said as to the nature of the contract, I do not think that the respondent is entitled to recover the value of the clothing as special damages. Moreover, there was no evidence that by Hindu custom the value of such worn out clothing must be paid to the donor by the girl's father if the betrothal is broken off.

I would therefore allow the appeal and order that the judgment and decree of the Supreme Court be set aside and that the suit do stand dismissed save that the order for the delivery to the respondent of the ornaments in the custody of the Supreme Court should stand. I think that the appellant should have the costs both here and below. He was at all times ready and willing to return the ornaments to the respondent and offered to do so before the action was brought, but no reply was received to his advocate's letters requesting particulars of the ornaments claimed by the respondent.

Briggs JA: I agree that the father of the intended bridegroom had no cause of action in this case. It is unnecessary to consider what might have been the rights of the intended bridegroom himself. But I think it may be desirable to say that I do not think the courts of this country would award damages against a prospective bride's father on the footing that he could compel her to marry as he had agreed. That was done in Purshotamdas' case. Even if that is still good law in India, which I doubt, I think such an action would fail in Kenya as contrary to public policy and contra bonos mores. See Dicey, 6th edn., 605. The

courts of this country will apply foreign systems of personal law only so far as they are not inconsistent with equity and good morals. It seems to be contrary to all good morals, either that a girl should be married against her will, or that she should be subjected to the pressures to which an action for damages of this type against her father would expose her. To this extent it is possible that in other cases the traditional rules of Hindu law might not be applied here.

Sir Newnham Worley P: I have had the advantage of reading the judgment prepared by the learned Vice-President and completely agree with it.

I only wish to add, for the sake of the record, that in *Khimji Kuverji v. Lalji Karamsey* (4), there is an inaccurate reference in the judgment of Beaumont, C.J., (1941) 65 Bom. 211 at p. 215 to the case of *Abdul Razak v. Mahomed Hussein* (9) (1918), 42 Bom. 499. The learned Chief Justice refers to that case as one where a Muslim father of the bridegroom sued the father of the bride for damages for breach of his contract to give his daughter in marriage and obtained a decree. Reference to the report in 42 Bombay, however, shows that the plaintiff was the prospective bridegroom himself. Kemp, J., held that the action lay but that the plaintiff could not recover the damages peculiar to an action for breach of promise of marriage under English law. He therefore held that the plaintiff could not succeed in his claim for a lump sum of Rs. 2,000 as damages, but allowed the suit to proceed with regard to the other reliefs prayed for, namely the return of ornaments and clothes presented by the plaintiff to the defendant's daughter in anticipation of marriage and for expenses incurred in connection with the agreement for the marriage. In the result the suit was dismissed.

This case is therefore no exception to the statement that there is no reported Indian case in which a parent of the prospective bride or groom has successfully sued in his or her own capacity for damages for breach of a contract to marry.

I do not consider that our decision in the instant case in any way conflicts with or limits the recognition which the Indian Courts have given to the habits, customs and religion of the Hindu community of this type of suit, but I agree with the learned Justice of Appeal that it is possible that in other cases the traditional rules of Hindu law might not be applied in Kenya. Purshotamdas' case is a likely instance of this: even if that case were to be followed in India to-day, as to which I feel some doubt, I cannot imagine its being followed by the courts in East Africa.

The order will be in the terms set out in the judgment of the learned Vice-President.

Appeal allowed.

For the appellant:
DV Kapila
DV Kapila, Nairobi

For the respondent:
HD Trivedi and *AR Kapila*
SR Kapila & Kapila, Nairobi

Geoffray De Souza v George Brothers Limited
[1957] 1 EA 115 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	17 January 1957
Case Number:	79/1956

Before:	Sir Newnham Worley P, McKisack CJ (U) and Bacon JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Uganda – Lewis, J

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[1] Libel – Business notice in newspaper – Whether capable of defamatory meaning – Publication on a privileged occasion without malice.

Editor's Summary

The appellant has sued the respondent company for damages arising out of the publication of the following notice in a Uganda newspaper on December 13, 1955:

NOTICE

> This is to inform the general public that Mr. Geoffray de Souza is no longer in our employment and that our firm has no connection in his new concern nor will be responsible for any commitments by him on our behalf.
>
> George Brothers Ltd.

The appellant had left the respondent company's employment on or about September 1, 1955, and had set up in business himself under the name of "Geoffs Ltd." No complaint was made of the notice down to the words "his new concern" but it was alleged that the remaining words implied that the appellant was the sort of man who might improperly enter into commitments on behalf of the respondent company. It was also argued that the notice contained "extraneous" matter which precluded the respondent company from contending that the whole notice was published on a privileged occasion and that there was no evidence of malice in fact. The action was dismissed.

Held – the only reasonable construction which could be put upon the latter part of the notice complained of was that it was nothing more than a plain statement of fact consequent on the cessation of the appellant's connection with the respondent company and was not capable of bearing any actionable or defamatory meaning.

Mulligan v. Cole and Others (1875), 44 L.J. Q.B. 153, applied.

Appeal dismissed.

Cases referred to:

(1) *Beswick v. Smith*, [1907–1908] 24 T.L.R. 169.

(2) *Caltex* (*Africa*) *Ltd. v. Oddie*, E.A.C.A. Civil Appeal No. 47 of 1955 (unreported).

(3) *Mulligan v. Cole and Others* (1875), 44 L.J. Q.B. 153.

Judgment

Bacon JA: read the following judgment of the court: In the suit resulting in this appeal the appellant claimed damages for libel. The suit was dismissed by the High Court of Uganda on the ground that the

words complained of were not defamatory of the plaintiff. We dismissed the appeal with costs and now give our reasons for so doing.

The plaintiff was formerly a director and shareholder of the defendant company and was employed by it as the manager of its shop in Jinja. On August 1, 1955, the plaintiff resigned from his directorship by means of a notice expiring on September 1, 1955. It appears that his employment as manager of the shop came to an end on or about the latter date. On December 10, 1955, there appeared in a newspaper called "Goan Voice" a notice, inserted by the appellant, which read as follows:

GEOFFS LTD.

Groceries, Wines and Spirits Merchants.

A new Branch is opened next
to Uganda Co. (Africa) Ltd.

RING TO 3529 JINJA.

The defendant company thereupon caused another notice to be published on

December 13, 1955, in another newspaper known as “The Uganda Argus.” This second notice contained the words complained of. The notice was as follows:

NOTICE.

> This is to inform the general public that Mr. Geoffray de Souza is no longer in our employment and that our firm has no connection in his new concern nor will be responsible for any commitments by him on our behalf.
>
> George Brothers Ltd.

Before us, counsel for the appellant made it clear that he did not complain of anything in the notice down to and including the words “his new concern,” but only of the remainder of the notice.

Briefly, the appellant’s case was that the latter part of the notice, and particularly the final words “on our behalf,” would suggest to the mind of any reasonable reader of “The Uganda Argus” that the respondent company was saying by implication that the appellant was the sort of man who might improperly enter into commitments on behalf of the respondent company – in other words that the notice constituted a warning to the public in relation to the appellant. The appellant further argued that the notice contained “extraneous” matter which precluded the respondent company from the contention that the whole notice was published upon a privileged occasion and that there was no evidence of malice in fact.

Counsel for the respondent company argued that the notice as a whole was incapable of any defamatory meaning and, secondly, that it was published on a privileged occasion, that is to say for the fair and reasonable protection of the interest of the company itself, and without malice.

When the appellant managed the respondent company’s shop he was, according to the undisputed evidence of Mr. George Fernandez, a director of the respondent company, well known to all concerned as “Geoff.” After giving up his directorship of and employment by the respondent company the appellant started a competitive business of his own as notified to the public by his notice of December 10, 1955, which notice, however, contained the somewhat misleading reference to “a new Branch.” The new business did not in fact consist of “a new Branch” at all, but of an independent retail undertaking conducted in the shop which the appellant opened in Jinja.

Counsel for the appellant referred to and sought to distinguish *Beswick v. Smith* (1), [1907–1908] 24 T.L.R. 169. In that case the plaintiff had been employed by the defendant as a commercial traveller and the defendant signed and circulated among his customers the following communication:

> “Beswick is no longer in our employ. Please give him no order or pay him any money on our account.”

The jury found that the words were libellous, but it was held on appeal that they were not capable of a defamatory meaning and that the defendant was entitled to judgment. It was argued that in the present case the latter part of the notice complained of, and particularly the words “on our behalf,” bore a more sinister meaning than could be attributed to the words complained of in *Beswick’s* case (1), in as much as the former implied that the appellant was a person who might seek dishonestly to commit the respondent company to liabilities to which he had no right to commit it.

If *Beswick v. Smith* (1) had been the only authority in point we might have been inclined to accept the appellant’s argument as indicating a sufficiently clear distinction between that case and the present one. We should here mention that the decision in *Beswick’s* case (1) was adopted by this court in *Caltex* (*Africa*) *Ltd.* (*East Africa*) *v. Oddie* (2), E.A.C.A. Civil Appeal No. 47 of 1955 (unreported). In the latter case the words complained of were contained in a letter addressed to the Customs Department of the

Government of Kenya and to a number of shipping agents with whom Oddie had had dealings as the Caltex Company's representative. The letter was as follows:

> "This is to advise that Mr. G. Oddie, shipping supervisor, will no longer be connected with Caltex (Africa) Ltd. as from August 31, 1954."

The suit for libel based on that publication was dismissed. That case, however, was clearly different from the present one, for the words complained of consisted of no more than a plain statement of the fact that Oddie's connection with the company would cease as from the specified date. Nothing was said about any possibility of Oddie committing the company thereafter to any liability. But we were referred to a further authority, *Mulligan v. Cole and Others* (3), (1875), 44 L.J. Q.B. 153, which appeared to us to conclude the first issue in the respondent company's favour. In *Mulligan's* case (3) the words complained of were:

> "The public are respectfully informed that Mr. Mulligan's connection with the institute has ceased, and that he is not authorised to receive subscriptions on its behalf."

It was pleaded that the words meant that the plaintiff

> "falsely assumed and pretended to be authorised to receive subscriptions on behalf of the said institute,"

but the learned trial judge directed a non-suit. The court of Queen's Bench (Mellor, Lush and Quain, JJ.) held that the non-suit was right in as much as the words of the alleged libel were not capable of bearing any actionable defamatory sense. In our view there was no appreciable distinction between that case and the present one and we followed the decision of the court of Queen's Bench. We came to the conclusion that the only reasonable construction which could be put upon the latter part of the notice complained of was that it was nothing more than a plain statement of fact consequent on the cessation of the appellant's connection with the respondent company as announced in the earlier part of the notice. We thought that the instant case was only another example of the kind of announcement envisaged in the passage from Gatley on Libel and Slander (4th Edn.) at p. 31, which was cited with approval in the Caltex case (2), namely:

> "It is not in itself libellous for a person to publish of one who has ceased to be employed by him that he is no longer so employed, and is no longer authorized to do business or receive moneys on behalf of the person lately employing him. There may, however, be extrinsic circumstances making the words to be understood in a defamatory sense by those to whom they were addressed."

As regards the "extrinsic circumstances" in which the notice complained of was published, this question led to a consideration of the second issue, namely whether the notice as a whole was published on a privileged occasion without malice. It must first be recorded that at the trial the plaintiff-appellant did not call any evidence and did not elicit from the one witness called on behalf of the defendant-respondent anything in any way indicating that the respondent company had been guilty of any form of malice in publishing the notice. The defendant-respondent on the other hand adduced evidence that an invoice made out to "George & Co., Jinja," had been received by the respondent company from a garage in Mbale which was in fact for the account of Geoffs Ltd. and that it was as a result of this that the notice complained of was published. We thought that the form of the appellant's own announcement in "Goan Voice" coupled with the sending of that invoice to the respondent company afforded ample justification for the precaution taken by the latter. That being so, the remaining point was whether there was any substance in the contention that the inclusion of extraneous matter in the notice took the latter part of it outside the privilege. We thought that that argument was unacceptable on the ground that the notice as a whole was neither more nor less than a justifiable attempt reasonably and fairly to protect the respondent company's interests against misunderstanding on the part of any member of the public who might deal with Geoffs Ltd. In the proved circumstances it was reasonable to expect that misunderstanding might easily arise on the part of persons who had come to know the appellant as a prominent personality connected with the respondent company's business.

Accordingly we thought that the decision of the High Court of Uganda was correct in as much as the notice complained of was not capable of being regarded in law as defamatory of the appellant.

Appeal dismissed.

For the appellant:
AA Baerlein
Baerlein & James, Kampala

For the respondent:
CK Patel
Patel & Shah, Kampala

MRV Churcher v The Landing & Shipping Company of East Africa Ltd
[1957] 1 EA 118 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of Judgment:	10 January 1957
Case Number:	66/1956
Before:	Sir Ronald Sinclair Ag P, Bacon Ag V-P and Lowe J
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Tanganyika – Abernethy, J

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[1] Negligence – Dock supervisor injured by load on crane – Whether negligent crane driver employed by parties who hired crane with driver.

Editor's Summary

The appellant, who was employed by the respondents as a dock supervisor, was seriously injured during the course of his employment when supervising the loading of bales of sisal into a lighter. The bales were being loaded by a crane and it was agreed that the appellant was injured as a result of the load of bales swinging out of its normal arc and that this was due solely to the negligence of the crane driver. In the High Court the appellant's suit was dismissed on the ground that the crane driver was not the servant of the respondents. The driver was in general the servant of the East African Railways & Harbours Administration who engaged him, trained him, paid him and alone had power to dismiss him. The crane and driver were hired by the respondents from the Administration. The driver reported each morning to the dock supervisor, a servant of the respondents, who told him where to work. The driver was in complete control of each load and was not obliged to obey signals to lift or lower unless he was satisfied that the load was in order.

Held – the respondents had not such control over the crane driver at the time of the accident as to become liable as employers for his negligence.

Mersey Docks and Harbour Board v. Coggins & Griffiths (*Liverpool*) *Ltd. and MacFarlane*, [1946] 2 All E.R. 345, applied. *Donovan v. Laing, Wharton & Down Construction Syndicate Ltd.*, [1893] 1 Q.B. 629, distinguished.

Appeal dismissed.

Cases referred to:

(1) *Mersey Docks and Harbour Board v. Coggins & Griffiths* (*Liverpool*) *Ltd. and MacFarlane*, [1946] 2 All E.R. 345.

(2) *Donovan v. Laing, Wharton & Down Construction Syndicate Ltd*., [1893] 1 Q.B. 629.

[January 10. The following judgments were read by Lowe, J., by direction of the court.]

Judgment

Sir Ronald Sinclair Ag P: This is an appeal by the plaintiff from a judgment and decree of the High Court of Tanganyika dismissing his claim for damages for personal injuries alleged to have been caused by the negligence of the respondents' servants.

The appellant was employed by the respondents as a dock supervisor at Tanga and, at the time when he received his injuries, he was standing at the dockside supervising the loading of bales of sisal into a lighter by a crane. The bales were being picked up by the crane on the side of the crane opposite the lighter, lifted and swung round, and then lowered into the lighter. Some forty to sixty bales had been transferred from the quayside to the lighter, passing the appellant at a distance of two to three feet, when one swung outwards from the usual arc, struck him and knocked him down. He received severe injuries.

According to the appellant the bales were attached to the crane cable by a gangway boy who gave the crane driver the order to lift, and then followed the slung bale round to see it lowered into the hold of the lighter. On the other hand, Mr. Crowhurst, an employee of the respondents and the only witness called by them, stated that the bale is hooked to the cable, or put in the sling, by a labourer and is raised on a signal given by a serang of the labour gang. The gangway boy's duty, he said, is to stand on the lighter and give the order to lower the load when no labourers are liable to be injured, and to stow the bales in the lighter. He admitted, however, that he was not at Tanga at the time and was not aware of the working conditions there. On this point the learned judge preferred the evidence of Mr. Crowhurst. But he gave no reasons for so doing and, in view of the fact that Mr. Crowhurst was not aware of the working conditions at the time and of the fact that the learned judge considered the appellant to be a patently honest and fair-minded witness, I think that the appellant's evidence should have been accepted. In my view, however, the difference between the two versions was not material to a decision on any of the issues raised.

The learned judge found that the swinging of the load out of its usual arc was due to the negligence of the crane driver and that there was no negligence on the part of any other person. He was satisfied from the evidence that it was the duty of the crane driver to see that the load was properly centred before lifting and that, had the crane driver properly centred the load and brought it round as slowly and carefully as he should have done, it would not have swung out from the usual arc and struck the appellant. To my mind, that was the only conclusion which could reasonably be arrived at on the evidence. It is fully supported by the evidence of Mr. Crowhurst which on this aspect of the case was not in conflict with that of the appellant. The appellant himself thought that the load had swung out of its normal arc because the crane driver did not plumb the sling, that is centre the load. I agree with the learned judge that there was no evidence of negligence on the part of anyone other than the crane driver.

The learned judge, however, dismissed the claim on the ground that the crane driver was not the servant of the respondents at the time of the accident, and the substantial question to be determined in this appeal is whether that conclusion was correct. It was not in dispute that the crane driver was in general the servant of the East African Railways and Harbours Administration (hereinafter referred to as "the Administration"). The Administration engaged him, trained him, paid him and alone had power to dismiss him. But an employer may for a particular purpose or on a particular occasion temporarily transfer the services of one of his general servants to another party so as to constitute him pro hac vice the servant of that other party with consequent liability for his negligent acts. The crane with the services of the driver was hired by the respondents from the Administration. Each morning the crane driver reported to the dock supervisor, a servant of the respondents, who told him where to work. The respondents had authority to tell the crane driver which loads were to be carried from one particular point to another. According to the evidence of Mr. Crowhurst, which the learned judge accepted, the only other orders given to the crane driver were the signals to lift and lower loads, but he was in complete control of each load and was not obliged to obey the signal to lift unless he was satisfied that the load was ready for lifting. Complaints which the respondents might have against a crane driver had to be made to the

Administration; the respondents could not take any disciplinary action themselves.

Mr. Donaldson, who appeared for the appellant, addressed us at length as to the test to be applied to determine whether, for the purposes of the maxim respondeat superior, a workman is to be treated as the servant of the general employer or of the hirer, and he referred us to a number of authorities; but he finally conceded that the correct test was that laid down by the House of Lords in *Mersey Docks and Harbour Board v. Coggins & Griffiths* (*Liverpool*) *Ltd. and MacFarlane* (1), [1946] 2 All E.R. 345. That was the test applied by the learned judge in the instant case, but Mr. Donaldson contended that he did not apply the test correctly to the facts. Mr. Donaldson further submitted that the facts in the *Mersey Docks'* case (1) were different from those in the instant case and that the decision in *Donovan v. Laing, Wharton, and Down Construction Syndicate Ltd.* (2), [1893] 1 Q.B. 629, where the facts were almost identical, should be followed.

In the *Mersey Docks'* case (1) a firm of stevedores had hired from the Mersey Docks and Harbour Board the use of a portable travelling crane together with its driver, Newall, to assist in loading a ship lying in the Liverpool docks. The contract was subject to the board's Regulations, Reg. 6 of which contained the clause: "The drivers so provided shall be the servants of the applicants." The driver in question was a skilled workman engaged and paid by the Board and the Board alone had power to dismiss him. The stevedores directed what operations should be executed by him, but they had no authority to direct how he should work the crane. Owing to the negligence of the driver, a checker employed by the forwarding agents who had engaged the stevedores was injured in the course of his employment. The question to be determined was whether, in applying the maxim respondeat superior, the general employers of the crane driver or the hirers were liable for his negligence. It was contended by the Board that, under the terms of the contract between the Board and the stevedores, the stevedores were liable. It was held:

> "(i) the question of liability was not to be determined by any agreement between the general employers and the hirers, but depended on the circumstances of the case, the proper test to apply being whether or not the hirers had authority to control the manner of the execution of the relevant acts of the driver;
>
> "(ii) the Board, as the general employers of the crane driver, had failed to discharge the burden of proving that the hirers had such control of the workman at the time of the accident as to become liable as employers for his negligence, since, although the hirers could tell the crane driver where to go and what to carry, they had no authority to give directions as to the manner in which the crane was to be operated. The Board were, therefore, liable for his negligence."

Lord Porter in his speech in that case said:

> "The indicia from which the inference of a change is to be derived have been stated in many different ways, notably in the words of Bowen, L.J., in *Donovan v. Laing, Wharton & Down* (2), where he says ([1893] 1 Q.B. 629 at p. 634): 'There are two ways in which a contractor may employ his men and his machines. He may contract to do the work, and, the end being prescribed, the means of arriving at it may be left to him. Or he may contract in a different manner, and, not doing the work himself, may place his servants and plant under the control of another – that is, he may lend them – and in that case he does not retain control over the work'."

He adds, and Lord Esher, M.R., uses words to the same effect:

> " 'It is clear here that the defendants placed their man at the disposal of Jones & Co., and did not have any control over the work he was to do.'
>
> "In that case, as in this, a crane driver was lent to a firm of stevedores to enable them to load a ship and an employee of the wharfingers whose duty it was to direct the working of the crane was injured by the driver's negligence. In these circumstances it was held that his general employers were not liable as they had parted

with the power of controlling him. The appellants strongly relied upon both the inference to be drawn from the facts and the statement of principle contained in that case. If that statement means that the employer on whose work

> the man was engaged controlled both the object to be achieved and the method of performance, I should think a finding that that employer was liable justified, but whether, in view of the later decision of *M' Cartan v. Belfast Harbour Comrs*. in your Lordships' House, the same inference would now be drawn from the facts proved in evidence in *Donovan's* case may be doubted. The decision itself is justified upon the finding of fact that all control had passed to the temporary master. . . . . .
>
> "Many factors have a bearing on the result, Who is paymaster, who can dismiss, how long the alternative service lasts, what machinery is employed – all these questions have to be kept in mind. The expressions used in any individual case must always be considered in regard to the subject matter under discussion, but among the many tests suggested I think that the most satisfactory by which to ascertain who is the employer at any particular time is to ask who is entitled to tell the employee the way in which he is to do the work upon which he is engaged. If someone other than his general employer is authorised to do this, he will, as a rule, be the person liable for the employee's negligence. But it is not enough that the task to be performed should be under his control, he must also control the method of performing it. It is true that in most cases no orders as to how a job should be done are given or required. The man is left to do his own work in his own way, but the ultimate question is not what specific orders, or whether any specific orders, were given, but who is entitled to give the orders as to how the work should be done. Where a man driving a mechanical device, such as a crane, is sent to perform a task, it is easier to infer that the general employer continues to control the method of performance since it is his crane and the driver remains responsible to him for its safe keeping."

Viscount Simon had the following comment to make on *Donovan's* case (2):

> "The test suggested by Bowen, L.J., in *Donovan v. Laing Construction Syndicate* when he said ([1893] 1 Q.B. 629, at p. 634): 'By the employer is meant the person who has a right at the moment to control the doing of the act' can be understood in this sense, and in this sense I would accept it: i.e. 'to control the doing of the act' would mean 'to control the way in which the act involving negligence was done.'
>
> "I find it somewhat difficult, however, to fit the facts in Donovan's case into this proposition, and if that decision is upheld, it must be on the basis found in the words of Lord Esher, M.R., when he said (*ibid*., at p. 632): 'The man was bound to work the crane according to the orders and under the entire and absolute control of (the hirers).' But as the House of Lords insisted in *M'Cartan v. Belfast Harbour Comrs*., the value of an earlier authority lies, not in the view which a particular court took of particular facts, but in the proposition of law involved in the decision. In *M'Cartan's* case Lord Dunedin referred to and expressly approved, the judgment of Lord Trayner in *Cairns v. Clyde Navigation Trustees*, which, on facts closely resembling the present, held that the trustees, as general employers, were in law liable for the negligent driving of a crane which they had let out with its driver for discharging a ship. Notwithstanding the dictum of Bowen, L.J., in *Donovan's* case, the principle of the carriage cases and the crane cases appears to me to be the same: I would especially refer to what Lord Dunedin said ([1911] 2 I.R. 143, at p. 151) in *M'Cartan's* case."

Lord Simonds and Lord Macmillan made similar comments on *Donovan's* case (2).

It is true that the facts in *Donovan's* case (2) bear a close resemblance to those in the instant case though, as Lord Simonds pointed out in the *Mersey Docks'* case (1), in *Donovan's* case (2) the temporary employer was said to have the power of dismissing the workman. But in the *Mersey Docks'* case (1) their Lordships considered that the decision in *Donovan's* case (2) could be justified only upon the finding of fact that all control of the crane driver had passed to the temporary employer and they clearly indicated their doubt as to whether that finding was justified. In the instant case it is

clear that all control of the crane driver had not passed to the respondents. The respondents had authority to tell the crane driver what to carry and where to carry it and when to lift and when to lower a load. But he was not bound to obey the signals to lift, or presumably to lower, unless he considered it safe to do so. Not only was the manipulation of the controls of the crane a matter for the driver himself but he had complete control of the load while it was being lifted. Although the respondents had a limited authority to tell him when the crane should be operated, they clearly had no authority to direct how he should operate it. Applying the test laid down in the *Mersey Docks'* case (1) to those facts, it is clear that the respondents did not have such control over the crane driver at the time of the accident as to become liable as employers for his negligence.

I would therefore dismiss the appeal with costs.

Bacon Ag V-P: I have had the advantage of reading the judgment of Sir Ronald Sinclair, Ag. P., and agree that for the reasons therein stated the appeal should be dismissed with costs. I also agree that the only proper view of the evidence as to negligence is that the injury suffered by the appellant was entirely due to the negligence of the crane driver alone.

Lowe J: I have had the benefit of reading the judgments of the learned Acting President and Vice-President, with both of which I agree. There is nothing more I can usefully add but I express the hope that the employers of the crane driver will consider whether or not they feel justified in making some ex gratia offer of compensation to the unfortunate appellant.

Appeal dismissed.

For the appellant:
RN Donaldson
Donaldson & Wood, Tanga

For the respondents:
R Cleasby
Atkinson, Cleasby & Co, Mombasa

Hasham Jiwa v Popatlal Premchand Vora Trading as Supreme Traders
[1957] 1 EA 122 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgement:	21 February 1957
Case Number:	53/1956
Before:	Sir Newnham Worley P, Sir Ronald Sinclair V-P and Briggs JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Corrie, J

[1] Bill of exchange – Bills of Exchange Ordinance s. 25 (*K.*) *– Promissory notes signed "per pro" by son in name of father – Whether evidence established son's authority to sign.*

Editor's Summary

The appellant had been ordered by the Resident Magistrate's Court, Nairobi, to pay the respondent Shs. 2,428/- and consequential relief in respect of two promissory notes which had been dishonoured. The notes had been signed "p.p. Hasham Jiwa, Sultanali". The appellant's appeal to the Supreme Court having been dismissed he filed a second appeal under s. 72 of the Civil Procedure Ordinance (K.) under which he was required to show that the decisions appealed from were contrary to law.

The appellant carried on business at Fort Hall under the name of Hasham Jiwa and was a shareholder in Husseini Grocery Stores Ltd., of Nairobi and had an interest in another concern called the Blue Room also in Nairobi. The appellant's son Sultanali was a director of Husseini Grocery Stores Ltd., and also managed the other two businesses for the appellant. From time to time he made purchases for all three businesses from the respondent and these were paid for by cheques signed

by Sultanali either as director of the company or "p.p. Hasham Jiwa". Separate bank accounts were kept for each concern. Hasham Jiwa was heavily indebted to Husseini Grocery Stores Ltd., and had given them a bill of sale. Although the appellant had not given Sultanali any general power of attorney he admitted having signed a mandate in his favour to his bankers authorising the bank to accept Sultanali's signature on cheques and bills; he would not admit but could not deny that promissory notes were included. In the absence of the mandate itself it was reasonable to assume that it was in the normal form of authority for a third party to operate a current account which requires the bank to consider the persons named as authorised, *inter alia*, to sign promissory notes. It was admitted that the promissory notes had been given in part payment of the debt of Husseini Grocery Stores Ltd., to the plaintiff, and that Hasham Jiwa would have received credit from them for the amount of the notes, if paid.

Held–

(i) there was ample evidence to support the magistrate's finding that Sultanali was clothed with the widest powers as manager of Hasham Jiwa and was authorised to take decisions as he thought best in the interests of the business.

(ii) there being no allegation to the contrary, it should be assumed that he bona fide considered he was acting for the best when he gave the promissory notes, since Hasham Jiwa had an interest to see that Husseini Grocery Stores Ltd., was not forced into liquidation, which must have meant that Hasham Jiwa's debt to them would be called in.

Appeal dismissed.

Cases referred to:

(1) *Attwood v. Munnings* (1827), 7 B. & C. 278; 108 E.R. 727.

(2) *Stagg v. Elliott* (1862), 31 L.J. C.P. 260.

Judgment

Sir Newnham Worley P: read the following judgment of the court: This is a second appeal from a judgment of the Supreme Court of Kenya which dismissed the appellant's appeal from a decree of the Resident Magistrate's Court, Nairobi, ordering him to pay to the respondent the sum of Shs. 2,428/- with consequential orders. At the conclusion of the argument, we dismissed the appeal with costs and now give our reasons for so doing.

The appeal having been brought under s. 72 of the Civil Procedure Ordinance, the onus is on the appellant to show that the decisions appealed from were contrary to law.

The plaintiff-respondent sued the defendant-appellant for Shs. 2,000/- and consequential relief as maker of two promissory notes for Shs. 1,000/- each and dated respectively June 1 and 28, 1954, payable 120 days after date, which were duly presented but not paid. The notes in question were signed "p.p. Hasham Jiwa, Sultanali" and the only defence with which we are concerned in this appeal is the denial that the appellant ever made the notes sued on, the real and sole issue being whether Sultanali had express authority to sign these notes on the appellant's behalf. Mr. Nazareth conceded that if there was authority to sign there was consideration.

The material facts as admitted by the parties or found by the learned magistrate are that the appellant carries on business under the name of Hasham Jiwa, which business is apparently located at Fort Hall. He was also a shareholder in Husseini Grocery Stores Ltd., a business conducted in Nairobi, and is interested in a concern called the Blue Room, also in Nairobi. Sultanali, who is the appellant's son, was either a director or the sole director of Husseini Grocery Stores Ltd. and he also managed the other two businesses for the appellant. From time to time he made purchases from the respondent for the account of all three businesses; payments, when made, were by cheque signed by Sultanali as director of the company or "p.p. Hashim Jiwa". Separate accounts were kept for each concern. In 1953–54 things began to go wrong both for the grocery stores and for the business of Hasham Jiwa. By June of that year, the latter owed the former over Shs. 41,000/-; this debt was

secured by a Bill of Sale over the debtor's stock in trade given in November, 1953. Husseini Grocery Stores Ltd. was itself heavily indebted to the respondent, the total amounting on July 31, 1954, to Shs. 49,912/-. During the early months of 1954, to secure this debt, Sultanali as director of the company gave the respondent a number of promissory notes, which were not met. Subsequently, as the respondent expressed it in his evidence,

> "after discussions Sultanali offered bills of the defendant for small amounts . . . The total value of promissory notes drawn by Sultanali for Hasham Jiwa in respect of the amount due to (quaere from) Husseini Grocery Stores Ltd. was Shs. 44,000/-. There would have been an adjustment when the promissory notes were met. None have been met."

The notes in suit were two of those making up the total of Shs. 44,000/-. Husseini Grocery Stores Ltd. went into liquidation somewhere about the middle of 1955.

At the trial the appellant admitted that he had guaranteed the debts of Husseini Grocery Stores Ltd. (in what manner and to what extent is not clear), but he denied that he had promised to pay the company's debt to the respondent and he denied that Sultanali had authority from him to pay that debt. He also denied that the two promissory notes in suit were signed with his authority or knowledge.

As to the latter denial the learned magistrate stated that he found it "difficult to believe" and "replete with improbability"; it appears to us however that his judgment was not based upon any express finding that the appellant knew of the giving of the promissory notes. He did, however, clearly find that Sultanali

> "was clothed with the widest powers in connection with the business and financial affairs of Hasham Jiwa"

and was satisfied that in giving those notes Sultanali was acting within the scope of his authority. This finding was upheld on appeal to the Supreme Court. Mr. Nazareth has criticized the reasons given by the learned first appellate judge as fallacious but recognizing that this was not sufficient, he concentrated on attacking the magistrate's finding alleging that there was no evidence to support it. We were unable to accept this last contention.

There was no suggestion that Sultanali was acting fraudulently or in bad faith. Mr. Nazereth relied mainly on s. 25 of the Bills of Exchange Ordinance (which is identical with s. 25 of the Bills of Exchange Act, 1882) and the two propositions (*a*) that a person taking a bill or a promissory note signed "per pro" has express notice that the agent is acting under a limited authority and should satisfy himself that the agent is acting within that authority: *Attwood v. Munnings* (1) (1827), 7 B. & C. 271; 108 E.R. 727; *Stagg v. Elliott* (2) (1862), 31 L.J. C.P. 260; and (*b*) that on the pleadings the onus lay on the respondent to prove that Sultanali was acting within the scope of his authority.

It is clear that the appellant had not given Sultanali any general power of attorney but he admitted having signed a mandate to his bankers on a printed form. He claimed not to have read this form before he signed it, but admitted that it authorised the bank to accept Sultanali's signature on cheques and bills: as to promissory notes he would not admit but could not deny that they were included. The mandate itself was not in evidence but it seems only reasonable to suppose that it was in the normal form of authority for a third party to operate on a current account, which requests the bank to consider the person named as authorised *inter alia*, to sign promissory notes (see, for example, the Encyclopaedia of Forms and Precedents (3rd Edn.), Vol. 2, p. 333 Precedent No. 11). There was in fact evidence that Sultanali had signed promissory notes "p.p. Hasham Jiwa" in favour of G. T. Modi & Co. of Nairobi. The appellant's evidence as to this was on a par with the rest of his evidence, confused and contradictory. Under cross-examination he said that these notes were given as security for a loan which Sultanali had obtained

on his behalf and with his permission but in re-examination he said

> "when I gave promissory notes to G. T. Modi it was in respect of goods supplied to me."

Furthermore, he said under cross-examination

> "I have already said that Sultanali can sign anything on behalf of Hasham Jiwa".

The respondent's uncontradicted evidence was that all his dealings for the accounts of the grocery stores and for the business of Hasham Jiwa were with Sultanali and that all cheques in payment were signed by Sultanali, in the case of the latter business as "p.p. Hasham Jiwa".

In the face of this evidence we think that the learned magistrate was fully justified in his finding that Sultanali was clothed with the widest powers as manager of Hasham Jiwa. He was the manager in the widest sense, and authorised to take decisions as he thought best in the interests of the business. There being no allegation to the contrary, it should be assumed that he bona fide considered he was acting for the best when he gave the promissory notes in suit. Mr. Nazareth has reiterated that Sultanali was not and could not have been authorized as agent of Hasham Jiwa to pay the debts of the company; but that is only a part of the story. If, as the magistrate has found and we accept, he had wide managerial powers he may well have thought it in the interests of the business to stave off the threatened action against the company which, as the learned judge said, would probably have led eventually to enforcement of the company's rights under the Bill of Sale. Moreover by so much as he paid off the company's debt to the respondent he reduced pro tanto Hasham Jiwa's debt to the company.

For these reasons we thought that the learned magistrate's conclusion was fully justified by the evidence and that the appeal failed.

During the argument on the appeal the advocates for both parties cited to us a number of authorities on the effect of fraudulent use of authority by an agent and on "holding out" by a principal. We have not referred to them as they had no relevance to the simple question of fact which we had to consider. We mention them only for the guidance of the registrar when taxing the respondents' bill of costs.

Appeal dismissed.

For the appellant:
JM Nazareth, QC and *A Ishani*
Ishani & Ishani, Nairobi

For the respondent:
DV Kapila
DV Kapila, Nairobi

Puran Chand Many v The Collector under the Indian Land Acquisition Act, 1894

[1957] 1 EA 125 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgement:	22 January 1957

Case Number:	12/1955
Before:	Sir Ronald Sinclair V-P, Sir Kenneth O'Connor CJ (K) and Briggs JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Corrie, J

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[1] Compulsory purchase – Indian Land Acquisition Act, 1894 *– Basis of assessment of compensation – Whether decision reached on incorrect principle of law – Meaning of "willing purchaser".*

Editor's Summary

The appellant in 1946 purchased some 16.22 acres of land in Clements Road, Nairobi, being Plot No. 2784 for Shs. 149,224/-. Government had in 1945 approved in principle a subdivision of the land for building purposes and this was confirmed in 1950. It was assumed by all concerned that the land could be used for building purposes on a subdivision into three-quarter acre plots. The land was compulsorily acquired in December, 1951, and the collector awarded Shs. 244,835/- against the appellant's claim of Shs. 1,380,000/-. The appellant referred the award to the Supreme Court which increased the amount of compensation to Shs. 283,800/- and the appellant again appealed on the ground that the compensation was inadequate.

An adjacent plot, No. 2785, of approximately the same area was purchased by one Rahimtulla in 1946 for £400 per acre. It was compulsorily acquired at the same time as Plot 2784 and they were dealt with together in the award and on the reference to the Supreme Court. In this case the award of Shs. 93,334/- was raised by the Supreme Court to Shs. 181,000/- and neither Rahimtulla nor the collector had appealed from that decision.

When the valuation of the two plots was made in 1951, it transpired that about one-third of Plot 2784 and nearly all of Plot 2785 were incapable of being used economically for building purposes and that their only potential use would be as playing fields.

In the case of Plot No. 2785 the Supreme Court had allowed £440 per acre, while in the case of Plot 2784 the value of comparable land had been assessed at only £100 and it was urged for the appellant that this figure should have been increased to £440 per acre.

Held–

(i) where a reference on a compulsory acquisition has been made to the court, it is permissible to have regard to the whole decision, and if the Court of Appeal is of opinion that the court of first instance proceeded on an incorrect principle of law, the decision is of no value even though neither party appeals from it.

(ii) the market value of land as the basis on which compensation must be assessed is “the price which a willing vendor might be expected to obtain from a willing purchaser”, and a “willing purchaser” is one who, although he may be a speculator, is not a wild or unreasonable speculator.

(iii) in considering whether to apply the criterion of a transaction affecting comparable land the court must consider whether the purchaser had paid so high a price that the court would conclude that he had not displayed the ordinary caution which a purchaser of land should display.

Per curiam – In the case of Plot 2785 the Supreme Court failed to realise that the purchaser had made a rash and unbusinesslike speculation in that he paid far more than it was worth as agricultural land; he apparently took no steps whatever to ascertain whether it could be used as building land, and in consequence the award in respect of that plot should be disregarded in assessing the value of the adjoining plot.

Appeal dismissed.

Cases referred to:

(1) *Birabe Narayan v. Collector*, 39 I.C. 14.

(2) *Frenchman v. Collector*, 24 Bom. L.R. 782.

January 22. The following judgments were read.

Judgment

Briggs JA: This is an appeal from a decision of the Supreme Court of Kenya on a reference to the court under s. 18 of the Indian Land Acquisition Act, 1894.

The appellant bought at public auction in 1946 a plot of privately owned land 16.22 acres in extent at

Clements Road, Nairobi. I shall refer to this land as “Plot 2784”. The price was Shs. 149,224/-, or £460 per acre. The title was a Crown lease for ninety-nine years from November 1, 1902, and was subject to a condition limiting user to agricultural purposes. The ground rent was Shs. 128/34 per annum. Since the land is only about three quarters of a mile from the town centre, it was at all material times improbable that it would be used for agriculture, and in 1945 Government had approved in principle a subdivision for building purposes. This was confirmed in 1950, and it has been common ground in these proceedings that at the time of acquisition the appellant was entitled to have Plot 2784 subdivided into building plots of three-quarters of an acre each with a condition for erection of one house on each plot. In that event new leases for ninety-nine years would have been issued with revised ground rents of 1½ per cent, of the capital value of the building sites, whether realized or estimated. It seems to have been assumed by all concerned that building on this basis would be possible, and in consequence the value of the plot appeared on the City Valuation Roll in 1952 at a high figure. The date on which value must

be assessed for the purposes of the compulsory acquisition is December 11, 1951. The appellant claimed Shs. 1,380,000/- and the collector awarded on November 28, 1952, Shs. 244,835/-. On a reference at the instance of the appellant the Supreme Court increased the amount of compensation by nearly £2,000 and fixed it at Shs. 283,800/-. The collector was ordered to pay one-half of the appellant's costs of the reference. The appellant appeals on the ground that the compensation for Plot 2784 is inadequate.

It is now necessary to refer shortly to a plot of land adjacent to Plot 2784, and known as Plot 2785. It is of approximately the same size and was bought by one Abdulla Rahimtulla at public auction in 1946 for £400 per acre. The title and conditions are similar to those of Plot 2784 and subdivision for building was approved in the same way. Plot 2785 was compulsorily acquired at the same time as Plot 2784, and they were dealt with together in the award and on the reference to the Supreme Court. The award for Plot 2785 was Shs. 93,334/-, and this was raised by the Supreme Court to Shs. 181,000/- for reasons which will appear. Neither Rahimtulla nor the collector has appealed from this decision.

When valuation of the two plots was effected for purposes of the acquisition proceedings it appeared that about one-third of Plot 2784 and nearly all of Plot 2785 consisted of black cotton soil of such a consistency and depth that building to permitted standards would only be possible thereon if very special and expensive measures by way of piling or concrete rafts were adopted. The Collector considered, and the Supreme Court later found as a fact, that these measures, if possible at all, would be so expensive that these areas could not, on an economic basis, be considered as potential building sites at all, and that their most profitable potential future use would probably be as playing fields. Before us the appellant's counsel accepted that this land was unsuitable for building purposes, and put forward no alternative to the suggestion of user as playing fields.

The basis of the Supreme Court's award in each case appears from the following passages taken from the judgment.

"The value of the portion of plot 2784 suitable for building thus works out as follows:

.....1. Selling price of plots from ¾ acre to 1 acre in extent, acreage 9.62 acres @ £2,000 per acre	£19,240		
.....2. Deduction for increased rent, 1½ % of selling price, at 20 years' purchase	4,440	£14,800	
.....3. .....Allowance for 2 years' deferment @ 5 % (907/1000/)		£13,400	
4. **Expenses –**			
(*a*) 850 ft. of roads 50 ft. in width with stone drains and culverts	£1,050		
(*b*) Surface water drainage	500		
(*c*) Legal charges, etc.	250	£1,800	
		£11,600	

The land unsuitable for building has been valued both by the collector and by Mr. Wyndham-Lewis at £100 an acre and I see no reason for allowing a higher value.	
Thus the value of this area of 5.4 acres is	£540
giving a total value for the land of	12,140
ADD: The value of the trees (as agreed)	200
	£12,340
15 % for compulsory purchase	1,850
TOTAL	£14,190
Shs.	283,800/-”

It should be noted that the difference between 16.22 acres and 9.62 plus 5.4 equals 15.02 acres depends on excisions for road reserves and the like which would have been necessary on subdivision. As regards plot 2785, the learned judge found that only one small portion of it was in fact suitable for building. This was variously estimated as being from .75 of an acre to 1.185 acres, and was found by the court to be .85 of an acre. This was not, however, important, since the valuation proceeded as follows,

> "A cautious purchaser, even if he had not at his disposal the wealth of expert evidence which has been given in this court, might doubt the suitability of the land for building and would limit his offer accordingly. But it is not only the cautious buyer who has to be considered. In the case of land, as with other commodities, it is frequently the speculator by whom market prices are determined. It can hardly be doubted that when the applicant paid £400 an acre for this land at auction in 1946, neither he nor the other bidders who ran him up to that figure can have realised the drawbacks of the land for building purposes.
>
> "Without the opportunity of sinking test boreholes, an intending purchaser might well suppose that this area was as capable of development as other areas in the neighbourhood of Nairobi which have a surface layer of black cotton soil. Nor is there any reason to suppose that five years later, the unsuitability of plot 2785/R for building development would have been more fully realised by possible purchasers than was the case in 1946. Indeed the only evidence we have is to the contrary. In the 1952 Nairobi City Valuation Roll the City Valuer estimated the value of plot 2785/R, as on January 2, 1951, at Shs. 327,530/-. That is to say, assuming that he was valuing the original area of 19.37 acres, at £845 per acre. Clearly this valuation was based upon the view that this land was capable of development for building purposes; and there is no reason to suppose that members of the public would be better informed in this respect than the City Valuer. It must, therefore, be inferred that in 1951, as in 1946, there would be persons prepared to buy this plot with a view to future building development; and the court has thus to determine what price a speculative purchaser would be prepared to pay at that date."

and later the learned judge said,

> "However, having regard to the evidence as to the demand for building plots in 1951, and to the fact that £400 an acre was obtainable for the land in 1946, I hold that it is a reasonable estimate that in 1951, five years later, a purchaser would be prepared to pay an additional ten per cent., that is to say, £440 per acre.
>
> "For the 16.185 acres remaining after deducting the area taken over for the East African Highway, this would give a price (including trees) of £7,120
>
> Adding the agreed value of the improvements 750
>
> Total £7,870
>
> 15% for compulsory acquisition 1,180
>
> or Shs. 181,000/-." £9,050

It was common ground before us that the 5.4 acres of plot 2784 for which £100 per acre was allowed were in all respects comparable with the major part of plot 2785. Even allowing a specially high figure, say £2,000, for the one good building plot, the balance of some 15 1/4 acres would still have been valued at about £335 per acre. The principal point raised before us on the appeal was that the amount of compensation given for the portion of plot 2785 which was unsuitable for building showed that the compensation given for the 5.4 acres of plot 2784 was inadequate. It was submitted that £440 per acre should be allowed for the 5.4 acres. This submission ignores the consideration that some adjustment on the lines I have suggested

would have to be made for the value of the one good building site on plot 2785, but it will not be necessary to consider this point in detail.

It was conceded by the respondent that, in assessing compensation on compulsory acquisition, the court is entitled to have regard, not only to sales of the same or comparable land (which is well established by authority), but also to the compensation allowed on other compulsory acquisitions of comparable land. It appears that where there has been a reference to the court, it is permissible to have regard to the court's decision, but where there has been no reference it is undesirable, and may be wrong, to rely on the award of a collector (Aggarawalla, Compulsory Acquisition of Land in India and Pakistan (3rd Edn.), 203–205). It is, however, clear that, if a decision of the court is to be taken into account for this purpose, it must be examined as a whole and, if this court is of opinion that such a decision of a court of first instance proceeded on an incorrect principle of law, it will be of no value to us, even though neither party has thought fit to appeal from it.

I think the decision of the learned judge concerning plot 2785 did proceed on an incorrect principle of law. The market value of land is the basis on which compensation must be assessed, and market value means primarily, I think,

> "the price which a willing vendor might be expected to obtain in the market from a willing purchaser".

This was the phrase used by the Select Committee, but each element in it has become subject to many glosses by judicial decision. In particular, the "willing purchaser" must be a particular kind of willing purchaser. It has been said that he must be "of good ability and well qualified to put the land acquired to the best advantage". *Birabe Narayan v. Collector* (1), 39 I.C. 14. He may be a speculator, intending not to use the land, but to resell it at a profit, and a general wave of speculation may raise the market value of land throughout an area; but he must not be a wild or unreasonable speculator. In considering whether to use an actual sale of comparable land as a yard-measure of value, the court must consider whether the purchaser

> "has paid so high a price that the court may consider that he had not displayed the ordinary caution which a purchaser of land should display",

Frenchman v. Collector (2), 24 Bom. L.R. 782. At least the same degree of prudence must be expected in the notional "willing purchaser". Where value is to be fixed by reference to potential future use of the land, its future "must not be entirely conjectural". It must be

> "estimated by prudent business calculations and not by mere speculation and impractical imagination".

The notional willing purchaser must, I think, be taken to be one who will make these calculations. Again

> "a prudent purchaser will calculate only such probabilities as are immediate and capable of practical realization".

These quotations are from Aggarawalla and I regret that I have been unable to verify his citations, but I respectfully adopt the learned author's views. I think the willing purchaser must not be a person who would speculate blindly on obtaining some advantage which simple precautions would show to be in fact unobtainable. No doubt there are such people, but it is not always that one appears when an asset of doubtful value is to be sold, and I do not think their existence should be taken into account for the purpose of assessing at the price of potential building land something which is not, and in practice cannot become, building land. I think that the learned judge failed to recognize that in 1946 Rahimtulla made a rash and unbusinesslike speculation, in that he paid far more than the land was worth as agricultural land, and apparently took no steps whatever to ascertain whether it could ever be used in practice as building

land. I think the court should have assessed the plot as it would have appeared in 1951 to a prudent purchaser who had made reasonable enquiries, namely, as one good building site and an area unlikely to be of any use

except as playing fields. I think that the award on plot 2785 should therefore be disregarded as an indication of the value of the 5.4 acres of plot 2784. It may be noted here that, if the appellant speculated in 1946, he did so more wisely than Rahimtulla, for he got nearly ten acres of good building land and has realized nearly twice what he paid for the plot. I think this ground of appeal fails.

The next ground of appeal was that the learned judge, in assessing the value of the potential building plots on plot 2784, had made no allowance, or inadequate allowance, for the fact that the area is "unrestricted". It was submitted that potential Asian buyers were both more numerous, and ready to pay higher prices, than European. The evidence of the experts on this point differed, and it appears almost certain that the learned judge adopted the view put forward by Mr. Wyndham-Lewis that in this case the absence of restriction would make no substantial difference in his estimate. Although there is no express statement to this effect in the judgment, it is clear that the learned judge accepted Mr. Wyndham-Lewis's conclusions as set out in Exhibit B, and I think he must therefore have accepted his reasoning. It is true that the learned judge says that the absence of restriction must have a substantial bearing on value, but in its context this appears really to be a reason for accepting Mr. Wyndham-Lewis's figure of £2,000, rather than the collector's figure of £1,332, which was apparently based on transactions where the land was restricted. In this sense allowance has been made for the absence of restriction. For myself I should have thought that the question of restriction would be of great importance if the sites were to be small, say one-fifth of an acre, but not necessarily of such importance in this case. However that may be, there was certainly evidence to support the learned judge's view, and I think it would be impossible for us to disturb his findings on this ground.

The third ground of appeal is not specifically raised in the memorandum, and objection was taken to it. We felt some doubt whether it was covered by the omnibus ground that the findings as to value were against the weight of the evidence, but decided to hear argument, since it appeared to raise a question of mathematical calculation and error, on which, if the error were established, it would have been unjust not to correct it. The submission was that the learned judge had correctly assumed that the building plots after subdivision would be subject to a ground rent of 1½ per cent. of their selling value and had on that basis estimated the selling value at £2,000 per acre. He had, however, then deducted from that figure the capitalized value of the ground rent at twenty years purchase. This amounted to two abatements in respect of the same diminution of value caused by the enhancement of ground rent. There is no detailed discussion in that part of the learned judges' judgment which expressly deals with plot 2784. The passage which I have quoted above is the only directly relevant one. There is, however, the following passage in that part of the judgment which deals with plot 2785:

> "I see no reason for rejecting Mr. Wyndham-Lewis's figures which give a total value for the sports ground of £3,272. Adding to this the value of the smaller plot, estimated by him at 1.185 acres, at £2,000 an acre, £2,370, less a deduction of £550 for enhanced rent, giving the figure of £1,820, he thus makes the value of the land £5,092."

It is to be observed that it was common ground that the new ground rent on subdivision would be 1½ per cent. of the selling price of each plot. The figures given by Mr. Wyndham-Lewis in Exhibit B and adopted by the learned judge in his judgment show £4,440 deducted for "increased rent". This is 1½%×20= 30% of the "selling price" of £14,800, and must have been arrived at in this way. It is not absolutely accurate, for it disregards the existing ground-rent, which should strictly speaking be deducted from the new rent. This was presumably done on the principle of de minimis. But when these points are considered together it is apparent that the learned judge had in view two different notional "selling prices", first the notional price as it would be if there were no, or no increase of, ground

rent, and secondly the reduced notional price which would be obtainable in view of the increased ground rent. In finding a figure of £2,000 he is not finding a sum which a notional purchaser would pay, but only one which he would have been willing to pay if there were only a nominal ground rent. On this basis it is clear that only one allowance is made for ground rent not two, and that the figures are correct. This ground of appeal must fail.

The final ground is that interest should have been allowed under s. 28 of the Act on the amount by which the Supreme Court's award exceeded the Collector's. This is a discretionary matter. It does not appear that the court was ever asked to award interest, and it does not appear that the court ever considered whether it should be awarded or not. The considerations which should, I think, have weighed with the court would have been first, that the appellant's claim was quite unreasonably high in relation to the amount awarded, and secondly that he had had only a small degree of success on his reference to the court. He asked for an increase of £57,000 and got £2,000. These would have been quite sufficient reasons for refusing interest. In the circumstances I would decline either to remit the matter to the Supreme Court, or to exercise in this court the discretion normally vested in the Supreme Court.

I think this appeal should be dismissed with costs.

Sir Ronald Sinclair V-P: I agree and have nothing to add. An order will be made in the terms proposed.

Sir Kenneth O'Connor **CJ [K]:** I also agree.

Appeal dismissed.

For the appellant:
B O'Donovan and *PL Maini*
Maini & Patel, Nairobi

For the respondent:
J Gledhill
Gledhill & Oulton, Nairobi

Ghulam Kadir v British Overseas Engineering Corporation (EA) Limited
[1957] 1 EA 131 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	1 March 1957
Case Number:	33/1956
Before:	Sir Newnham Worley P, Briggs and Bacon JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Rodwell, Ag. J

[1] Sale of goods – Order in writing – Construction of words "Price: subject to fluctuation" – Whether any contract existed between parties.

Editor's Summary

In November, 1951, the appellant ordered from the respondent forty tons of steel bars, at a total price of £2,738 17*s*. 0*d*. The order contained the following terms:

Delivery: 1952. We understand this is without engagement.

Price: Subject to fluctuation and increase in freight and insurance rates.

In May, 1952, the appellant was informed that prices had been increased by about seven per cent., and the appellant confirmed the order at this increased price. In November the respondents wrote to the appellant saying that they had been advised that the steel would be ready for despatch in the near future, that they had been asked to confirm the order, that they had called on him (the appellant) and had been informed by his representative that the steel was still required and had accordingly confirmed the order. No reply was received. On December 8 the respondents informed the appellant that prices had again been increased by a further four per cent. On December 10 the appellant repudiated the contract. The respondents offered to try to cancel the contract and managed to dispose of about ten tons of the steel but the balance was shipped to Mombasa and sold by auction. The respondents sued and obtained judgment for the loss incurred amounting to Shs. 30,735/42.

The appeal was argued on two grounds. First that the original order was so uncertain in its terms that no contract ever came into existence and secondly, that a

term must be implied in the contract that if the sellers sought under the words "subject to fluctuation" to increase the price, they must on each occasion notify the buyers, who would then have the option either to accept the new price or to determine the contract.

Held–

(i) at the time the contract was made, certain facts were known which both parties must have had in mind, namely, that the sellers would have to place a specific order in the U.K. for the steel, that it was in short supply, that the market was rising, that shipping space was difficult to obtain, that insurance and freight rates were likely to be increased and that the contract might not be performed for over a year.

(ii) the words "subject to fluctuation" in the circumstances meant that the contract was dependent on the contract the sellers were making with their suppliers and if the latter raised their prices, a corresponding increase would be passed to the buyer, and that there was no element of uncertainty in a contract of that kind.

(iii) there was no reason to imply any term at all giving the buyer any right of cancellation.

Appeal dismissed with costs.

Cases referred to in judgment:

(1) *May & Butcher Ltd. v. R.*, [1934] 2 K.B. 17.

Judgment

Briggs JA: read the following judgment of the court: We dismissed this appeal against a judgment of the Supreme Court of Kenya giving damages for breach of contract, and now give our reasons. The appellant, who is a working blacksmith, ordered from the respondent company, who are importers, forty tons of steel bars on November 10, 1951, at a total cost of £2,738 17*s*. 0*d*. The order contains the following terms,

"*Delivery:* 1952. We understand that this is without engagement.

Price: Subject to fluctuation and increases in Freight and Insurance rates. Clearing and Railage charges to be added at cost, plus custom duty. Subject to export licence being obtained.

Payment: Fifteen per cent. deposit. Balance against Invoice on presentation.

Part Shipment: Authorised.

We understand that if for any reasons whatever, you are unable to execute this order, your liability shall cease with the return of Deposit."

In May, 1952, the respondents informed the appellant that prices had been increased by about seven per cent. They offered to accept cancellation of the order, but the appellant confirmed it. The goods were likely to be ready for shipment from England about December, 1952, and on November 14, the respondents wrote to the appellant as follows,

"We received a letter from Bishopsgate Steels dated November 4, from which we understand that the material you have ordered will be ready for despatch within a few weeks of the date of the letter.

"They have asked us to confirm that it is still required and it was with this object that we called on you

immediately on receipt of this letter, and we were assured by your Mr. Kadir that this material was still required.

"We immediately cabled Bishopsgate Steels telling them to proceed with the order and we now hope to be able to advise you of the name of the carrying vessel in the very near future.

"The letter in question is, of course, open to your inspection at any time."

No reply was received and we accept as a fact that the order had been finally confirmed as stated in November. On December 8 the respondents wrote that the goods had now been manufactured and awaited shipment. They also told the appellant that prices had again been raised. They enclosed details showing a total of £3,038 13*s*. 0*d*. representing about eleven per cent. more than the original price or four per cent.

more than that agreed in May. On December 10 the appellant repudiated the whole contract. He gave various excuses, of which it is only necessary to say that they were excuses and nothing more, and it is clear that his complaint was not based on the price increase of four per cent. The respondents very generously offered to cancel the contract if they could. They were able to divert about ten of the forty tons, and based no claim on that part of the contract. Rather more than thirty tons were shipped to Mombasa and later sold by auction. The loss incurred by the respondents and the amount for which judgment was given was Shs. 30,735/42.

Two points were taken on appeal. First it was contended that the original order was so uncertain in its terms that no contract ever came into existence. This contention was based on the provision that the price was to be "subject to fluctuation". Reliance was placed on *May & Butcher Ltd. v. R.* (1) [1934], 2 K.B. 17. It is of course clear that on a sale of goods there must be some sort of agreement which determines the price or, if nothing is said about price at all, the price will be whatever is reasonable. If "subject to fluctuation" meant that the matter was at large there would probably have been no contract at all. But it is clear that the parties intended to make a contract and we should attempt to give to the words the meaning which the parties must have intended them to bear. In the relevant circumstances this is not at all difficult. At the time when the contract was made both parties knew, and must have had in mind, the following facts:

1. The respondents would have to place a specific order for the contract goods with manufacturers or exporters in the United Kingdom, and render themselves liable to pay for those goods.
2. Steel of this kind was in extremely short supply and manufacturers had a long back-log of orders.
3. The market was rising and no manufacturer was likely to book firm at current prices an order which he might not be able to fulfil for many months.
4. Shipping space was very difficult to obtain.
5. Insurance and freight rates were likely to be increased at any time.
6. The contract might not be performed for well over a year, although both parties hoped it would be performed much sooner.

In these circumstances we think it is obvious that what the parties intended to say, when they used the words "subject to fluctuation", was this.

> "This contract is dependent on the contract which the sellers are making with their suppliers. The latter will be entitled to raise their prices against the sellers and, if they do so, a corresponding percentage increase may be charged by the sellers to the buyers. This does not, of course, entitle the sellers to raise their price to a disproportionate extent – or indeed to raise it at all, unless the circumstances described arise."

We see no element of uncertainty in a contract of this kind. The figures might later be in dispute, but a court or an arbitrator would have no difficulty in deciding whether an increase claimed was justifiable. Furthermore the conduct of the parties when the first price increase was notified seems to us to show beyond all doubt that this was the sense in which they understood the words in question.

The second point taken was that a term must be implied in the contract that, if the sellers sought under the words "subject to fluctuation" to increase the price, they must on each occasion notify the buyers, who would then have the option either to accept the new price or to determine the contract altogether. This contention was argued partly on the basis that otherwise he might be obliged to pay some astronomic and commercially impossible price. On the meaning which we attach to the words "subject to fluctuation" this would not be so. Any increase would have to be justified by the true state of the market.

The appellant also relied on the sellers' conduct. They did undoubtedly offer at the time of the first price increase to accept cancellation; but they did so on other occasions as well, because of the long delay and the inconvenience which it was apparently causing to the buyer. We think these offers were perfectly voluntary acts and quite unrelated to any implied term. In the circumstances

which we have detailed, the sellers could not possibly have taken the risk that the buyer might cancel at any time after they themselves were unable to do so. The goods were not of a kind readily or freely marketable and they would almost inevitably have suffered a heavy loss. This view is confirmed by the letter of November 14 to which we have referred. It was in effect a warning that the last possible opportunity for cancellation had gone past. It seems that the manufacturers charged their current price at the date of completion of manufacture, as one would expect. The increase was only of four per cent. and it does not appear in truth to have been in any way the cause of the dispute. If there were any implied right to cancel at all, it certainly would not extend beyond the date when the buyers were informed that the goods were shortly coming forward and, in effect, that the sellers could probably no longer themselves effect cancellation. But we think there was no reason to imply any term at all giving the buyer any right of cancellation. Furthermore, if we had felt it necessary to hold that the buyer could not be held to an increase of price without his consent, we should have done so on the footing that, if he refused to pay the proposed higher price, the seller should have the option either to cancel the contract or to enforce it at the price last agreed. When we suggested this possibility to the appellant's counsel he was not responsive, and this is readily understood, since it would have improved his client's position only to the extent of about £120.

We think the contract was at all times binding on the appellant. Apart from the points discussed, it was not suggested that he was ever entitled to determine it, or that the damages were excessive. The appellant was ordered to pay the costs of the appeal.

Appeal dismissed with costs.

For the appellant:
FR Stephen
Stephen & Roche, Nairobi

For the respondents:
JA Couldrey
Kaplan & Stratton, Nairobi

Yusito Onguti s/o Oyoo v R
[1957] 1 EA 134 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	17 January 1957
Case Number:	270/1956
Before:	Sir Newnham Worley P, McKisack CJ (U) and Bacon JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Uganda – Lewis, J

[1] Criminal law – Murder – Misdirection – Failure of judge to refer to conflict in evidence of prosecution witnesses – Evidence tending to prove manslaughter.

Editor's Summary

In this case the evidence of the two principal witnesses for the prosecution differed substantially and in his judgment the trial judge made no reference to one of these witnesses whose evidence, if it were true, went to establish manslaughter rather than murder.

Held – it was incumbent upon the trial judge to deal expressly with the conflict between the evidence of the Crown witnesses and with the vital question whether it was safe to convict of the graver offence and in the circumstances it was unsafe to affirm the conviction for murder.

Appeal allowed, conviction and sentence for murder quashed and conviction for manslaughter substituted.

Cases referred to in judgment:

(1) *Julius Matendechere s/o Masakhu v. R., E.A.C.A.*, Criminal Appeal No. 485 of 1955 (unreported).

Judgment

Bacon JA: read the following judgment of the court: The appellant was convicted by the High Court of Uganda of the murder of his cousin Jakayo Aroka by a single blow with an axe which fractured Jakayo's skull. Despite an operation whereby a piece of bone was removed from Jakayo's brain he died some eleven days after being struck. We allowed the appeal in part, quashed the conviction and sentence, substituted a conviction for manslaughter and imposed a sentence of five years' imprisonment with hard labour. Our reasons for so doing were as follows:

The story of the fatal incident was this. In the compound where the appellant had his home there was a hut in which his wife Juliya lived. The entrance to the hut consisted of a door three feet wide but only five feet high. There is no evidence as to whether the hut had a window whereby light entered at the material time. At about 6 p.m. one evening the appellant returned home from his work, entered the hut and lay down to rest on skins which Juliya had prepared for him on the floor. Presently Jakayo (the deceased) and one Anderea Okwok, an uncle of Jakayo and of the appellant, called at the hut. Juliya was inside the hut preparing food near the fire. Kakayo called out "hodi". Thus far there was no conflict between the only eyewitnesses who testified at the trial, Juliya and Anderea, both of whom were called by the Crown. But their evidence as regards subsequent events differed markedly in several respects.

Anderea testified that after Jakayo had spoken his greeting Juliya replied "karibu" and the appellant "suddenly struck Jakayo" with the axe "a blow with full swing of his arm", adding that "it did not touch the door – it was done deliberately". He further testified that the appellant did not speak to Jakayo. But Juliya testified to the following sequence of events:

> "Jakayo Aroka came and said 'hodi'. Accused said: 'I am lying down; do not enter.' Accused then said 'Do not come and bother me.' Jakayo said: 'What will you do if I enter?' Accused said: 'Go away.' Jakayo said: 'I will drag you out if I do enter.' Accused got on his knees and reached for his axe. He seized the axe and swung it and struck Jakayo on his head as he was crouching in the doorway."

In cross-examination Juliya also made four significant statements: she said that Jakayo was drunk, that Anderea told Jakayo not to enter the hut, that the appellant and Jakayo were friends and that "the death was accidental".

Obviously those two Crown witnesses' versions differed substantially. But the learned trial judge commenced his very brief judgment by stating that "the facts were not really disputed" and throughout it he made no reference whatever to Juliya or to her evidence.

In our opinion it was, with respect, clearly wrong altogether to omit to deal with the witness Juliya. A very similar (though not the same) situation arose in *Julius Matendechere s/o Masakhu v. R.* (1), E.A.C.A. Criminal Appeal No. 485 of 1955, anreported. There, the charge being murder, the Crown called three eye-witnesses. Two of them said that while the deceased was walking home the appellant had assaulted him with his fists and then with a stick. The third, the appellant's wife Dinah, said that the appellant had found the deceased attempting to rape her on the path and had attacked him before he could escape, but had not used a stick. The defence tallied with Dindah's version of the affair. In the concluding paragraph of its judgment this court said:

> "In his judgment the learned trial judge did not, as it seems to us, appreciate that the prosecution's case involved two alternative possible views of the facts, one of which would lead to a verdict of murder and the other to a verdict of manslaughter. He set out the two accounts of the facts as being the contentions of

prosecution and defence respectively, and as regards Dinah he said that, although she was called by the Crown, since her evidence so strongly supported the accused he would ‘consider her evidence as being evidence for the defence’. We think that this was not merely an over-simplification, but an erroneous approach to the prosecution’s evidence as a whole, and Crown counsel felt

> obliged to concede that, if the learned trial judge had kept in mind the essentially alternative character of the prosecution's case, it was at least possible that he might have decided that it was not safe to convict of murder, and that nothing more grave than manslaughter had been established. Accepting that view, we considered that the conviction for murder could not stand."

In the instant case the Crown witnesses Anderea and Juliya also put forward "alternative possible views of the facts", one tending to a conviction for murder, the other to a conviction for manslaughter. Both persons were put forward as witnesses of truth. It was, we think, incumbent upon the learned trial judge to deal expressly with that matter and with the vital question as to whether it was safe to convict of the greater offence.

Nor did the learned judge mention another matter of considerable importance which was elicited from Anderea in cross-examination, namely the doubt as to whether, from his partially obscured view-point outside the hut, he could see at all clearly what was happening inside it. Anderea said this:

> "The accused's hut had only one door. I was" (indicates) "six feet from entrance when accused struck Jakayo Aroka. I could see even though Jakayo Aroka was in doorway."

The Crown put in a statement made by the appellant to the police after being charged and cautioned, in which he recorded the gist of his conversation with the deceased when the latter was on the threshold of the hut, described how he had picked up the axe without getting up off the floor, and said "I hit him while I am still down, axe hit him on his head, he fell down outside". The Crown also put in the appellant's deposition. In it he again spoke of the conversation with the deceased, after which came this:

> "He replied 'I am coming in' and bent his head and shoulders forward through the doorway. I sat up and, picking the axe from near the fireplace, swung around in the direction of the door. The axe-head hit the door-frame and then the side of his head. He fell backwards and sat in the doorway, just outside the room."

The deposition later related how the appellant at once went off to the Jago and reported to a Local Government askari named Okeny that he had "accidentally hit the head of his brother with an axe". (The askari (P.W. 5) testified that the appellant had told him "he was sorry because he struck Jakayo without any reason".) The deposition concluded with the appellant's cross-examination. which was as follows:

> "I heard Jakayo say: 'If I come into the house what will you do?' and I thought when he appeared in the doorway that he was going to fight me. That is why I grabbed the axe and swung it round to the door.
>
> "I have not fought with my brother since I came out of the Army in 1945. Jakayo's father and my father had the same father and mother, that is why I call him my brother. He lives about half a mile from me. He was older than myself.
>
> "I was angry with him because I had told him three times not to come into my house and he came. I swung the axe to frighten him away. I did not intend to kill him. I hoped he would back out of the doorway before the axe hit him."

The appellant's extra-judicial statement and his deposition having been read by Crown counsel at the trial, the appellant declined to testify or to make any further statement.

It was not disputed that, as soon as the appellant saw that the deceased had been hit by the axe, he went off to another hut, fetched his puttees and bound up the wound. Juliya testified that the deceased then walked away; there was no evidence to the contrary. Neither of those facts was mentioned in the judgment.

A further question of considerable importance was whether the axe-head had made contact with the door, or perhaps with the door-frame, and had glanced off it before striking the deceased's head. The

appellant had testified at the preliminary

inquiry that it glanced off the doorframe. At the trial Anderea said: “It did not touch the door.” We have already mentioned the doubt as to whether he could see. In view of the importance of this question we looked at Anderea’s deposition. In it he did not mention the matter at all. That is not surprising, for it was not until after he had given evidence that the appellant testified and raised the point. But Anderea was not then re-called, and thus did not deal with the matter at all at the preliminary inquiry.

The only other witness who dealt with this matter at the trial was the askari Okeny. When first giving evidence he made no reference to it. He was, however, recalled and testified in chief as follows: “Some days ago I examined accused’s hut. I saw no cuts on the door.” When cross-examined on that additional evidence, Okeny gave the measurements of the door which we have mentioned and then said:

> “Accused and the chief were present. Accused said Jakayo tried to enter and he struck him on head. Accused did not say that he threw axe at Jakayo and it hit the door and then struck man on head. Accused did not say it was an accident.”

We thought that, in view of the conflict on this important matter, it was unfortunate that the Crown did not call the chief there mentioned. The judgment referred to Okeny’s additional evidence as follows:–

> “The accused made a statement in the lower court and there said that he swung the axe around and it hit the door and then Jakayo Aroka’s head. The axe weighed about three pounds. When the door was examined by P. 5 (Okeny) no axe-marks were found and on that occasion accused said nothing of the axe striking the door.”

It seemed to us that that passage was open to criticism in several respects. What the appellant had said at the preliminary inquiry was not “a statement” but sworn evidence. The appellant had not there (or at any time) said that the axe “hit the door”, but that it hit the door-frame. Nor had he ever said that the axe had cut the wood; if his story was true, the axe-head might well have only dented or marked the wood. Okeny did not testify as to the door-frame at all, and moreover did not say that he saw “no axe-marks”, but only that he saw no cuts. Finally, in the judge’s note of Okeny’s additional cross-examination (which we have quoted in full) it is not recorded that Okeny testified that the appellant “said nothing of the axe striking the door” but that “he did not say that he threw axe at Jakayo and it hit the door”. The appellant is never recorded as having said to anyone at any stage that he threw the axe, and it was not a matter for adverse comment that he had not said so when Okeny purported to examine the hut. In our view the judgment thus contained a number of substantial inaccuracies on this important feature of the case.

Lastly there is the weighty matter of the medical evidence. The judge’s note of this was very brief. Those parts of it which were material to the question with which we had to deal were as follows:

> “Jakayo Aroka was admitted with a cut wound four inches long and one inch wide into his skull, which was fractured . . . Cause of death: abscess following a fractured skull. An axe like this could have caused fracture . . . The axe must have been used with considerable force. The injury was not consistent with axe being thrown. The blow was delivered downwards. Only one blow was delivered.”

Two features of that evidence seemed to us to call for inquiry: first, nothing was said as to the position on the skull of the cut wound; secondly, the sentence “The blow was delivered downwards” stood as a bald statement without apparent support. Accordingly we looked at the witness’ deposition, whence it transpired that he had stated that the wound was “on the left side of his head”, that the deceased was five feet six inches tall and that

> “the head wound was about 1½ inches above the left ear. It was immediately above the ear, the upper edge being further from the ear and the lower curving

> down behind the ear. The blow must have been inflicted from an angle both above and at the side of the deceased's head."

In our view that evidence should certainly have been given, recorded and carefully considered at the trial. If it was given it was not recorded. The only relevant passage in the judgment was this:

> "The medical evidence showed that the axe entered skull in a downwards direction and that considerable force had been used. This gave the lie to the defence theory."

We thought that those observations were certainly not based on the true facts as known by the medical officer called by the Crown – the sole medical witness at the trial. So far from giving the lie to the defence, those facts were entirely consistent with it. If the Crown failed to elicit at the trial the facts as recorded by the witness in his deposition it was a serious omission.

Taking together all those matters to which we have referred we came to the conclusion that it was clearly unsafe to affirm the conviction for murder. On his own story the appellant had, however, been guilty of a reckless and dangerous act in swinging the axe in the direction of the deceased as he bent down to enter the hut. Accordingly he was guilty of manslaughter.

Appeal allowed.

The appellant did not appear and was not represented.

For the respondent:
JJ Dickie (Crown Counsel, Uganda)
The Attorney-General, Uganda

Robert Austin Mullery v R
[1957] 1 EA 138 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	23 January 1957
Case Number:	234/1956
Before:	Sir Newnham Worley P, Sir Ronald Sinclair V-P and Briggs JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of the Seychelles – Rassool, J

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[1] Contempt of court – Scurrilous verses concerning Chief Justice in his capacity as judge – Publication to judge alone – Whether circumstances bring administration of justice into disrepute and contempt.

[2] Appeal – Competence of appeal to Court of Appeal for Eastern Africa – Criminal Procedure Code, s. 301 (1) (*Sey.*).

Editor's Summary

The Hon. Mr. Justice Lyon, Chief Justice of the Seychelles, received through the post an envelope containing two sheets of paper on which were typed carbon copies of doggerel verses set out as three poems containing scurrilous attacks on the judge in his capacity as Chief Justice. The appellant was subsequently charged with *inter alia* contempt of court and, although acquitted on other charges, was convicted and sentenced to two months' imprisonment which he served, since his advisers considered that an appeal was not competent under s. 301 (1) of the Seychelles Criminal Procedure Code in respect of a sentence of less than six months. Subsequently, an appeal was lodged and the appellant presented his case in writing. The Court of Appeal, however, decided to assign counsel to conduct the appeal and a supplementary memorandum was filed limited to the main issue – contempt vel non. Although the verses were not signed, counsel conceded that they had been written by the appellant, that they were in the worst possible taste and grossly libellous, and would have constituted contempt had they been published to a third party, but he submitted that where the writing complained of is only communicated to the judge of whom it is written, there is no publication and accordingly the writing could not be held to be calculated to bring the judge into contempt or to lower his authority.

Held–

(i) in a prosecution for contempt of court it is necessary to show that something has been done or published which is calculated to lower the reputation and authority of the court in the eyes of the public and that in order to constitute a contempt by libelling a judge it is not sufficient to communicate the libel to him and to him only.

(ii) had the proceedings in this case taken the form of a prosecution for criminal libel a conviction would probably have followed and it was doubtful whether such a conviction could have been successfully attacked.

(iii) s. 301 (1) of the Seychelles Criminal Procedure Code allows an appeal from a conviction of the Supreme Court upon any one of the grounds contained in para. (*a*) to para. (*e*) of that sub-section which must be construed disjunctively.

Appeal allowed.

Cases referred to:

(1) *Joseph Orakwue Izuora v. The Queen*, [1953] 1 All E.R. 827; [1953] A.C. 327.

(2) *Kuruma s/o Kaniu v. The Queen*, [1955] 2 W.L.R. 223; 21 E.A.C.A. 242; [1955] 1 All E.R. 236.

(3) *McDermott v. British Guiana Judges* (1868), 5 Moo. P.C.C.N.S. 466; 16 E.R. 590.

(4) *Surendranath Banerjea v. The Chief Justice and Judges of the High Court of Bengal* (1882–1883), 10 I.A. 171.

(5) *R. v. Gray*, [1900] 2 Q.B. 36.

(6) *Perera v. The King*, [1951] A.C. 482.

(7) *Charlton's case*, 2 My. & Cr. 316; 40 E.R. 661.

(8) *R. v. Faulkner*, 2 Mont. and A., 311.

(9) *The King v. Almon*, 5 Burr. 2686; 98 E.R. 411.

(10) *Pullman v. Hill & Co.*, [1891] 1 Q.B. 524.

(11) *In re Wallace* (1866), L.R. 1 P.C. 283; 4 Moo. P.C.C.N.S. 140; 16 E.R. 269.

Judgment

Sir Newnham Worley P: read the following judgment of the court: This is an appeal from the Supreme Court of Seychelles which convicted the appellant on information of the common law offence of contempt of court and sentenced him to undergo two months' imprisonment. At the time of conviction and for some while afterwards the appellant's advisers and the learned trial judge appear to have thought that no appeal lay to this court under s. 301 (1) of the Seychelles Criminal Procedure Code (Cap. 77) because the sentence was less than the six months specified in para. (*a*) of that sub-section and that the only course open to the appellant was to petition Her Majesty in Council for special leave. The appellant was, mainly for this reason, refused bail and has, we understand, served the sentence imposed. Nevertheless, he is, of course, entitled to canvass the correctness of his conviction and, if he succeeds, to

have it set aside; and incidentally to have restored to him a typewriter which was declared forfeited. In the proceedings before us the Crown-respondent has not challenged the competence of the appeal and rightly so: the appellant was charged on an information and the order made thereon was clearly a conviction within the meaning of s. 301 of the Code. This would have been so, even had the proceedings been in summary form: *Izuora v. The Queen* (1), [1953] A.C. 327. We have no doubt that the proper construction of s. 301 (1) requires that the word "and," which occurs between para. (*a*) to para. (*e*), must be read disjunctively and not conjunctively. The sub-section specifies five cases in any one of which an appeal will lie; but, even so, it is difficult to reconcile para. (*e*) with the opening words of the sub-section.

The appellant having eventually filed his notice and memorandum of appeal to this court elected to present his case in writing in accordance with r. 39 (1), but as it appeared desirable in the interests of justice that the appellant should be represented at the hearing of the appeal, we assigned Mr. Gledhill to represent him. At the trial a number of objections were taken on technical and procedural points, most of which

are repeated in the memorandum of appeal and the written case. Mr. Gledhill, however, filed a supplementary memorandum limited to the main issue – contempt vel non, and he confined his argument to this issue. We therefore give no ruling on the other objections raised in the original memorandum, but it must not be assumed that we thereby imply any doubt as to the correctness of the rulings given thereon by the learned trial judge. It may, however, be helpful if we refer to one or two of these points. During the course of the investigation the appellant's house was searched under the authority of a warrant issued by the learned chief justice and it was objected that the warrant was illegally issued and that accordingly the documents and other articles seized in the course of the search should not have been admitted in evidence. It is not necessary for us to decide whether or not the search was lawful: even if it were not that would not affect the admissibility of the articles seized. In *Kuruma s/o Kaniu v. The Queen*, [1955] 2 W.L.R. 223, which was an appeal from the decision of this court reported in 21 E.A.C.A. 242, the judicial committee said that the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is relevant, it is admissible and the court is not concerned with how the evidence was obtained. Their Lordships also said that there can be no difference in principle for this purpose between a civil and a criminal case, although no doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused. They did, however, add that they were not qualifying in any degree whatsoever the rules relating to the admission of confessions.

The only other preliminary observation which we desire to make relates to the question of jurisdiction to punish for contempt. The Supreme Court of Seychelles is a Court of Record: the Seychelles Judicature Order in Council, 1903, s. 4 (1). Therefore the offence of contempt and the powers of the court for punishing it are the same there as in England, not by virtue of the Penal Code (Cap. 93) but by virtue of the common law of England: *McDermott v. Judges of British Guiana* (3) (1868), 5 Moo. P.C.C.N.S. 466; *Surendranath Banerjea v. Chief Justice and Judges of the High Court of Bengal* (4), (1883), 10 I.A. 171 at p. 179.

The material facts are fairly simple and not now in dispute. The Honourable Mr. Justice Malcolm Douglas Lyon is the chief justice of Seychelles and lives at Bel Eau. On July 9, 1956, there was delivered through the post at his chambers in the courthouse at Victoria a sealed envelope addressed "Personal. Mr. M. D. Lyon, Bel Eau, Victoria." It was postmarked "Victoria, July 9, 1956." On opening the envelope Mr. Lyon found inside two sheets of paper on which were typed carbon copies of doggerel verses, set out as three poems, containing scurrilous attacks on Mr. Lyon in his capacity as chief justice. In the course of the argument before us, Mr. Gledhill conceded that the verses were defamatory of Mr. Lyon in his capacity as a judge, though he contended that there had been no contempt of court because there had been no publication. In view of this admission it is not necessary for us to set out the verses in this judgment or to debate their meaning. It will suffice to say that, in our opinion, they imply that the chief justice is subservient to the executive, that he is a drunkard and tries cases while under the influence of drink and that his decisions are given arbitrarily without regard to the law. The verses were not signed, the author being evidently one of that contemptible class of persons who prefer to attack anonymously. The grossness of the libels merited condign punishment and the sentence of two months was in the circumstances rather a lenient one, if the conviction was correct in law.

We think it right to say that in our opinion Mr. Justice Lyon has throughout this matter acted with perfect propriety. He showed the verses to his registrar and then handed them over to the police; when the investigations were complete he did not, as he might have done, deal himself with the matter as a contempt of his court but left it to be tried on information by a judge appointed ad hoc; and at the trial he

gave evidence with the restraint and dignity appropriate to his high office.

The information filed by the attorney-general charged three counts. The first of these was for contempt of court and the particulars laid alleged that the accused

> "published to the Honourable Mr. Justice Malcolm Douglas Lyon, Chief Justice of Seychelles, certain typescript verses hereinafter set out which contain scandalous and contemptuous matters of and concerning the said Honourable Mr. Justice Lyon in his capacity as Chief Justice with intent to bring into disrepute and contempt the administration of justice by the Supreme Court of Seychelles and in so doing did commit the offence of contempt of court."

The verses in question were then set out. The second and third counts alleged, respectively, doing an act with a seditious intention, and publishing a seditious publication contrary to s. 55 (1) para. (*a*) and para. (*c*) respectively of the Seychelles Penal Code. On these two counts the appellant was acquitted, the learned trial judge being of opinion that the intention and innuendoes charged were not sufficiently proved. We are not further concerned with them. On the first count the appellant was convicted and sentenced.

The evidence led for the prosecution at the trial mainly comes under two heads:

(*a*) evidence adduced to prove that the offending verses had been typed on a typewriter seized in the appellant's house and had been posted by him to the chief justice;

(*b*) evidence of Mr. Justice Lyon and of Police Superintendent Williams as to the meaning of the verses.

The evidence called for the defence related mainly to the question of typing: no attempt was made to justify the libels.

It is, however, unnecessary for us to review this evidence. As to (*a*), Mr. Gledhill did not seek to attack the trial judge's finding of fact that the appellant was the person who typed and posted the verses to Mr. Lyon. There was certainly ample evidence to support that finding. As to (*b*), this evidence may have been relevant to the sedition charges, but it was irrelevant to the first count since it is the function and duty of the court itself to decide whether an act done or writing published amounts to a contempt. Furthermore, as we have already said, Mr. Gledhill very properly conceded that this doggerel was not merely in the worst possible taste but was grossly libellous.

It is well settled that to come within the definition of contempt of court there must be involved some

> "act done or writing published calculated to bring a court or a judge of the court into contempt or to lower his authority,"

or something

> "calculated to obstruct or interfere with the due course of justice or the lawful processes of the courts":

see *R. v. Gray* (5), [1900] 2 Q.B. 36; *Perera v. The King* (6), [1951] A.C. 482 at p. 488 and *Izuora v. The Queen* (1). In the instant case the particulars of the offence charged show that the prosecution sought to bring the conduct of the appellant within the former "defamatory" category and that was the view taken by the learned trial judge who states at p. 123 of the record:

> "I further find that these verses published to the chief justice were calculated to bring him into contempt or to lower his authority. It is personal scurrilous abuse of the chief justice."

The allegation that the verses contained scurrilous and contemptuous matter of and concerning Mr. Justice Lyon in his capacity as chief justice with intent to bring into disrepute and contempt the administration of justice by the Supreme Court of Seychelles may perhaps have been mere surplus-age since it is for the court itself to determine whether the matter complained of constitutes contempt of court and it is clear that in any given case such matter may come within either or both of the two categories of contempt. But we think it is sufficiently clear in the instant case that the verses in question could not on

any reasonable view be considered to be calculated to obstruct or interfere with the due course of justice or the lawful processes of the court. They do not refer to any pending or future proceeding in the court or even to any specific proceeding which had come before the learned chief justice in the past.

It follows therefore that the conviction can only be maintained if the verses were properly held to come within the former category, i.e. a writing published calculated to bring the court or a judge of the court into contempt or to lower his authority. As we have said, Mr. Gledhill ultimately conceded that the doggerel verses in this case would be contemptuous if they had been published to a third party and he rested his whole argument on the contention that, where the writing complained of is only communicated to the judge of whom it is written, there is no publication and accordingly the writing cannot be held to be calculated to bring the judge into contempt or to lower his authority. It is clear that in the case of contempt coming within the second or "obstruction of justice" category publication to the judge alone is sufficient. Mr. Gledhill also concedes that for the purpose of a prosecution for defamation under Chapter XVIII of the Penal Code publication to the judge defamed would be sufficient (see s. 186 (1)). The narrow issue in this appeal is therefore whether the communication to a judge of scurrilous matter concerning him by means of a "private" letter can amount to publication. We use the word "private" in this connection as applying equally to a letter addressed to the judge personally and to a letter addressed to him in his office as a judge. Counsel have not been able to refer us to nor have our researches discovered any reported case which satisfactorily answers this question, but the weight of authority appears to be on Mr. Gledhill's side.

> "Scandalous attacks upon judges are punished by attachment or committal upon the principle that they are, as against the public, not the judge, an obstruction to public justice; and a libel on a judge, in order to constitute a contempt of court, must have been calculated to cause such an obstruction. Temperate criticism in good faith is immune. The punishment is inflicted, not for the purpose of protecting either the court as a whole or the individual judges of the court from a repetition of the attack, but of protecting the public, and especially those who either voluntarily or by compulsion are subject to the jurisdiction of the court, from the mischief they will incur if the authority of the tribunal is undermined or impaired." (Halsbury's Laws of England (3rd Edn.) Vol. 8, s. 9).

In principle it is difficult to see how the authority of the tribunal or of the judge can be undermined or impaired unless the scandalous attack becomes known to the public, i.e. to at least one person other than the author of the attack and the recipient. In none of the reports to which we have been referred is there any case in which the contrary has been held. It is true that in the case reported as *Mr. Lechmere Charlton's* case (7), 2 My. & Cr. 316: 40 E.R. 661, Lord Chancellor Cottenham said in the course of his judgment:

> "Every insult offered to a judge in the exercise of the duties of his office is a contempt,"

and Mr. Brookes sought to rely on this. But it would be dangerous to seek to base a principle upon such a general remark taken from its context in the course of a lengthy judgment; particularly when, as in that case, the judgment was not founded upon that remark but was in fact based upon a finding that the insulting writing went further and included a plain and direct threat, the object of which was to induce a judicial officer to depart from the course of his judicial duty and to adopt a course which he would not otherwise pursue.

The question which we are now called upon to decide was mooted but not decided in the case of *R. v. Faulkner* (8), reported in Montagu & Ayrton's Bankruptcy Reports, Vol. 2, p. 311. In that case Faulkner had been fined for contempt of court, the alleged contempt consisting in writing and sending to a commissioner of the Court of Bankruptcy a letter which referred to expressions made use of by him in certain bankruptcy proceedings before him. Faulkner obtained from the Court of Exchequer a rule to show cause why the fine should not be returned and the rule was made absolute on the ground that the commissioner was not a court of record and had acted without jurisdiction. At p. 341 Lord Abinger said:

“This opinion makes it unnecessary to consider whether the proceeding brought before the court was that sort of contempt or obstruction of the court

> which in a court of record might be punished. That is always a difficult question to be considered, and I am very glad that we are not bound now to enter into it."

But in the course of the argument there were remarks from the bench which suggested that both Lord Abinger and Baron Alderson entertained doubts upon this score. At p. 321 the report reads as follows. Lord Abinger asked:

> "Does he (i.e. the commissioner) carry about the virtues of a court of record with him wherever he goes?"

to which the attorney-general (who was resisting the rule) replied:

> "He carries about the powers of a court of record as a judge upon the circuit, who whenever he is sitting in the execution of his duty as a judge is a court of record."

Lord Abinger then said:

> "Then if he had received that letter, not sitting in court, it would not have amounted to a contempt."

The attorney-general then started to say:

> "An insulting letter, addressed to a judge, touching a matter then under consideration, threatening or endeavouring . . ."

Lord Abinger:

> "I can only say, that if I received such a letter I should not consider myself at liberty to commit him."

Baron Alderson:

> "There would be a great many committals if such a course were pursued by the judges."

Lord Abinger:

> "Do you mean to say that one of the judges has the power to fine a man for sending him a silly letter or an impudent letter about any matter that he has decided? I can only say that I should be very much afraid of exercising it."

The attorney-general:

> "There can be no doubt that if any person wrote a letter of this sort to a judge, couched in as offensive terms as this letter, he would, upon his coming into court, and acknowledging it, be guilty of a contempt."

To which Baron Alderson replied:

> "The essence of this power is, that it is not to be questioned, and, therefore, we must look carefully to see whether the legislature has given a power over which there is no control."

Sir William Follett, in support of the rule, made this submission (at p. 329):

> "In every case in which these matters are brought before the court it is necessary to look at the peculiar nature of it; and if the court should be of opinion that the commissioner has power to commit for a contempt before him, obstructing the course of justice, we contend that he has not the power to commit for a letter written to him, whether reflecting on him in the character of judge or anything else."

To which Lord Abinger is reported as having replied:

> "Supposing a judge sitting at Nisi Prius, where it is admitted he constitutes a court of record, were to receive a private letter containing matters offensive to him, could he immediately order the clerk in the court, or the associate, to enter that he fined the writer?"

Sir William Follett:

“Certainly not: and, for this reason, we contend we are at liberty to draw the attention of the court to the circumstances. The contempt complained of here

> is not so strong as the case put by Lord Abinger: this letter does not do it in point of fact. The Attorney-General took the same view of it, that unless that letter were a contempt in the face of the court he could not argue that the commissioner had a right to commit. It must be something to impede the course of business. Great stress was laid upon the circumstance that the letter was delivered to Mr. Fane whilst he was sitting in the character of commissioner. The fact is, the letter was written and delivered to Mr. Fane in the evening."

Baron Parke then referred to the case of *The King v. Almon* (9), 5 Burr. 2686, as a case where there was a libel on Lord Mansfield, not in the face of the court, and punished by attachment, to which counsel retorted that there was no judgment in that case and it was the only one in which the attempt was ever made. Finally, Baron Parke asked (p. 330):

> "Does not an intemperate and abusive letter to a judge, in respect of the judgment he has pronounced, obstruct the proceedings of the court?"

To which Sir William Follett replied:

> "If so, it is extending the rule further than it has ever been done before."

These expressions of opinion by such distinguished judges are certainly enough to make us pause before coming to a contrary conclusion.

Mr. Gledhill also referred us to the definition of "publication" by Lord Esher, M.R., in *Pullman v. Hill & Co*. (10), [1891] Q.B. 524 at 527:

> "The making known the defamatory matter after it has been written to some person other than the person of whom it is written. If the statement is sent straight to the person of whom it is written there is no publication of it."

And he referred to Hawkins Pleas of The Crown (3rd. Edn.), Chapter 21 "Of Contempt against the King's Courts" where it is said, in s. 13:

> "But it seems the better opinion at this day, that a man cannot be indicted for any scandalous or contemptuous words spoken of or to such officers, not being in the actual execution of their office; for such an offence seems rather to proceed from ill-breeding than a contempt of the government; and though it may be a cause to bind a man to his good behaviour, yet it does not seem of such consequence to be a sufficient ground for a public prosecution as for an offence against the common peace, etc. . . ."

We have, however, found difficulty in reconciling what we have said so far with the case of *In re Wallace* (11) (1866), L.R. 1 P.C. 283, which went on appeal to the Privy Council from the Supreme Court of Nova Scotia. Wallace, who was an attorney and barrister of the Supreme Court, was suspended from practising therein for having addressed a letter to the chief justice which reflected on the conduct of the chief justice in matters which had been before him and also reflected on the conduct of the other judges and the administration of justice generally in the court. On appeal the judicial committee held that the letter, though a contempt of court and punishable by fine and imprisonment, having been written by Wallace in his individual and private capacity as a suitor in respect of a supposed grievance as a suitor and having no connection whatever with anything done by him professionally, it was not competent for the Supreme Court to go further than award to the offence the customary punishment for contempt of court, i.e. fine or imprisonment. The order of suspension was accordingly discharged but Lord Westbury giving the judgment of the committee said that the letter was a contempt of court "which it was hardly possible for the court to omit taking cognisance of" and at another point in the judgment said:

> "We desire it to be understood that we entirely concur with the judges of the court below in the estimate which they have formed of the gross impropriety of the conduct of the appellant."

The difficulty raised by this case is that the letter complained of came within the “scandalising” category, i.e. it was an act done or writing published calculated to bring the court or a judge of the court into contempt, etc., at least, it was certainly

dealt with as such by the Supreme Court of Nova Scotia. At p. 289 the chief justice giving the judgment of himself and five other judges said:

> "If the judges can be insulted by language or letter addressed to them and such a contempt of their person and authority committed with impunity, their weight and influence would be lost, and, failing to vindicate the dignity of their office thus outraged, they would forfeit and deserve to forfeit the public respect and confidence so necessary to their character and the due administration of justice. It was this feeling and the necessity thus imposed on us by the letter of Mr. Wallace rather than any personal consideration, which has compelled us to take steps against him."

Now it is clear that there was no publication of Wallace's letter except to the chief justice and therefore, until proceedings were taken against Mr. Wallace, no public knowledge of the letter. How then could the communication to the chief justice be said to be calculated to cause the judges or the court to forfeit public respect and confidence? With all respect to the learned judges of that court we find it difficult to follow their argument. It might of course be said that those parts of Wallace's letter which attacked the integrity of the other judges, having been communicated to the chief justice, there was sufficient publication; but we feel that this is rather an artificial distinction and it is quite clear that the judges of the Supreme Court did not attempt to distinguish between the attacks on the chief justice and the attacks on the other judges but treated them all alike as being contemptuous. Their Lordships of the Judicial Committee appear to have taken the same attitude towards the letter although Lord Westbury's judgment makes no specific reference to the reflections on the chief justice but refers to

> "a letter, addressed to the chief justice, reflecting on the judges and on the administration of justice generally in the court; which undoubtedly was a letter of a most reprehensible kind."

It is, however, apparent that the case made for Wallace on appeal was substantially that the mode of punishment inflicted was not the appropriate and fitting one and that the finding that the letter was contemptuous was not seriously contested. In those circumstances it was not necessary for the Committee to examine closely the nature of the contempt and it would be unsafe to assume that had they done so their Lordships would necessarily have agreed with all the reasons given by the learned judges of the court of Nova Scotia. The letter did in fact refer to matter which had been recently determined by the court in some of which appeals to the Privy Council were contemplated. It may be, therefore, that the committee considered the letter as a contempt within the second or "obstructive" category. For this reason, although in many respects the facts in *Wallace's* case (11) are very similar to the facts in the case now before us, we think it would be unsafe to take that case as an authority for the proposition that in order to constitute a contempt by libelling a judge it is sufficient to communicate the libel to him and to him only. Certainly so to say would be to extend the rule further than has ever been done before.

If it be thought that the view we are taking exposes judges to the annoyance or indignity of receiving insulting or derisive letters without any available redress, that is not so. The remedy lies, if the matter be grave enough, in a prosecution for criminal libel. Had that course been taken in the present case it would seem that a conviction must inevitably have followed and it is difficult to see any ground on which it could have been successfully attacked. The distinction surely lies in this: in a prosecution for criminal libel it is sufficient to show that the judge has been defamed; but in a prosecution for contempt of court it is necessary to show that something has been done or published which is calculated to lower the reputation and authority of the court in the eyes of the public.

For these reasons therefore we conclude that this appeal must be allowed and the conviction entered against the appellant be set aside. For the reason already stated,

we can make no effective order as to the sentence imposed on him, but we can and do order that the forfeiture of the Royal typewriter seized in his house be revoked and the article be returned to the appellant.

Appeal allowed.

For the appellant:
J Gledhill
Gledhill & Oulton, Nairobi

For the respondent:
C Brookes (Crown Counsel, Kenya)
The Attorney-General, the Seychelles

Aboker Mohamed, HT Ahmed Farah, Rer Rageh and others v The Queen
[1957] 1 EA 146 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	7 January 1957
Case Number:	240/1956
Before:	Sir Ronald Sinclair V-P, Briggs and Bacon JJA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Somaliland Protectorate – Russell, J

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[1] Criminal law – Murder – Sentence of death – Substitution of life imprisonment by appellate court – Circumstances justifying exercise of discretion – Indian Penal Code, s. 302 *– Criminal Procedure Ordinance s.* 278 (2) *as amended* (*Som.*).

Editor's Summary

The appellants had all participated in an unlawful assembly in the course of a dispute between two factions of a tribe. Shots were fired and one group ran away, pursued by members of the other faction. In the ensuing chase, three tribesmen were killed. At the trial the appellants and certain others were charged with murder and the prosecution relied on s. 149 of the Indian Penal Code pursuant to which all those present at an unlawful assembly are guilty of an offence committed by one of them in prosecution of the common object. The appellants, having been found guilty and sentenced to death, appealed against both conviction and sentence. The Court of Appeal allowed the appeal of one appellant against his conviction and also allowed the appeals of the other appellants against sentence of death. The case is reported principally because of the reasons given by the court for setting aside the sentences of death.

Held–

(i) where there are sufficient mitigating circumstances, the Court of Appeal will exercise its discretion and substitute a sentence of life imprisonment for a sentence of death.

(ii) in the instant case the mitigating circumstances were (*a*) that it was not proved that any of the appellants personally inflicted any of the injuries which the deceased received, (*b*) it was not an attack on unarmed or defenceless persons but on a group, some of whom appeared to be willing to enter into hostilities, and (*c*) it was not an attack on the police or other constituted authority.

(iii) in this case the circumstances were such as to justify the court in exercising its discretion and substituting a sentence of life imprisonment, although it did not follow that any of the three factors would alone have been sufficient to persuade the court to reduce the sentence and death was not to be considered an unusual sentence for murders committed in the course of tribal warfare.

Appeal allowed.

No cases referred to in judgment

Judgment

Sir Ronald Sinclair V-P: read the following judgment of the court: The six appellants were convicted by the High Court of Somaliland Protectorate of murder and were sentenced to death. They appealed against both

conviction and sentence. We allowed the appeal of the sixth appellant, setting aside the conviction and sentence of death. We dismissed the appeals of the first, second, third, fourth and fifth appellants against conviction, but allowed their appeals against sentence, setting aside in each case the sentence of death and substituting therefor a sentence of imprisonment for life. We now give our reasons for so doing.

All the appellants are members of the Ahmed Farah section of the H.T. tribe and all except the first appellant are members of the Burraleh Mohamed subsection. On June 10, 1956, at about midday at Mohamed Ugas a "shir" had been held to discuss the amount payable as compensation for the wounding of the third appellant by a young man of the Ibran rer Harbi section of the H.T. tribe on the previous day. The Ibran rer Harbi had accepted the award of compensation for the wounding of the third appellant and had brought two rams to be handed over as preliminary compensation, when suddenly a number of the Ibran rer Harbi who were in the vicinity of Mohamed Ugas, where the karias of both sections of the tribe were situated, were pursued by a large group composed mainly of the rer Burraleh Mohamed. People from the village and from the "shir" rushed to the scene. Some spoke to the opposing group trying to keep the peace, but while this was taking place a shot was fired from the rer Burraleh Mohamed followed by a shot from the other group. The Ibran rer Harbi ran away and were chased by the rer Burraleh Mohamed for a considerable distance. Some twenty shots were fired and two members of the Ibran rer Harbi, Arraleh Jiir and Ahmed Bullaleh, were overtaken and killed by members of the rer Burraleh Mohamed group. Arraleh Jiir and Ahmed Bullaleh were shot three times in the back and each received multiple stab wounds. One member of the rer Burraleh Mohamed was killed by a single stab wound.

The six appellants were jointly charged with eight other men who were acquitted, with the murder of Arraleh Jiir under the provisions of s. 149 and s. 302 of the Indian Penal Code in that they were members of an unlawful assembly some of the members of which murdered Arraleh Jiir in the prosecution of the common object of that assembly, which was to murder persons of the Ibran rer Harbi section of the H.T. tribe. Section 149 of the Indian Penal Code provides:–

> "If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

There was ample evidence to support the finding of the learned trial judge that there existed an unlawful assembly composed almost entirely of the rer Burraleh Mohamed whose common intention was to murder persons of the Ibran rer Harbi subsection, and that some of the members of the unlawful assembly committed murder, by shooting and stabbing to death Arraleh Jiir who was endeavouring to make good his escape, an offence committed in prosecution of the common object. By the provisions of s. 149 of the Indian Penal Code every member of that unlawful assembly was guilty of murder.

We shall consider first the appeals against conviction of the first, second, third, fourth and fifth appellants. They all denied taking any part in the unlawful assembly. The third, fourth and fifth appellants sought to establish alibis, while the first appellant, though admitting that he was in the vicinity of the fight watering his camels, maintained that he took no part in it. The second appellant, who is the father of the third appellant, attended the "shir". His defence was that his only concern was to stop the fight and that, though he went towards the scene, he could not run fast enough to arrive in time owing to his age. But the evidence of the witnesses for the prosecution, if believed, established beyond doubt that these appellants were members of the unlawful assembly and shared its common object. The first appellant was identified as carrying a "bud", the second appellant a spear, the third appellant a spear, the

fourth appellant a rifle and the fifth appellant a rifle. The learned judge accepted the evidence of the witnesses for the prosecution implicating these appellants

and rejected the evidence of the witnesses for the defence and we can find no ground for saying that he was wrong to do so. It is true that the first appellant was identified by only one witness, but the learned judge gave cogent reasons for accepting the evidence of this witness.

As to the sixth appellant, two witnesses, Dahir Egal (P.W. 4) and Farah Haji Hersi (P.W. 7), identified him as taking part in the unlawful assembly. Farah Haji Hersi said that he was in front on the eastern side and carrying a rifle. Dahir Egal, on the other hand, testified that he was about the middle of the crowd, and that he was not carrying a rifle. Three witnesses gave evidence confirming the sixth appellant's story that on the day when the murder took place he was at Kerlogode, a day's walk from Mohamed Ugas. Dealing with the case against this appellant, the learned judge said:–

> "On the other hand the evidence of Farah Haji Hersi against the 12th accused was supported by the evidence of Dahir Egal (P.W. 4) although the latter did not go so far as to say that he carried a rifle. In spite of the defence of an alibi which I thought was particularly unconvincing, I am satisfied that the 12th accused shared in the common object of the unlawful assembly of which he was a member."

In view of the definite evidence of Dahir Egal that the sixth appellant was not carrying a rifle, it was a misdirection to state that he "did not go so far as to say that he (the sixth appellant) carried a rifle." The learned judge acquitted the fourteenth accused because two identifying witnesses, one of whom was Farah Haji Hersi, gave unsatisfactory evidence as to whether that accused was carrying a weapon. Had the learned judge appreciated that the two witnesses who identified the sixth appellant as being a member of the unlawful assembly definitely contradicted each other as to whether he was carrying a rifle, we think he might not have been satisfied that the guilt of the sixth appellant had been established beyond reasonable doubt. For these reasons we considered that it was unsafe to allow the conviction of the sixth appellant to stand.

Under s. 302 of the Indian Penal Code the offence of murder is punishable with death or transportation for life. In addition the offender is liable to fine. Section 278 (2) of the Criminal Procedure Ordinance as amended by Ordinance No. 15 of 1956 provides that where a sentence of "transportation for life" may be imposed by the High Court, the High Court may alternatively impose a sentence of "imprisonment for life." The courts in India have held that the normal punishment for murder is death which must be imposed unless there are extenuating circumstances.

> "The extreme sentence is the normal sentence: the mitigated sentence is the exception. It is not for the judge to ask himself whether there are reasons for imposing the penalty of death, but whether there are reasons for abstaining from doing so."

Ratanlal & Thakore's Law of Crimes (17th Edn.) at p. 754.

> "The only sentences possible in a case of murder are those of death and transportation for life. Of these two, death is the ordinary and usual sentence prescribed by the law and, where crime of a particular character is rife, it is the only appropriate sentence. But in cases of alleviation, the court is empowered to substitute the alternative sentence, but has to assign reasons therefor. The discretion to be exercised by the court is a judicial discretion, it is not arbitrary but must follow accepted principles":

Gour's Penal Law of India (6th Edn.) Vol. 2 at p. 1359. The view which the courts in India have taken may have been affected by s. 365 (5) of the Indian Code of Criminal Procedure which provides that

> "if the accused is convicted of an offence punishable with death, and the court sentences him to any punishment other than death, the court shall in its judgment state the reasons why sentence of death was not passed."

However that may be, we think that view is correct although there is no equivalent provision in Somaliland.

The learned judge gave no reasons for imposing the sentences of death, but we do not think it was necessary for him to do so, since we take the view that by the law of

Somaliland Protectorate the normal punishment for murder is death. But, although as a general rule an appellate court will not interfere with the discretion of a judge unless it has been exercised unjudicially or on wrong principles, we do not think that that rule should be applied where a sentence of death has been imposed under s. 302 of the Indian Penal Code. First, it is, at the least, difficult to say whether the judge has exercised his discretion on wrong principles when he need give no reasons for imposing a sentence of death. Secondly, we think that an appellate court is entitled, indeed bound, to exercise its own discretion where the life of a subject is at stake. In our view, therefore, we are entitled to substitute a sentence of imprisonment for life for a sentence of death if we find that there are sufficient mitigating circumstances to justify such a course.

In the present case we thought that there were such mitigating circumstances. First, it was not proved that any of the appellants personally inflicted any of the injuries which the deceased received. Secondly, this was not an attack on unarmed and defenceless persons or on women and children but on a group of some whom appeared, at least at the beginning, to be willing to enter into hostilities. Thirdly, this was not an attack on the police or other constituted authority. We do not wish it to be thought, however, that the capital sentence is not ordinarily appropriate to murders committed in the course of inter-tribal warfare. And it does not follow that any of the three factors which we have mentioned would alone have been sufficient to persuade us to reduce the sentence.

Appeal allowed.

For the first and sixth appellants:
HC Oulton
Gledhill & Oulton, Nairobi

For the second, third, fourth and fifth appellants:
D Cassidy
D Cassidy, Moshi

For the respondent:
DR Boy (Crown Counsel, Kenya)
The Attorney-General, Somaliland Protectorate

Antonio Barugahare and others v R

[1957] 1 EA 149 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	2 April 1957
Case Number:	282/1956
Before:	Sir Ronald Sinclair V-P, Briggs JA and Lewis J (U)
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Uganda – McKisack, C.J

[1] Evidence – Statement by deceased – Admissibility – The Evidence Ordinance s. 30 (1) (*U*) – *The Indian Evidence Act,* 1872 *s.* 32 (1).

Editor's Summary

The only point in this appeal was the admissibility of certain evidence given by a friend of the deceased woman. The witness gave evidence that the deceased had told her some six weeks before her death that the first accused had asked her to marry him and to lend him money to pay his poll tax. No objection to this evidence had been taken at the trial and it had been introduced for the purpose of showing a motive.

Held – The evidence was outside the scope of para. (1) of s. 30 of the Evidence Ordinance and went beyond what was permissible, since the facts alleged were not proximately relating to the death; however, even if the evidence had been excluded, the accused must still inevitably have been convicted.

Swami v. The King Emperor, [1939] 1 All E.R. 396 applied.

Appeal dismissed.

Cases referred to in judgment:

(1) *Swami v. King-Emperor*, [1939] 1 All E.R. 396.

Judgment

The following judgment was read by **Lewis J:** by direction of the courts: This was an appeal from conviction of murder by the High Court of Uganda. There were five appellants, of whom the first, second, fourth and fifth-named were condemned to death. The third-named appellant was found to have been under eighteen years of age at the date of the offence and was therefore sentenced to be detained during the Governor's pleasure. When the appeal was called on the third appellant was unable to attend owing to illness. He desired to be present and be heard, and accordingly we decided to postpone the hearing of his appeal, but to hear at once the appeal of the other four appellants. The only point which could validly be raised in their favour was that certain evidence, with which we shall deal, had been improperly admitted against them. We were of opinion that this irregularity had had no material effect, in that, if the evidence in question had been excluded, they must still inevitably have been convicted. We accordingly dismissed their appeals.

The evidence in question was given by a woman named Fulumera, a friend of the murdered woman Magdalena and was as follows:

> "I knew deceased Magdalena. We were friendly and used to visit each other. Shortly before her death she told me Accused I was asking her to marry him and to give him money to pay his poll tax, and that she had refused to marry him. She did not tell me whether she agreed to give him money. I was at her house when she told me this. It was after last Christmas that she told me about asking money for poll tax. It was another occasion that she told me about his asking to marry her – it was before Christmas, about half-a-month before Christmas."

The date of the offence was January 23, some six weeks after the first conversation to which Fulumera refers. The learned Chief Justice dealt with the matter in his judgment as follows:

> "A woman called Fulumera (p. 18) testified that she visited deceased about 2 p.m. that day. She was a friend of deceased, and the latter had recently told her that Accused 1 had been asking her (deceased) to lend him money and to marry her."

The object of the prosecution was of course to establish a motive against the first appellant, who appears to some extent to have been the ringleader. No objection was taken, and it appears to have been assumed that the evidence was admissible under para. (1) of s. 30 of the Evidence Ordinance, which is in pari materia with s. 32 (1) of the Indian Act. The locus classicus on the latter is in *Swami v. King-Emperor*, (1) [1939] 1 All E.R. 396, at p. 401, where their Lordships of the Privy Council said:

> "The first question with which their Lordships propose to deal is whether the statement of the widow – that on March 20, the deceased had told her that he was going to Berhampur, as the accused's wife had written and told him to go and receive payment of his dues – was admissible under the Indian Evidence Act, 1872, s. 32 (1). That section provides as follows:
>
> > " 'Statements written or verbal of relevant facts made by a person who is dead . . . are themselves relevant facts in the following cases (1) when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.
> >
> > " 'Such statements are relevant whether the person who made them was or was not at the time when they were made under expectation of death and whatever may be the nature of the proceedings in which the cause of his death comes into question.'
>
> "A variety of questions as to the effect of this section has been mooted in the Indian courts. It has been suggested that the statement must be made after the transaction has taken place, that the person making it must

be at any rate near death, and that the ‘circumstances’ can only include the acts done when and where the death was caused. Their Lordships are of opinion that the natural meaning of the words used does not convey any of these limitations. The statement

> may be made before the cause of death has arisen, or before the deceased has any reason to expect to be killed. The circumstances must be circumstances of the transaction. General expressions indicating fear or suspicion, whether of a particular individual or otherwise, and not directly related to the occasion of the death, will not be admissible. However, statements made by the deceased that he was proceeding to the spot where he was in fact killed, or as to his reasons for so proceeding, or that he was going to meet a particular person, or that he had been invited by such person to meet him, would each of them be circumstances of the transaction, and would be so whether the person was unknown, or was not the person accused. Such a statement might indeed be exculpatory of the person accused. 'Circumstances of the transaction' is a phrase, no doubt, that conveys some limitations. It is not as broad as the analogous use in 'circumstantial evidence,' which includes evidence of all relevant facts. It is, on the other hand, narrower than res gestae. Circumstances must have some proximate relation to the actual occurrence, though – as, for instance, in a case of prolonged poisoning – they may be related to dates of the actual fatal dose.
>
> "It will be observed that 'the circumstances' are those of the transaction which resulted in the death of the declarant. It is not necessary that there should be a known transaction other than that the death of the declarant has ultimately been caused, for the condition of the admissibility of the evidence is that 'the cause of (the declarant's) death comes into question.' In the present case, the cause of the deceased's death comes into question. The transaction is one in which the deceased was murdered on March 21 or March 22, and his body was found in a trunk proved to be bought on behalf of the accused. The statement made by the deceased on March 20 or March 21 – that he was setting out to the place where the accused lived, and to meet a person, the wife of the accused, who lived in the accused's house-appears clearly to be a statement as to some of the circumstances of the transaction which resulted in his death. The statement was rightly admitted."

Applying these tests, we were of opinion that Fulumera's evidence was outside the scope of the section. The statements of the deceased indicating motive would have been rightly admitted if made after the attack, and perhaps even if made in clear reference to an imminently expected attack which later took place; but we think that in the present circumstances they were neither statements as to the cause of death nor statements as to the circumstances of the transaction which resulted in the death. In one sense a murder may be said to "result from" a long-nurtured grudge, and the source of the grudge may be said to be a transaction which itself results in the death; but we emphasize the requirement laid down by the Privy Council that there must be "some proximate relation to the actual occurrence." Whether or not the facts here alleged bore a relation to the murder, there was certainly no proximate relation. Questions of this kind are questions of degree and to some extent of impression, but we think the evidence tendered in this case went beyond what is permissible.

Appeal dismissed.

First, second, fourth and fifth appellants in person.

Third appellant did not appear and was not represented.

For the respondent:
MJ Starforth (Crown Counsel, Uganda)
The Attorney-General, Uganda

Pascal Clement Braganza v R

[1957] 1 EA 152 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	1 March 1957
Case Number:	289/1956
Before:	Sir Ronald Sinclair V-P, Briggs and Bacon JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Rudd and Edmonds, J.J

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[1] Criminal law – New trial – Grounds for ordering.

Editor's Summary

The appellant had been convicted of theft in the magistrate's court, Nairobi, the evidence being mainly two statements made by him, one to his employer's representatives and one to a police officer. On appeal to the Supreme Court it was held that the former statement had been wrongly admitted in evidence and that certain issues of fact relevant to the admissibility of the second statement might, if the first statement had been excluded by the magistrate, have been determined in the appellant's favour; a re-trial was, therefore, ordered before another magistrate and against this order the appellant appealed. The statement to the police officer could be read in two ways, on one of which it might be taken as a confession, and if it was it would support a conviction without corroboration.

Held – In considering whether the order for re-trial was right it was only necessary to hold that the statement might reasonably be read as a confession which could, even if uncorroborated, support a conviction.

Appeal dismissed.

Judgment

Briggs JA: read the following judgment of the court: The appellant was charged jointly with one Ignatius de Souza with theft of two tractor track links and on conviction in the magistrate's court at Nairobi was sentenced to twelve months imprisonment with hard labour. His conviction was largely based on two statements made by him, one being to two representatives of his former employers, who were the complainants, and the other to a police officer. On appeal to the Supreme Court it was held that the former statement had been wrongly admitted in evidence, and this is now common ground. As regards the latter statement, the court held that certain issues of fact relevant to its admissibility might, if the first statement had been excluded by the magistrate, have been determined by him in the appellant's favour. It was therefore impossible to say whether the second statement had been properly received in evidence, or should have been excluded. The court therefore ordered a re-trial by another magistrate. From that order the appellant appealed to this court. We dismissed the appeal and now give our grounds for doing so.

It was contended for the appellant that it appeared from the record that, even if the statement to the police was admissible, there was still not sufficient evidence to justify a conviction, and that in such circumstances it is improper to order a re-trial. We accept the principle that re-trial should not be ordered

unless the court is of opinion that on a proper consideration of the admissible, or potentially admissible, evidence, a conviction might result; but we saw no reason to suppose that the Supreme Court had either overlooked that principle or departed from it. We thought that, although it was not expressly so stated in their judgment, it appeared by implication that they were of opinion that, if the statement to the police was found to be admissible, there would be evidence to support a conviction. The appellant's counsel, however, contended that, if that was their opinion, it was erroneous. He conceded that there was evidence of a theft, but submitted that there was no evidence at all to connect the appellant with it. This depends on the way one reads the statement to the police. Read in one way it might be taken as a confession of the offence charged; read in another way it might not amount to that. It was repudiated by the appellant in an unsworn statement at the trial, not retracted. If it was a confession it would therefore support a conviction without corroboration. We thought that, for the purpose of considering

whether the order of re-trial was right, it was only necessary to hold that, on a reasonably possible view of its meaning, the statement might be a confession which could, even if uncorroborated, support a conviction. Since we did so hold, we considered that the order for re-trial could not be said to have been wrongly made.

It only remains to say that, since the re-trial will take place, it would clearly be undesirable that we should give our own views as to the meaning which should be attributed to the statement, or as to the effect of other evidence on which the Crown relies. It is possible that on the re-trial there may be more evidence against the appellant than was produced at the first trial. That is not either a reason against ordering a re-trial or a reason in favour of it. The order was not made on the basis that the Crown had failed to prove its case the first time, but might be able to do so the second time, and it could not properly have been made on that footing. We say no more than that there was evidence on the record indicating that on a re-trial a conviction might eventuate.

Appeal dismissed.

For the appellant:
J O'Brien Kelly and *SL Chawla*
J O'Brien Kelly, Nairobi

For the respondent:
C Brookes (Crown Counsel, Kenya)
The Attorney-General, Kenya

Dhanji Govind and another v Commissioner of Income Tax

[1957] 1 EA 153 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	30 January 1957
Case Number:	64/1955
Before:	Sir Ronald Sinclair V – P, Sir Kenneth O'Connor CJ (K) and Briggs JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Rodwell, Ag.-J

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[1] Income tax – Premiums for leases – Whether taxable as income – The East African Income Tax Management Act, 1952, *s.* 8 (1).

Editor's Summary

The appellants owned jointly a plot of land in Nairobi on which they had erected a building consisting of six shops on the ground floor with offices and residential accommodation above. Four of the shops were let in 1952 for a term of ten years with a right of renewal for a further five years. Three of the shops were let at monthly rentals of Shs. 350/- and the fourth at Shs. 450/-. Three of the tenants paid a premium of Shs. 30,000/- each and the fourth a premium of Shs. 22,000/- for their leases making a total of Shs. 112,000/-. Of this total the appellants had received Shs. 25,000/- in 1951 and the balance of Shs. 87,000/- in 1952. Each of the appellants was assessed to income tax in the year 1951 on his half share of the Shs. 25,000/- received in that year and in respect of the year 1952 on his half share of the Shs. 87,000/- received in 1952.

Their appeal to the local committee and a further appeal to the Supreme Court of Kenya having been dismissed they again appealed on the grounds that the premiums were not income but capital receipts and, accordingly, not taxable or, alternatively, if they were income this should be apportioned and spread over ten years being the term of the leases in respect of which the premiums were paid. For the respondent it was argued that even if the premiums were capital receipts, they were chargeable to tax.

Held–

(i) if the premiums had been capital receipts they would not be taxable as income under s. 8 (1) (*g*) of the Eastern African Income Tax (Management) Act, 1952, as contended by the respondent.

(ii) the premiums were in fact income under s. 8 (1) (*g*) and were, therefore, assessable to tax in the year of receipt and could not be apportioned over the term of the leases.

Per **Sir Ronald Sinclair V-P:** "if this judgment is thought to work hardship on the taxpayer, the law of income tax is such that it is useless to try to relate it to any standards of natural justice.

Appeal dismissed.

Cases referred to:

(1) *Gillatt & Watts v. Colquhoun*, 2 T.C. 76.

(2) *Green v. Favourite Cinemas Ltd*., 15 T.C. 390.

(3) *British Insulated and Helsby Cables v. Atherton*, 10 T.C. 155.

(4) *Collyer v. Hoare & Co. Ltd*., 17 T.C. 169; [1937] 3 All E.R. 491.

(5) *Usher's Wiltshire Brewery Ltd. v. Bruce*, 6 T.C. 399.

(6) *Davies v. Abbott*, 11 T.C. 575.

(7) *Greyhound Racing Association* (*Liverpool*) *Ltd. v. Cooper*, [1936] 2 All E.R. 742.

(8) *Hughes v. B. G. Utting & Co. Ltd*., 23 T.C. 174; [1940] 2 All E.R. 76.

(9) *Kauri Timber Co. Ltd. v. Commissioner of Taxes*, [1913] A.C. 771.

(10) *Henriksen v. Grafton Hotel Ltd*., [1942] 1 All E.R. 678.

January 30. The following judgments were read.

Judgment

Sir Ronald Sinclair V-P: The two appellants, who are brothers, are partners in equal shares in the firm of Dhanji Govind & Bros. which during the relevant period carried on commercial business at Nairobi. They are the registered proprietors as tenants in common of Plot No. 138/22 in Nairobi together with the buildings thereon. They hold the land on a lease from the Crown for a term of ninety-nine years of which there are now approximately fifty years to run. The property is not part of the partnership assets but is owned by the appellants as individuals. The appellants erected on the land a four-storied building which was completed in February, 1952. The building comprised six shops on the ground floor, offices on the first and second floors and residential accommodation on the third floor. The six shops on the ground floor were let in 1952 to six tenants. Four of the shops were let from April 1, 1952, for a term of ten years with a right of renewal for a further period of five years. Of these four shops, three were let at a monthly rental of Shs. 350/- and the fourth at a monthly rental of Shs. 450/-. Three of the tenants of these four shops paid a premium of Shs. 30,000/- each and the fourth a premium of Shs. 22,000/- for the term of the lease and the right of renewal, making a total of Shs. 112,000/-. Of this sum, Shs. 25,000/- was paid to the appellants in 1951, and the balance of Shs. 87,000/- in 1952. Each of the appellants was assessed to income tax in respect of the year 1951 on his half share of the Shs. 25,000/- received in that year and in respect of the year 1952 on his half share of the Shs. 87,000/- received in 1952. They appealed to the local committee and, their appeals having been dismissed, they appealed to the Supreme Court of Kenya against their assessments in respect of the year 1952 on the ground that the premiums were not income but capital receipts and accordingly not taxable or, alternatively, on the ground that the premiums, if income, should be apportioned and spread over ten years being the term of the leases in respect of which

the premiums were paid. The Supreme Court was of the opinion that the premiums were income within the meaning of the East African Income Tax (Management) Act, 1952, and that they were income for the year 1952 and for no other year, and accordingly dismissed the appeals. As I understand the judgment of the learned judge of the Supreme Court, he held that the premiums were taxable income on the ground that the appellants were carrying on a business of letting property. The appellants now appeal to this court on substantially the same grounds.

Before dealing with the main ground of appeal that the premiums were capital payments and not income, I shall dispose of the contention of the respondent that the premiums, even if they were capital payments, are chargeable under s. 8 (1) (*g*) of the Eastern African Income Tax (Management) Act, 1952 (hereinafter referred to as "the Act"). Section 8 (1) of the Act, so far as it is relevant to this appeal, reads:

> "8.(1) Tax shall, subject to the provisions of this Act, be charged in respect

of each year of income at the rate imposed for that year by the appropriate Territorial Income Tax Ordinance upon the income of any person accruing in, derived from, or received in–

(i) East Africa, in the case of a person who is resident in the Territories, or

(ii) the Territories, in the case of a person who is not resident in the Territories,

in respect of–

(*a*) gains or profits from any trade, business, profession, or vocation, for whatever period of time such trade, business, profession or vocation, may have been carried on or exercised;

. . . . . .

(*g*) rents, royalties, premiums and other profits arising from property."

Mr. Newbold who appeared for the respondent conceded that the Act imposes a tax on income, but he argued that "income" must be construed in its wide sense as meaning "anything coming in", whether it is capital or revenue, and that as premiums are expressly chargeable under paragraph (*g*) they are taxable even if they are capital payments. I am unable to accept that contention. Such a construction would extend the normal meaning of the term "income". There is no comprehensive definition of what is income in the English Income Tax Acts, but it has been said over and over again that the tax imposed by those Acts is an income tax charged on income as distinct from capital. I can find nothing in the East African Act which requires a wider meaning to be given to the term "income" and I think that the purpose of the Act is to impose a tax on income as distinct from capital. In my view, therefore, if the premiums received by the appellants were capital receipts, they would not be if taxable even though "premiums" are expressly included in paragraph (*g*).

In support of his submission that the premiums were capital and not income receipts, Mr. Lean for the appellants referred us to a number of English authorities. But the scheme of the English Income Tax Acts is so different from the East African Act that I derive little assistance from most of them. In *Gillatt & Watts v. Colquhoun* (1), 2 T.C. 76 and *Green v. Favourite Cinemas Ltd*. (2), 15 T.C. 390, it was held that a premium paid to acquire a lease for business purposes was a capital expenditure which was not deductible in arriving at profits. Those decisions are in accordance with the test applied by Lord Cave in *British Insulated and Helsby Cables v. Atherton* (3), 10 T.C. 155 at p. 192:

> "But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable, not to revenue, but to capital."

Mr. Lean argued that as a premium paid by a tenant is capital expenditure, it is therefore capital in the hands of the landlord. But that is not necessarily so. When a sum changes hands it is clear that it may also change its character, and a lump sum payment may be treated as capital in the hands of the recipient, though deductible as a revenue expense by the payer, and vice versa: see Simon's Income Tax (2nd Edn.), Vol. 1, art. 6 and art. 39. In *Collyer v. Hoare & Co. Ltd*. (4), 17 T.C. 169, a brewery company was the owner and lessee of a number of licensed houses which it let to tenants who were "tied" to purchase their liquors from the company. Leases were granted for periods of from 3½ to twenty-one years and in a number of cases the tenants paid a premium in addition to annual rent. The rent paid by the company or the amount of the Schedule A assessment (where the company was the freeholder) was in nearly every case greater than the rent paid by the tied tenant, but less than the rent paid by the tenant plus the sum arrived at by spreading over the term of the lease the premium paid by him. The Crown contended that in determining whether the company had sustained a deficiency of rent in connection with their tied houses

(which would admittedly be admissible as a deduction under the decision in *Usher's Wiltshire Brewery Ltd: v. Bruce* (5), 6 T.C. 399), both rents and premiums received

must be taken into account. It was held that, in computing the appropriate deduction for a particular tied house, account must be taken of any premium paid as well as rent. For the purpose of ascertaining the commercial profits of the company, premiums were there treated as revenue receipts. Furthermore, although a premium paid by a tenant is capital expenditure, in England tax in respect of land is charged under Schedule A on the annual value thereof, and for the purpose of determining the annual value, a premium paid for a lease may be taken into account: *Davies v. Abbott* (6), 11 T.C. 575. As it is the landlord who eventually pays the tax chargeable under Sch. A, a premium received by him is, in effect, ultimately treated as income.

Mr. Newbold's argument in support of the contention of the respondent that the premiums were income receipts is as follows: if a capital asset is sold, the purchase money received is a capital receipt, but if money is received for the utilisation of a capital asset, it is revenue: here, the capital asset was the head lease together with the buildings on the land: the appellants did not dispose of all their interest in this asset, but merely utilised it by granting sub-leases, retaining the reversion: the premiums received for such utilisation were therefore revenue.

In my view the contention of the respondent is correct: there is authority to support it. In *Greyhound Racing Association* (*Liverpool*) *Ltd. v. Cooper* (7), [1936] 2 All E.R. 742, a company having acquired a racing track and equipped it for greyhound racing, fell into financial difficulties, and the debenture holders appointed a receiver. The latter hired the track to another company. The second company, desiring to go into voluntary liquidation, it became necessary to ascertain its liabilities, and the receiver of the first company was approached to fix a sum for which he would accept a full surrender of the hiring agreement. It was eventually agreed that a full surrender would be accepted on a payment of £15,640. It was held that the payment was a payment in respect of future rents and was to be treated as income and not as capital. In the course of his judgment in that case Lawrence, J., said at page 744:

> "The question as to what receipts are revenue and what are capital has given rise to much difference of opinion; but it is clear in my opinion, that, if the sum in question is received for what is in truth the use of capital assets, and not for their realisation, it is a revenue receipt, not capital. It is argued here that the licence of March 11, 1932, was a capital asset of the appellant company, and that the sum paid for the surrender of that licence was a part realisation of that capital asset . . . But here in my opinion, the only capital asset in fact acquired by the appellant company was the track and its equipment. The user of that track, whether by the appellant company or its licensee, did not create new capital assets, nor did it realise the original capital asset, which remains the property of the appellant company, for which it has received, in the year 1934, the sum of £15,640 and is to receive the new rents provided for by the agreement of November, 1934."

Hughes v. B. G. Utting & Co. Ltd. (8), 23 T.C. 174, to which we were referred by both counsel for the appellants and for the Crown, is not directly in point but there are some relevant observations in the speech of Lord Romer in the House of Lords. The facts of that case were that a company carried on a business of speculative builders. It built houses and disposed of them by granting 99 year leases at yearly ground rents and at premiums. The company contended that in computing its profits for tax purposes nothing ought to be included in respect of the premiums or the ground rents; and, alternatively, that as regards the ground rents no profit arose in respect of the ground rents until the ground rents were sold. The Special Commissioners decided that both the premiums and the realisable values of the ground rents, at the dates of the sales of houses, should be brought in as receipts of the trade. It was held that, though the Special Commissioners' decision was correct as to premiums, the ground rents (i.e. the unsold freeholds) should be brought into account at cost or market value, whichever was the less. It was pointed out that although the agreements with the purchasers spoke of a sale at a price, in fact what had happened

was that the company had granted leases for 99 years and had retained the freehold interest. Lord Romer said at p. 196:

> "By such agreement, in which the proposed lessee is described as 'the purchaser' the company purports to agree 'to sell' and the lessee purports to agree to 'purchase by way of lease' for the sum therein specified the particular land and house in question. It then fixes the date for completion and provides that upon completion a lease of the property will be granted to the 'purchaser' for a term of ninety-nine years, at the ground rent therein specified. But the expression 'a sale by way of lease' is a contradiction in terms. A sale is the antithesis of a lease. The owner of a freehold house may sell it, or he may retain it. In the former case he will receive money or (as in Emery's case, [1937] A.C. 91) money's worth the value of the house based upon its income-producing potentialities. In the latter case, assuming that he does not occupy it himself, he will retain it as an income-producing investment, and will obtain the income by means of letting it upon lease. It would be wholly inaccurate in that case to say that he is 'selling' the house by way of lease. He is doing nothing of the kind, whether the lease be short or long, and whether he exacts a premium which is merely an anticipation of future income, or relies solely upon an annual or monthly or weekly rent."

and at p. 198:

> "The court did not, however, treat the premiums as being consideration received on a sale. It is no doubt true that if a lease for ninety-nine years or any other longer term were to be granted by the respondents at a peppercorn rent in consideration of a premium, the premium would almost certainly be equivalent to the purchase money that could have been obtained upon a sale of the free-hold, and the reversion would have no appreciable value. The reversion would nevertheless exist as an asset of the respondents, and the transaction, though differing in no way from a sale in its material results, could not even then be accurately described as one."

I am clearly of the opinion that the premiums were received by the appellants for the user of a capital asset and not for its realisation and that they were therefore income and taxable under para.(*g*) of s. 8 (1) of the Act.

Mr. Lean also submitted that a payment cannot be income unless there is some form of continuity or repetition. I do not think that is a conclusive test.

> "Though an item of receipt or expenditure does not in fact recur, it may nevertheless constitute an item on revenue account if it is capable of recurring even if only in the sense that it is related to transient circumstances":

Simon's Income Tax (2nd Edn.), Vol. 1, art. 45. In the present case the receipt of further premiums in respect of the property was undoubtedly a possibility. In any event, it seems to me that the premiums were simply lump sum payment made in consideration of the appellants' foregoing some of the monthly rent which would otherwise have been charged or, in the words of Lord Romer in *Hughes v. Utting & Co. Ltd*. (8), were "merely an anticipation of future income".

It was also contended by the respondent that the Supreme Court was right in finding that the appellants were carrying on a business of letting property and, accordingly, that the premiums are taxable under paragraph (*a*) of s. 8 (1) of the Act as gains or profits from a business as well as under para. (*g*). I think it is not necessary for us to decide that point. Whether the premiums are considered as income under para. (*g*) or as revenue receipts of a business under para. (*a*), they are taxable income of the year of receipt. We are not asked by the taxpayer to say that the letting of these properties was a business for the purpose of allowing him to deduct current expenses of that business, and in the absence of such a request, I think the question whether para. (*a*) or para. (*g*) applies is in this country and for the purposes of this case academic, and therefore should not be answered.

The leasehold interest of the appellants in the property is, no doubt, a wasting asset, but as their Lordships of the Privy Council said in *Kauri Timber Co. Ltd. v.*

Commissioner of Taxes (9) [1913], A.C. 771:

> "It has long been the law of the United Kingdom that the exhaustion of capital, however it might be treated on strict actuarial principles or according to principles of economics, may for the purposes of taxation be treated as profit."

As to the alternative ground of appeal namely that, if the premiums are held to be income for the purposes of assessment they should be spread over the period of the term of the leases, I regret that I must take the same view as did the Supreme Court. In *Davies v. Abbott* (6), on which Mr. Lean relied, it was held that to arrive at the annual value of land under Schedule. A where a premium has been paid for a lease, there might be added to the rent paid a further sum equal to the premium divided by the number of years in the term of the lease. That decision is no authority for Mr. Lean's contention that a premium taxable as income may be spread over the period of the term of the lease. On the contrary, it is clear from the provisions of the Act that in East Africa a receipt in one year must be brought into account in that year. There is no power to relate it to any year other than the year of receipt and, in the absence of an express power, "spreading over" is not permissible.

I think a word of warning may be added. This judgment should not be taken as authority that every premium received for granting a lease must be income. There may be cases where the granting of a lease is in substance, if not in form, a disposal of the whole of the lessor's capital investment. In such a case the sum representing recoupment of his capital would not be income, and the profit, if any, might be either a capital gain or income according to the circumstances.

Also I would add that, if this judgment is thought to work hardship to the taxpayer, the law of income tax is such that it is useless to try to relate it to any standards of natural justice. And finally I would recall the following remarks of Lord Greene, M.R., in *Henriksen v. Grafton Hotel Ltd*. (10), [1942] 1 All E.R. 678 at 682:

> "It frequently happens in income tax cases that the same result in a business sense can be secured by two different legal transactions, one of which may attract tax and the other not. This is no justification for saying that a taxpayer who has adopted the method which attracts tax is to be treated as though he had chosen the method which does not or vice versa."

I would therefore dismiss the appeal with costs.

Sir Kenneth O'Connor CJ: I agree with the judgment which has just been delivered and have nothing to add.

Briggs JA: I also agree.

Appeal dismissed.

For the appellants:
I Lean
Shapley Barrett, Allin & Company, Nairobi

For the respondent:
CD Newbold, QC and *JC Hooton*
The Legal Secretary, East Africa High Commission

Administrator-General, Zanzibar v Nassor Bin Fazil Bin Nassor and others
[1957] 1 EA 159 (SCZ)

Division:	His Highness The Sultan's Court for Zanzibar at Zanzibar
Date of judgment:	18 May 1957
Case Number:	97/1956
Before:	Law J
Sourced by:	LawAfrica

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[1] Mohamedan law – Validity of unexecuted will – Whether failure to execute is indicative of lack of intention to proceed with will.

[2] Mohamedan law – Validity of gift to take effect in future.

[3] Mohamedan law – Wakf – Non-compliance with legal formalities fatal – Registration of Documents Decree (*Cap.* 111) *s.* 4 (*Z.*), *and Land Alienation Decree,* 1939, *s.* 4 (*Z.*), *as amended by Decree* 26 *of* 1953 (*Z.*).

Editor's Summary

A testatrix some time before her death, with the assistance of a clerk in the Kadhi's Court, had prepared a draft will, a draft deed of gift and a draft deed of dedication of two shambas as a wakf. These draft documents were never engrossed, executed or registered by the testatrix though at least six months had elapsed from the time of their preparation to the date of her death on July 2, 1955. On an originating summons taken out by the Administrator-General as plaintiff–

Held–

(i) the court being satisfied that (*a*) the unsigned will represented the deceased's testamentary intentions and (*b*) her failure to sign the will during the period of at least six months did not, in the circumstances, indicate an intention not to proceed with the will as drafted, the will should under Mohamedan law be treated as her will.

Aulla Bibi v. Ala-ud-din (1906), 28 All. 715, applied; *Re Esaji Alibhai*, 1 Z.L.R. 612, distinguished.

(ii) since by the draft deed of gift, the gift was to take effect at a future date, it was under Mohamedan law invalid, and as there was no evidence of intention to enable the court to regard it as a testamentary disposition it could not be treated as such.

(iii) as to the draft deed of wakf, non-compliance with the requirements of the Registration of Documents Decree (Cap. 111) and the Land Alienation Decree, 1939, as amended, rendered it invalid.

Declaration accordingly.

Cases referred to:

(1) *Re Esaji Alibhai*, 1 Z.L.R. 612.

(2) *Venkat Rao v. Namdeo* (1931), 58 I.A. 362.

(3) *Aulla Bibi v. Ala-ud-din* (1906), 28 All. 715.

Judgment

Law J: In this matter the court is asked to determine the following questions arising out of the death of Maryam binti Hussein bin Abdulkarim el-Ajmia (hereinafter referred to as the deceased)–

(i) whether the first and second defendants are related to the deceased as claimed by them; and if so are they both entitled to inherit under the estate of the deceased;

(ii) whether the undated and unsigned writing, a translation whereof is annexed to the plaint and marked "A", should under the Mohamedan law be treated as a valid will of the deceased;

(iii) (*a*) whether the unsigned writing dated Thul Haj, a translation whereof is annexed to the plaint and marked "B", creates a valid gift under the Mohamedan law; and

(*b*) whether house No. 9/67 together with its land situate at Mtendeni, which the said writing purports to donate to the third defendant, be excluded from the estate of the deceased;

(iv) (*a*) whether the undated and unsigned writing, a translation whereof is annexed to the plaint and marked "C", creates a valid wakf over the properties therein mentioned;

(*b*) whether the said properties should be excluded from the estate of the deceased; and

(*c*) whether defendant No. 5 should be appointed mutawalli thereof;

(v) how the costs of and incidental to these proceedings are to be provided for.

I have already ruled (on February 7, 1957) that the first question is not suitable for decision on an originating summons. In my opinion the question whether the first and second defendants are lawful heirs of the deceased, a matter as to which there is no agreement, should properly be the subject of a separate suit between them. I am informed that such a suit has in fact been instituted, and question (i) does not accordingly fall to be considered at this stage.

As regards questions (ii), (iii) and (iv), they are closely related and I propose first to examine the circumstances which form the background to the coming into existence of all three documents the subject of these three questions. These documents are a draft will, a draft deed of gift, and a draft deed of dedication of two shambas as wakf. There is no doubt as to how these documents came into existence. The deceased died on July 2, 1955. Some time before her death the deceased sent for Seyyid Soud, the fourth defendant. Seyyid Soud's recollection is that the two ensuing interviews took place about 2½ months before the deceased's death, but as he is certain that one Sheikh Abdulkarim was present, and as Sheikh Abdulkarim died on December 22, 1954, it is clear that Seyyid Soud's memory is at fault, and that his meetings with the deceased must have taken place at least seven months before her death. As to what happened at these meetings, I accept Seyyid Soud's evidence as completely accurate. The deceased Maryam was ill and apprehensive of dying in the near future. She explained to Seyyid Soud that she wished to make a will and to give a house to Hassan bin Khamis, the third defendant, and to dedicate two shambas as wakf. Seyyid Soud advised her to obtain the help of a Kadhi's clerk, and as a result of this advice the deceased sent for Mohamed Ahmed, a clerk in the Kadhi's court, who also gave evidence in these proceedings. He is accustomed to drafting Mohamedan legal documents. He deposed that the deceased's instructions to him were that she wanted to draw up a will, a deed of gift and a wakf deed. She gave him detailed instructions, as a result of which he drafted the documents, Exhibits A, B and C, translations whereof are attached to the plaint. He then sent the documents to the deceased, who again consulted Seyyid Soud. On this occasion Seyyid Soud read the three drafts to the deceased, and she agreed that they represented exactly what she wanted. Seyyid Soud then left, after advising the deceased to have the drafts engrossed and formally signed and witnessed so that they could be registered. For some unexplained reason this was never done, and on the deceased's death the three drafts were still in her possession in their incomplete condition. Seyyid Soud, who was named as executor in the draft will, renounced his executorship when it became evident that there were rival claimants to the estate as lawful heirs, and the administration of the estate was taken over by the plaintiff, the Administrator-General.

The deceased was an Ibathi Moslem, and I now turn to a consideration of the individual draft documents and to their effect having regard to Mohamedan law as it applies to her. Firstly, the draft will.

A Mohamedan will may be either written or oral, *Re Esaji Alibhai* (1), 1 Z.L.R. 612. In this case the court is not concerned with an oral will. When the deceased gave her instructions to Mohamed Ahmed, she was not then making an oral will but declaring her intention as to the contents of a will which was to be reduced to writing. A declaration of intention to make a written will cannot be regarded as an oral will, because it cannot be inferred that there was an intention that the oral declaration itself should operate as a testamentary disposition, *Venkat Rao v. Namdeo* (2) (1931), 58 I.A. 362. These instructions

were in fact reduced to writing by Mohamed Ahmed, and the written document was approved by the deceased as her will when Seyyid Soud read it over to her. The fact that it was unsigned and has remained unsigned is immaterial

and does not affect the validity of the will, *Aulla Bibi v. Ala-ud-din* (3) (1906), 28 All. 715. In *Esaji's* case (*supra*) a draft unsigned will was not admitted to probate because although it represented the testator's wishes, he had declared his intention of obtaining his son's approval to it before signing it, but he died before his son's approval could be obtained. The court held that in those circumstances the draft was no more than a tentative will, as it was subject to approval of a son who did not approve. Had the son had an opportunity to approve but not approved, the draft might have been altered to meet his wishes. In *Aulla Bibi's* case (3) (*supra*) the testator gave a vakil instructions to draft his will, but died before he could sign it. The unsigned draft was admitted to probate, the court being satisfied that it represented the testator's final testamentary intentions. The only point of difference between *Aulla Bibi's* case (3) and the one at present under consideration is that in the former case the testator died within a few days of the preparation of the draft, whereas in the present case the testatrix survived at least six months. Her failure to sign the will during that period may indicate a lack of intention to proceed with the will as drafted; it may also have been due to failing health and inability to look after her affairs. It is not easy to decide whether or not at the deceased's death the draft will (Exhibit A) represented her definite and final testamentary intentions. Only three matters are dealt with in the draft will. Firstly, after providing for the expenses of her interment there is an injunction that an obligatory pilgrimage to Mecca should be performed on behalf of herself and her brother, Abdulla. Secondly, there is a specific bequest of Shs. 1,000/- to Zuwena binti Baraka; and thirdly, she nominated Sheikh Abdulkadir to be mutawali of a family wakf in her place. Now Sheikh Abdulkadir died, as we know, very soon after the draft will was prepared. As regards Zuwena binti Baraka, it seems a distinct possibility that she also predeceased the testatrix, as the Administrator-General and Seyyid Soud have heard nothing from her or her heirs. In these circumstances, it would seem that when Maryam died, her draft will had become to a large extent nugatory. However, there still remained the injunction that a pilgrimage should be performed on her behalf. After very careful consideration, I have come to the conclusion that the reason why this will was never signed, as had been intended, was because the deceased was seriously affected by the death of her old friend and adviser, Sheikh Abdulkadir, and this despondency of mind, together with her deteriorating health and failing strength, caused her to lose interest in her personal affairs so that not only did she fail to sign the will but she also failed to proceed with the engrossment, execution and registration of the draft deeds of gift and wakf, both of which concerned matters very close to her heart and which I am sure she never intended to abandon. I am satisfied that the draft will (Exhibit A) represents the deceased's testamentary intentions and should under Mohamedan law be treated as her valid will. I accordingly answer question (ii) in the affirmative.

As regards the draft deed of gift, it has not been registered in accordance with s. 4 of the Registration of Documents Decree (Cap. 111) and is therefore inadmissible in evidence, except as evidence of a collateral transaction not requiring to be effected by registered instrument, such as for instance of a prior oral gift. But the third defendant does not allege any oral gift, and quite clearly there was no valid prior gift as the deceased at no time parted with possession of the house referred to in the draft deed to the third defendant. The third defendant relies on the draft deed. Even if admissible in evidence, the proposed gift was to take effect at a future date ("seven days before her death") and under Mohamedan law a gift is not valid which is expressed to take effect at a future date whether definite or indefinite (Mulla (14th Edn.), p. 149). Now it is quite clear that the deceased intended the third defendant to have the house as a gift. She stated to Seyyid Soud and to Mohamed Ahmed that she was under a deep obligation to the third defendant who had been of great assistance in looking after her and had nothing at all of his own. Mr. Chowdhary for the third defendant concedes, as he must, that the house was never

effectively “gifted” to the third defendant, either orally or under the draft deed. He submits, however, that the deceased in effect bequeathed the house to the third

defendant, by a verbal testamentary disposition in the presence of Seyyid Soud, alternatively that the draft deed should be considered as an unsigned will. If I could give effect to this submission, I would do so. Unfortunately it is clear from the evidence that the deceased did not intend to make a testamentary disposition of her house to the third defendant. Had she such an intention, she would have given effect to it in her will, which was drafted at the same time and by the same person as the deed of gift. On the contrary, she clearly intended to exclude her house from her heritable estate by purporting to make the gift effective "seven days before her death." I cannot say that an intention was testamentary which was not testamentary. In the circumstances I can only answer the two parts of question (iii) in the negative, although I do so with regret. It was the deceased's intention that the third defendant should have the house, but she has failed to achieve that intention. I express the hope that whoever in due course is found to be the heir of the residue of the deceased's estate will perform the moral obligation which is on him to honour the deceased's clearly expressed wishes in this matter. I can do no more.

As regards the draft deed of wakf, it is clearly not valid. A dedication of land by way of wakf is a permanent alienation, and as such must not only be registered under s. 4 of the Registration of Documents Decree (Cap. 111), but is invalid without the consent of the Land Alienation Board under s. 4 of the Land Alienation Decree, 1939, as amended by Decree 26 of 1953. By the proviso to the latter section, wakfs to near relatives are exempted, but this provision does not apply to the purported wakf in this case which was to be in favour of a mosque. The answer to all three parts of question (iv) is therefore in the negative.

As regards question (v), the costs of and incidental to these proceedings shall be paid out of the estate.

Declaration accordingly.

For the plaintiff:
JS Balsara
The Attorney-General, Zanzibar

For the first defendant:
KS Talati
Wiggins & Stephens, Zanzibar

For the third defendant:
SW Chowdhary
SM Chowdhary, Zanzibar

For the fifth defendant:
JL Pinto
The Administrator-General, Zanzibar

The second and fourth defendants in person.

Saleh Bin Mohamed v Suleman Bin Yusuf Bin Ahmed

[1957] 1 EA 163 (SCZ)

Division:	His Highness The Sultan's Court for Zanzibar at Zanzibar
Date of judgment:	23 May 1957
Case Number:	67/1957
Before:	Windham CJ
Sourced by:	LawAfrica

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[1] Document – Construction of document – Whether deed purporting to record a sale is really a mortgage – Evidence Decree (*Cap.* 10) *s.* 92 (*Z.*) *– Admissibility of oral evidence to explain document – Onus and quantum of proof.*

Editor's Summary

The plaintiff, as executor of Mohamed Nagi Bin Salim, sued the defendant for arrears of rent, mesne profits and vacant possession of a house which the defendant had sold to the deceased for Shs. 7,000/- but of which the defendant had remained in occupation ever since the date of sale. The defendant claimed that the deed of sale dated June 29, 1953, was in reality a disguised mortgage with an option to re-purchase and that he had repaid Shs. 7,000/- to the deceased by delivery of thirty-two bags of cloves valued at Shs. 7,699/-, leaving a balance of Shs. 699/- in his favour for which he counterclaimed.

Held – the burden of proof that a document purporting to effect a sale is really something else is a heavy one and the defendant had failed to discharge this burden.

Moosaji Tayabali v. Suleman Bin Nasoor, 9 E.A.C.A. 29, followed.

Judgment for the plaintiff.

Cases referred to:

(1) *Baksu Lakshman v. Govinda Kanji* (1880), 4 Bom. 594.

(2) *Balkishen Das v. Legge* (1899–1900), 27 I.A. 58.

(3) *Athman Bin Haji v. Said Bin Saleh*, 4 Z.L.R. 58.

(4) *Moosaji Tayabali v. Suleman bin Nassor*, 9 E.A.C.A. 29.

Judgment

Windham CJ: In this case the plaintiff, as executor of one Mohamed Naji bin Salim who died on November 16, 1954, sues the defendant for vacant possession of a house, No. 3/77 at Mlandege, Zanzibar, which the defendant sold to the deceased on 29th June, 1953, for Shs. 7,000/-, but of which the defendant has remained in occupation ever since the date of the sale, together with arrears of rent at Shs. 40/- per month as from December 1, 1954, until November 30, 1955, when the plaintiff's notice to the defendant to quit expired, and mesne profits at the same rate as from that date until vacant possession is given up.

The defendant admits that he has continued in possession of the house since June 29, 1953, without paying any rent at all. But his defence is that the registered conveyance of that date which purports to be an outright sale of the house by him to the deceased for Shs. 7,000/- is in reality a disguised mortgage with an option of repurchase, and that by a delivery to the deceased of 32 bags of cloves that were sold for Shs. 7,699/- he repaid the amount advanced to him by the deceased, leaving a balance in his (the defendant's) favour of Shs. 699/-, for which sum he counterclaims. Another item in his counterclaim, amounting to Shs. 1,225/-, was abandoned by him through his counsel during the hearing.

The plaintiff, in support of his claim, has produced two documents – the formal registered deed of sale, exhibit A, and a written agreement dated November 27, 1954, exhibit B. Both these documents are admittedly executed by the defendant. In exhibit B the defendant admits having sold the house in dispute to the deceased and agrees to repay to the plaintiff (as the deceased's executor) the purchase price of the house within fifteen months or, upon his failure to do so, to pay the plaintiff Shs. 40/- per month for fifteen months.

I have found little difficulty in arriving at the essential findings of fact in this case, largely because the plaintiff himself and the two disinterested witnesses whom he called all impressed me as witnesses of truth, whereas neither the defendant nor the witness whom he called did so. I am satisfied from the evidence given by and for the plaintiff that the defendant signed exhibit B well knowing what its terms were.

I consider that the defendant has wholly failed to establish that he paid or repaid to the deceased the sum of Shs. 7,699/- or any part thereof through the sale by the deceased of the thirty-two bags of cloves delivered by the defendant to him, or in any other manner. It is not challenged by the plaintiff that the defendant did deposit thirty-two bags of cloves with the plaintiff for safe custody. But I accept the plaintiff's evidence that later on, upon the deceased's instructions, the defendant took them away again, accompanied by the deceased. But as regards what then happened to the cloves, I find myself unable to accept the defendant's evidence, or that of his witness, Mkombe Simai, a customs coolie. In any event their evidence wholly failed to prove whether the cloves were in fact sold by the deceased, or for what figure, or what their estimated value was. I accept the evidence of the plaintiff and his witnesses that the defendant never raised this claim regarding the proceeds of the thirty-two bags of cloves, or mentioned it to any of them, until he filed his defence and counterclaim. I am not satisfied that the deposit of these bags of cloves had anything to do with the payment or repayment of Shs. 7,000/- by the defendant in respect of the house in dispute.

With regard to the true nature of the registered conveyance, exhibit A, it is on the face of it an out-and-out sale of the house by the defendant to the deceased for Shs. 7,000/-. It has been held, it is true, that under s. 92 of the Indian Evidence Act, which is reproduced in s. 92 of the Evidence Decree (Cap. 10), oral evidence of circumstances and conduct, though not indeed directly of the parties' intentions, may be adduced to show that a document purporting to be a sale is in reality a mortgage: *Baksu Lakshman v. Govinda Kanji* (1) (1880), 4 Bom. 594; *Balkishen Das v. Legge* (2) (1899), 27 I.A. 58, and other cases cited in Sarkar on The Indian Evidence Act (9th Edn.) at p. 684 et seq. But the burden on a party seeking to show that a document purporting to be a sale is really something else, or in particular that two documents such as exhibits A and B in the present case together constitute a mortgage rather than an out-and-out sale followed later by an option to re-purchase, is a heavy one: see *Athman Bin Haji v. Said Bin Saleh* (3), 4 Z.L.R. 58, followed recently by this court in High Court Case No. 36 of 1956 of Pemba. And see also *Moosaji Tayabali v. Suleman Bin Nassor* (4), 9 E.A.C.A. 29, where the Court of Appeal for Eastern Africa, in considering a similar submission in the light of s. 58 (3) of the Transfer of Property Decree (Cap. 82) held that

> "evidence to vary the plain meaning of a deed of sale formally drawn by a lawyer should be clear and unequivocal"

and that

> "where you have a document which on its face and in its terms is clearly and admittedly a sale deed and not a mortgage and where it has been held that the surrounding circumstances do not vary the plain language of the document, where an onus, and in my opinion a heavy onus, rests on a person to override the plain and accepted meaning of the document, the oral evidence must be strong and certain to be of any use."

In the present case the surrounding circumstances are certainly not such as to vary the plain meaning of the documents exhibits A and B. The leaving of the vendor in possession of the property transferred is quite equivocal; it may suggest that the transaction was a mortgage and not an outright sale, but it is equally consistent with the vendor continuing in possession as a tenant, a frequent occurrence. And the non-payment of any rent by the defendant between the date of the sale deed (June 29, 1953) and the deceased's death some 16 ½ months later is equally equivocal; the deceased may have been indulgent in not demanding rent from the defendant; indeed the plaintiff's evidence at the end of his cross-examination suggests that the defendant was a person with whom his neighbours were apt to be lenient as regards the demanding of rent. And on the other side of the scale there are several factors suggesting clearly that the transaction was in truth an out-and-out sale. First, exhibit B, giving the

defendant an option to repurchase (which as I have found he failed to exercise) was made not soon after the deed of sale, exhibit A, as is usual when the double transaction

is really a mortgage, nor even during the deceased's lifetime at all, but only upon his executor, the plaintiff, in the interests of the beneficiaries, insisting that the defendant could no longer stay on in the house without paying rent. Secondly, I accept the evidence of Salim Abdullah Gurnah, who drew up the document exhibit B, that the defendant admitted to him when executing it that he had sold the house to the deceased. Thirdly, in the written statement of defence the defendant avers that the amount which the deceased lent to him on what he alleges to have been a mortgage was Shs. 7,000/-. If that was so, then there appears to be no provision for mortgage interest at all, since in exhibit B the defendant agrees to repay Shs. 7,000/- and no more. He endeavoured in evidence to retract from this admission on pleadings by saying that the deceased had in fact only lent him Shs. 5,000/-, the remaining Shs. 2,000 being (presumably) attributable to concealed mortgage interest. But he is bound by his pleadings, and the lack of any explanation of the absence of mortgage interest remains.

To summarize, I find that the defendant has failed to discharge the burden of showing that the documents exhibits A and B are other than what they purport to be, and he has also failed to prove to my satisfaction that he made any payment to the deceased or to the plaintiff, whether through the sale of cloves or otherwise, such as would establish his counterclaim or even effect an exercise of his option to repurchase under exhibit B. Nor has he paid any rent.

I accordingly dismiss the counterclaim with costs, and give judgment for the plaintiff in the terms prayed in para. (*a*) and para. (*b*) of the plaint, with costs. The defendant will give up vacant possession of the house on or before July 31, 1957.

Judgment for the plaintiff.

For the plaintiff:
DF Karai
DF Karai, Zanzibar

For the defendant:
SM Chowdhary
SM Chowdhary, Zanzibar

Asha Binti Musa and another v Ali Bin Musa Bin Ali Shirazi and The Wakf Commissioners

[1957] 1 EA 165 (SCZ)

Division:	His Highness The Sultan's Court for Zanzibar at Zanzibar
Date of judgment:	31 May 1957
Case Number:	8/1957
Before:	Windham CJ
Sourced by:	LawAfrica

[1] Deed – Description of land – Land dedicated and described as containing specific number of clove and coconut trees – Large discrepancy between number of trees specified in deed and number actually on land – Whether misdescription may be ignored.

Editor's Summary

A deed made in 1952 dedicated a piece of land in the Island of Zanzibar known as Mambosasa as a wakf. In the deed the land was described by its boundaries and went on to specify that the land contained *inter alia* approximately 200 big clove trees, 50 small clove trees and 160 big coconut trees. It was subsequently found that the land within the boundaries described in the deed contained many more trees than those mentioned in the deed, including 927 large clove trees and 293 coconut trees, but no small clove trees. The plaintiffs issued an originating summons to determine whether the misdescription of the number and species of trees upon the land within the boundaries stated in the deed should be ignored or whether a portion of the land containing the precise number and kind of trees mentioned in the deed should be excised from the remainder and that such portion only should be deemed to be subject to the wakf.

Held–

(i) where a deed describes a piece of land in two ways, each of which is incompatible with the other, a clear description by boundaries will prevail.

(ii) since the description by the number and species of trees did not indicate the precise portion subject to the wakf, the whole of the land within the boundaries stated in the deed must be deemed to have been dedicated.

Declaration accordingly.

Cases referred to:

(1) *In re Brocket*, [1908] 1 Ch. 185.

(2) *Lee v. Alexander* (1883), 8 App. Cas. 853, H.L.

(3) *Barton v. Dawes*, 138 E.R. 106.

(4) *Jack v. M'Intyre*, 8 E.R. 1356.

Judgment

Windham CJ: A point of construction has been raised in this Originating Summons of a kind not unfamiliar in England among conveyancers and in the Chancery Division of the High Court, namely the question which of two inconsistent descriptions of property in the parcels clause of a deed of conveyance or settlement should prevail.

In the present case the subject-matter of a wakf, which was made on April 10, 1952, is described by the dedicator in the wakf deed in the following terms. He declares that he has

> "dedicated as wakf and preserved the whole of his shamba Mambosasa which is situated at Kinduni, Mkokotoni Mudiria in the Island of Zanzibar which is bounded:
>
> by the shamba of Msellem bin Masoud on the North,
>
> by the shamba of Amour bin Mohamed on the South,
>
> by the shamba of Simai el-Shirazi on the East and
>
> by the wakf shamba of Musa bin Ali Shirazi and the
>
> shamba of Amour bin Mohamed el-Muharmi on the West
>
> which contains the following trees: approximately 200 big clove trees, 50 small clove trees, 160 big coconut trees and 5 sundry fruit trees, including all the boundaries, rights, appurtenances such as land and trees, etc., thereof, . . ."

The inconsistency in the above description of the dedicated shamba is not patent, but arises from the undisputed fact that the whole shamba Mambosasa, bounded as above described, does not contain

> "approximately 200 big clove trees, 50 small clove trees, 160 big coconut trees and 5 sundry fruit trees,"

but contains (and contained on April 10, 1952, when the wakf was made) a far larger number of trees, namely 927 large clove trees, no small clove trees, and 293 coconut trees. The question for decision is whether this misdescription of the number of trees on the dedicated shamba should be ignored and the whole shamba be considered as wakf, or whether from the whole shamba there should be carved out by the Wakf Commissioners a portion containing the number of trees of the respective kinds as stated in the deed, and that only such portion should be deemed to be subject to the wakf.

Now this is not an instance of a general description of the property being followed by a particular description, in which case the particular description (i.e. the description by the number of trees in the present case) could if clear enough be properly held to qualify and restrict the general one, upon the principle enunciated in Norton on Deeds (2nd Edn.) at pp. 231–2, and applied in such cases as *Re Brocket*, (1) [1908] 1 Ch. 185. For in the present case the earlier description is not merely in such general words as "my shamba Mambosasa at Kinduni" but it specifically states that the wakf is of the whole

shamba and proceeds to give its four boundaries in such manner as to leave no ambiguity. Thus the case is rather one of a particular description being followed by an inconsistent and erroneous statement as to quantity (here of trees) or as to particulars, and falls within the maxim – “falsa demonstratio non nocet,” where-under the erroneous statement will be disregarded and will not modify or cut down or otherwise prevail over the certain description (here, by boundaries). The rule has also been expressed in the following words:

> "Whenever there is in the first place a sufficient certainty and demonstration, and afterwards an accumulative description, and it fails in point of accuracy, it will be rejected."

The rule is set out in Norton (op. cit.) at p. 233, where it is exemplified by a number of English decisions. It may even override the apparent intention of the maker of the deed or the parties to the conveyance; in the House of Lords case of *Lee v. Alexander* (2) (1883), 8 App. Cas., 853, H.L., Lord Blackburn at p. 869 said:

> "I take the canon of construction to be that where the description of the premises assigned is clear and unambiguous, effect must be given to it by the court, even though convinced from other parts of the deed that it was not what the parties meant to say."

It is immaterial whether the exact description precedes or follows the erroneous statement of particulars or quantity; in either case the exact description will prevail. In *Barton v. Dawes* (3), 138 E.R. 106, for instance, the property conveyed was first described as being "all that messuage . . . and several closes," etc.: in the occupation of A, and "containing altogether 209 acres, 2 roods, 28 perches," and

> "consisting of the several particulars specified in a schedule and more particularly delineated in the map drawn in the margin of the said schedule."

One of the closes which was part of the messuage and which helped to make up the area of approximately 209 acres was omitted from the map and schedule. It was held that this close did not pass, since the exact description in that case was the one by reference to the map and schedule while the "falsa demonstratio" was that which included the statement that the total area of what was being conveyed was (approximately) 209 acres. In *Jack v. M'Intyre* (4), 8 E.R. 1356, a leased property was described as being

> "in the townland of B, containing 509 acres arable, meadow and pasture, bounded on the south by D, on the north and east with L. N., and on the west with T's and W's land."

In fact the land so bounded comprised 400 acres of bog land in addition to the 509 acres of land therein described. It was held that the 400 acres passed as well, on the ground (*inter alia*) that the description by boundaries was so specific and certain that the omission to mention that it contained 400 acres of bog as well as 509 acres of good land could not be construed to cut it down to the 509 acres. Owing doubtless to the relative economic unimportance of trees in England compared to the importance of clove or coconut trees in Zanzibar there appears to be no English reported case in point where land is described in a conveyance by the number of trees which it contains, or indeed by the number of any other objects. But the general principle underlying the decisions which is in my view applicable to the present case is that where there are in the document two patently or (as here) latently incompatible descriptions of the land to be conveyed or otherwise dealt with, then a clear description by boundaries will prevail; and particularly will this be so where, as in the present case, the other description is not such as to indicate exactly what piece of land was intended to be covered or to enable it, from such description, to be demarcated. In the present case it might be possible in a dozen different ways to carve out from the whole Mambosasa shamba a portion containing

> "approximately 200 big clove trees, 50 small clove trees, 160 big coconut trees and 5 sundry fruit trees."

On the other hand, non constant that the different species and ages of trees would be so relatively grouped as to enable a portion containing those numbers of each respectively to be carved out easily or at all. In short, where of two inconsistent descriptions of the land to be conveyed or dedicated one makes it clear and certain what piece of land it is while the other does not, then that which is clear will prevail and that which is not will be disregarded.

I therefore hold, in answer to the question raised in the Originating Summons, that the wakf deed in dispute purported to dedicate as wakf the whole of the shamba

known as Mambosasa situated at Kinduni, as contained within the boundaries therein described, and containing in fact (as has now been agreed) approximately 927 clove trees and 293 coconut trees. All costs will come out of the wakefd property.

Declaration accordingly.

For the plaintiffs:
AQAR Mukri
Mukri & Sameja, Zanzibar

The first defendant in person.

For the second defendant:
JL Pinto (Assistant Administrator-General, Zanzibar)

For the defendants:
Administrator-General, Zanzibar

MD Kermali and others v Mussa G Dhalla and others
[1957] 1 EA 168 (SCZ)

Division:	His Highness The Sultan's Court for Zanzibar at Zanzibar
Date of judgment:	19 July 1957
Case Number:	18/1956
Before:	Windham CJ
Sourced by:	LawAfrica

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[1] Mohamedan law – Wakf – Validity of appointment of mutawallis (*trustees*) *– Whether a Khoja must be so born.*

[2] Limitation of action – Limitation Decree (*Cap.* 11) (*Z*) *– Art.* 116 *of the Schedule thereto.*

Editor's Summary

In 1911, one Datubhai Hemani, a Khoja of the Shia Ithnasheri faith, by an instrument duly executed and registered, dedicated a site he had purchased in the town of Zanzibar as a wakf and built thereon an Imambara or religious place for Khoja Ithnasheris. Provision was made in the deed for the supervision of the wakf by the appointment of four mutawallis (trustees) each of whom was in turn to supervise the charge for a year and if one died the remaining mutawallis were to appoint to the vacancy a fit gentleman who was to be a Khoja of the Shia Ithnasheri faith. From the terms of the deed it was clear that all Khoja

Ithnasheris were to be beneficiaries of the wakf. In 1949, the first defendant, Mussa G. Dhalla was the sole surviving mutawalli. He then appointed three persons to be mutawallis with him, naming the second defendant, H. D. Kermali, as one and

"the President and Secretary for the time being of the Khoja Shia Ithnasheri Kuwat Ulislam Jamat"

as the others. The President of the Jamat at the time was the first plaintiff, M. D. Kermali. In 1952, M. A. Saleh, the third defendant, and Abdulrasul Karmali Hasham, the fourth defendant, became respectively President and Secretary of the Jamat and thus became mutawallis of the wakf. Each of them had held these offices ever since, having been re-elected in 1954 and 1956.

Subsequently the four plaintiffs, representing a minority group within the Jamat, decided to challenge the right of the third and fourth defendants to be mutawallis and commenced proceedings in which they claimed that the appointment as mutawallis of the third and fourth defendants by virtue of their respective offices in the Jamat was contrary to the instrument dedicating the wakf which required the appointment of individuals chosen "as fit gentlemen" of the Shia Ithnasheri faith. In the case of the third defendant, the plaintiffs also sought to have his appointment as mutawalli declared null and void on the ground that he was not and never had been a Khoja of the Shia Ithnasheri faith. The third defendant contended that he was a Khoja of the faith although he had not been so born and, alternatively, that he had been adopted as such by the Khoja Ithnasheri community and had held high office among them and accordingly that in the interests of the beneficiaries of the wakf, the court should in its discretion depart from the strict requirements of the wakf deed and permit him to continue as mutawalli so long as he remained President of the Jamat. The third defendant was admittedly not a Khoja by birth. Both his parents were Memons who normally adhere to the Sunni branch of the faith, but the third defendant's mother took him at an early age to the Imambara of which he had since become

mutawalli and he had identified himself throughout his life with the Khoja Shia Ithnasheri community, taking ultimately a prominent part in its activities and contributing to the funds of the Jamat. The third defendant, accordingly, claimed that he had been received into the community and was a full member thereof, whilst the plaintiffs contended that a person could only be a Khoja by birth and descent:

Held–

(i) the plaintiffs were precluded by art. 116 of the Schedule to the Limitation Decree from objecting to the appointment as mutawallis of the third and fourth defendants by virtue of their respective offices in the Jamat, because six years had elapsed since the right to claim relief on that ground had accrued.

(ii) the Khojas are a caste in the sense of heredity, a Khoja must be born into that caste, and the third defendant not having been so born was not a true Khoja.

(iii) since the beneficiaries of the wakf were all Khoja Shia Ithnasheris, and they constitute a section of the public, the wakf was of a public nature.

(iv) in the exercise of the discretion vested in the court, and having regard to the liberal spirit of Islam and the interests of the beneficiaries of the wakf, the court would not remove the third defendant from his position as mutawalli.

Order accordingly.

Cases referred to:

(1) *Aga Khan Case* (1866), 12 Bom. H.C. Rep. 323; 1 Z.L.R. 630.

(2) *The Khojas and Memon Cutchees Case* (1847), Indian Decisions, Vol. 4, 707.

(3) *Hirbai v. Gorbai* (1875), 12 Bom. H.C. Rep. 294.

(4) *Mahomed Ismail Ariff v. Ahmed Moola Dawood* (1916), 43 Cal. 1085.

(5) *Delroos Banoo Begum v. Nawab Syud Ashgur Ally Khan* (1875), 15 B.L.R. 167.

(6) *Ashgar Ali v. Delroos Banoo Begum* (1878), 3 Cal. 324.

(7) *Muhammad Yusuf & Others v. Muhammad Shafi & Others* (1935), I.C. 344.

(8) *Syed Shah Muhammad Kazim v. Syed Abi Saghir* (1932), 11 Pat. 288.

(9) *Khajeh Salimullah v. Abul Khair M. Mustafa* (1910), 37 Cal. 263.

Judgment

Windham CJ: This action concerns an internal dispute within the Khoja Shia Ithnasheri Kuwatul Islam Jamat of Zanzibar, and the main question for decision is whether among that community a person can in certain circumstances properly claim to be a Khoja who was not born a Khoja, or whether that term embraces only those persons who are Khojas by birth, that is to say whose parents, or at least whose fathers, were Khojas. The question arises in the following manner.

On October 17, 1911, a certain Datubhai Hemani, who it is undisputed was a Khoja of the Shia

Ithnasheri faith, executed a written and registered instrument of wakf in Gujerati which has been produced as exhibit B, and English translation of which is attached as annexure "A" to the plaint. By that instrument Datubhai Hemani, after reciting it to be

> "my intention at my expense to make one Imambara (religious place) in the town of Zanzibar"

and after further reciting that with that object he had bought the site for the erection of the imambara and that its construction had already begun and that he had also bought a house at its rear to serve as a hall and kitchen for it, and that the imambara and house should henceforward be known as "Alimakan," proceeded to dedicate it as wakf in terms of which the following passage from the deed contains all that is relevant for the purpose of this action:

> "The said above-mentioned places have been purchased in my name and are being made at my expense. From to-day I consider it my complete duty to make it as Wakf for Khoja Shia-Ithnasheris, according to my intention, because there is not any reliability in the life of the human being, wherefore by this Wakf Deed I hereby declare that the said above-mentioned both places are as "Wakf" for Khoja Shia-Ithnasheris, that is, all of them have equal right. I myself or

> my heirs or attorneys shall not have any right whatsoever, but for the purpose of looking after these places, for effecting repairs and for keeping accounts of receipts and payments, and besides that, if any other person or persons give any gift or pay any sum for current maintenance or give any immovable property, then for looking after that, and to carry out the work the following four Mutawallis have been selected (and) appointed:
>
> 1. Datubhai Hemani.
> 3. Hashambhai Alibhai.
> 2. Jafferbhai Hameer.
> 4. Hashambhai Bhaledina.
>
> Thus four persons as its Muwatallis are appointed. The object of it is that they will one after another by turn supervise one year and on completion of a year will transfer the charge with the accounts of that year to another Mutawalli and obtain his signature. By this way, and by turn, Mutawallis will carry out the work. God forbid, of the Mutawallis, if any Mutawalli dies or changes faith, then the remaining Mutawallis by majority within one month appoint to the vacancy of the Mutawalli a fit gentleman, who should be a Khoja following the faith of Shia-Ithnasheri; his appointment should be made, and in future the number of Mutawallis should not be reduced below four."

It is clear from the terms of the above dedication that all Khoja Shia Ithnasheris are beneficiaries of the wakf. The four plaintiffs are all indisputably Khoja Shia Ithnasheris resident in Zanzibar, and it is as such that they have brought this action, in which the validity of the appointment of the third and fourth defendants in 1949 as two of the four mutawallis (that is to say trustees) in ultimate succession to the four original mutawallis has been challenged. Until 1949 the replacements of the four original mutawallis and their successors appear to have been carried out properly and regularly in accordance with the directions in the wakf deed, that is to say by the remaining three mutawallis or their survivor filling the vacancies from time to time by appointing "a fit gentleman, who should be a Khoja following the faith of Shia-Ithnasheri." In 1943 the first defendant was so appointed; his appointment as mutawalli is not challenged in this action, and he has been formally made a defendant in his capacity as one of the existing four mutawallis. In 1949 the first defendant, who was the sole surviving mutawalli, appointed as his three co-mutawallis the second defendant (by name) and

> "the President and Secretary for the time being of the Khoja Shia Ithnasheri Kuwat Ulislam Jamat."

The President at that time was the first plaintiff himself. In 1952 the third and fourth defendants became respectively the said President and Secretary, and they still hold those respective offices. As such they automatically became, and still are, the remaining two mutawallis of the wakf. The plaintiffs do not challenge the appointment of the second defendant as a mutawalli, and like the first defendant he in fact supports the plaintiffs and has been merely joined formally as one of the four existing mutawallis. But the plaintiffs do challenge the appointment of the third and fourth defendants, as being not in accordance with the wakf deed.

First, the appointment of both of them is challenged on the ground that it was an appointment by virtue of their holding certain offices and not as individuals, whereas the wakf deed requires that "a fit gentleman" shall be appointed as the new mutawalli by the survivors each time that an existing mutawalli dies or changes faith. This, it is contended, requires a fresh and individual appointment on each occasion and does not empower the surviving mutawallis to appoint whoever may be or become the holder of an office from time to time, since that would entail an indefinite number of persons succeeding each other

automatically as mutawallis without the surviving trustees for the time being having, as such, any control over their appointment as President or Secretary of the Jamat or, in consequence, any control over their succession to mutawalliship. This ground of objection may, however, be disposed of briefly, in view of a concession which learned counsel for the plaintiffs has very properly made upon a point of law pleaded and argued against it by learned defence counsel, namely that the plaintiffs are debarred from raising this point by limitation. Learned counsel

for the defence admits, in my view rightly, that the succession of the third and fourth defendants to mutawalliship not as individuals but as holders for the time being of certain offices in the Jamat, and not even as the holders of those offices in 1949 when the appointment by office was made, was not in accordance with the terms of the wakf deed. But he contends that the plaintiff's prayer for relief on that footing is time-barred by virtue of art. 116 of the Schedule to the Limitation Decree (Cap. 11), which prescribes a limitation period of six years from the date when the right to sue accrued. The prayer under this head is

> "for an order that the appointment of the President and the Secretary respectively of the Khoja Shia Ithnasheri Kutwatul Islam Jamat as mutawallis be cancelled"

and that

> "fit and proper persons who should be Khojas professing the Shia Ithnasheri faith be appointed to fill up the said vacancies."

The cause of action upon which this prayer is based accrued, as is rightly conceded, not in 1952 when the third and fourth defendants became President and Secretary respectively of the Jamat, but on June 9, 1949, when the appointment by the first defendant of the holders for the time being of those offices (who were not in 1949 the third and fourth defendant) as mutawallis was made; for that is the appointment which the plaintiffs are asking this court to cancel or to declare void. This suit was filed on March 16, 1956, and thus more than six years had elapsed since the plaintiffs could have sued for such a declaration. The plaintiff's suit, in so far as it seeks such a declaration, must therefore be dismissed on the ground of limitation.

That disposes of the relief sought against the fourth defendant. With regard to the third defendant, however, the plaintiffs seek to have his appointment as a mutawalli of the wakf declared null and void upon an independent ground, namely that, even if his mutawalliship cannot be attacked on the ground of its being by virtue not of any individual appointment but of his holding the office of President of the Jamat, it can be attacked and ought to be declared void on the ground that he is not a Khoja, in view of the provision in the wakf deed that every mutawalli shall be a "Khoja following the faith of Shia-Ithnasheri." It is rightly conceded for the defence that the plaintiffs' right to have the third defendant's appointment as mutawalli declared void on this ground accrued only when he became mutawalli by virtue of his first appointment as President of the Jamat, namely in 1952, so that the statutory six year period under art. 116 of the Schedule to the Limitation Decree had not elapsed when the suit was filed in 1956, and the defence of limitation cannot therefore be raised.

The third defendant contends that he is a Khoja, although he was not born one. In the alternative he claims that, even if he is not a Khoja in the strict sense, he has been adopted by the Khoja Shia Ithnasheri community and held high office among them for a number of years and that therefore the court, in the exercise of its discretion and in the best interests of the beneficiaries of the wakf, ought to depart from the strict requirement of the wakf deed that every mutawalli must be a Khoja and ought to preserve the status quo by permitting him to continue as a mutawalli so long as he holds the office of President of the Jamat and by declining to declare his appointment as mutawalli to be null and void.

Regarding the question whether the third defendant is entitled to be called a Khoja the facts of his personal history are not in dispute. He was admittedly not a Khoja at birth, for he was born a Memon, both his parents having been Memons. The Memons are a caste or sect wholly distinct from the Khojas, although like the Khojas they originated in India in the neighbourhood of Kutch and were there

converted from Hinduism to Islam some centuries ago. The Memons are normally, and in Zanzibar it would seem entirely, of the Sunni branch of the faith, whereas the Khojas in Zanzibar, all of them being of either the Ismaili or the Ithnasheri sub-sects, are of the Shia branch.

When he was about six years old the third defendant's parents appear to have parted company, for his mother confided him to the care of a paternal uncle while she stayed

with a Khoja widow in Zanzibar, who began taking her to the Imambara which is the subject matter of this suit and of which he is now a mutawalli. Not unnaturally he too began attending it with his mother, and since 1912, when he was about eleven years old, he has adhered solely to the Shia Ithnasheri faith and community and, like his mother, has had nothing more to do with the Memon community. His father died in 1923, his death certificate describing him as a Memon. His mother has died very recently, since the conclusion of the addresses in this case.

Meanwhile the third defendant continued to identify himself with the Khoja Shia Ithnasheri community. He twice married Khoja Shia Ithnasheri ladies, first in 1929 during a visit to India and secondly, a long time after the dissolution of that marriage, in 1952 in Zanzibar, the marriage in each case, as well as the divorce, being performed in accordance with the ceremonies and rules of the Khoja Shia Ithnasheri Jamat, and the latter wedding being registered in its register. And from about 1930 onwards he played an increasingly prominent and public part in the activities of the Khoja Shia Ithnasheri community. In 1928 he began contributing to the funds of the Khoja Shia Ithnasheri Kuwatul Islam Jamat of Zanzibar. In 1934 he was elected as adviser to the Management Committee of that Jamat, and in 1940 he was elected a member of that Committee. He was elected again and served on the Committee from 1945 to 1947. In July, 1952, he was elected Vice-President of the Committee and at the end of 1952 he was first elected as its President. It was this election which, as we have seen, automatically made him one of the four mutawallis of the wakf that is the subject matter of this suit. The Presidential term is two years, and he was again elected as President in 1954 and again in 1956. In addition to these offices that he held in the Management Committee of the Jamat in Zanzibar the third defendant in 1946 had been elected a delegate to the conference of the Khoja Shia Ithnasheri Jamat for Africa, and became in that same year an original member of the newly formed Central Council of it. In 1952 he again became a member of that council, which had now become known as the Supreme Council. He is now one of the four Vice-Presidents of that council, representing the Zanzibar members of it. That council has jurisdiction over Khoja Ithnasheris throughout East Africa and the Congo.

From his long association with the Khoja Shia Ithnasheri community and his election to the high offices to which I have referred, I am satisfied that, whether or not the third defendant can strictly be held to be a Khoja in view of his not having been born one, no serious attempt was made, until 1952, to prevent him from identifying himself with the Khoja community. I am ready to accept the evidence of the first plaintiff that, from as early as 1933, he himself had raised a lone voice protesting against the third defendant holding various offices on the ground that he was not a Khoja. But this allegation was not seriously made by any considerable section of the Khoja Shia Ithnasheri Kuwatul Islam Jamat of Zanzibar until 1952, when the third defendant was first elected President of that Jamat. It was then that the first plaintiff raised the point and obtained the support of a minority of the members of the Jamat, including the remaining three plaintiffs. Owing, however, to the strong support of the third defendant by the majority of the members, the first plaintiff and his minority group have been unable to make their voice effectively heard, and the fact that the third defendant has been thrice elected to the Presidency unanimously has been due to the abstention by the first Plaintiff and his group from voting. The opposition of the first plaintiff to the third defendant, whether founded purely on a point of principle as the former maintains, or on personal antagonism and jealousy as the latter suggests, has created a regrettable cleavage in the Jamat, and the plaintiffs, unable to get the dispute impartially heard and determined in any other manner, have accordingly brought this action for the purpose.

The main dispute involves, as I see it, the determination of two questions. First, whether the third defendant can properly be held to be a Khoja, giving to that term whatever meaning it must be deemed to

have in the deed of wakf, exhibit B. Secondly, if he is not a Khoja, then whether or not this court ought to order his removal from the office of mutawalli of the wakf.

The determination of the first point is no easy matter, because from the considerable

body of evidence adduced on the question what is the exact meaning of the term “Khoja.” and in particular what is its meaning as used in Zanzibar today, two irreconcilable views have emerged, while at the same time little or none of that evidence has consisted of more than the opinions of persons who confess that they are not experts in matters of history or religion. The historical origin of the Khojas is not in dispute. All agree that the name Khoja was originally applied to certain community of Indians who were converted from Hinduism to Islam in the regions of Sind and Kutch by one Pir Sadrdin some five hundred years ago, and that they were converted to the Shia branch of the faith and to the Ismaili sect thereof. It is unnecessary to do more, in this connection, than to refer to the monumental and erudite historical exposition contained in the judgment of Arnould, J., in what has come to be known universally as the *Aga Khan Case* (1), (1866) 12 Bom. 323, which is also reported in Appendix II to I. Z.L.R. at pp. 630 to 668, to which latter report I will hereinafter refer. It is also common ground that the Khoja community has spread beyond India to, among other places, Zanzibar, and that while there are in India today some Khojas who since the original conversion have split off from the main body and adhered to the Sunni branch of Islam, the Khojas in Zanzibar, of whom there are some thousands, are all of the Shia branch, being either of the Ismaili or of the Ithnasheri sect, the latter sect having split off from the Ismailis about eighty years ago (that is to say some years later than the judgment in the *Aga Khan case* (1), in which they are therefore not mentioned), and that there are now about three thousand of the Ithnasheri sect in Zanzibar. So much is common ground. The point in dispute, however, is whether in Zanzibar a person can only call himself a Khoja if he is descended, or makes an unrefuted claim to be descended, from one of the original Khoja converts of Pir Sadrin in India some five hundred years ago, or whether, although admittedly not so descended nor even born a Khoja, he can claim, as the third defendant claims, to be a Khoja “by adoption” on the ground that he has from an early age joined and been received into the Khoja community and embraced the tenets of the particular community that he has joined and has become a full member of one of their Jamats. And this in turn depends on the question whether “Khoja” is the description of a caste, in the Indian sense involving membership through heredity, or merely that of a community which on certain conditions one may join and be adopted by though not having been born into it.

It is unsatisfactory, and indeed I find it somewhat surprising, that no evidence has been called on this point by either side which can truly be called expert evidence, such as would have been the evidence of one of the priests of the community, resident in Zanzibar, to whom the third and the fourth defendants referred in evidence, and who are qualified to give expert opinions on Sharia law which can be overruled only by the High Priest in Persia. But the point must be decided on the material available, and each side has called a number of persons, in addition to the first and second plaintiffs and the third and fourth defendants themselves, to give their opinions on the meaning of the word “Khoja” as used in Zanzibar among both the Ithnasheri and the Ismaili sects; and although none of these persons were expert witnesses in the true sense, their evidence has been admitted by mutual consent under s. 49 of the Evidence Decree (Cap. 10) as being that of persons who may be considered to have special means of knowledge of the meaning of the term either by reasons of their holding high office in their respective Jamats or by reason of their being prominent and long-standing members of the Muslim community in Zanzibar who as such would know the meaning of the term as understood by its inhabitants generally, which would presumably be the meaning attached to it by the dedicator of the wakf in the deed exhibit B.

These opinions, as I have said, have divided themselves into two conflicting and fairly evenly balanced groups, favouring the one or the other of the two possible meanings of the term “Khoja” which I have set out. And I would say at once that I believe each one of the witnesses, on either side, to have

given his opinion on the point honestly and in good faith. It has been suggested by learned counsel for the third and fourth defendants that from the very fact of this even balance of opinion, and

from the fact that no historical treatises have been referred to by either side in which the question now in dispute is specifically touched upon, nor any decided cases in which it was both in issue and pronounced upon, the plaintiffs must be held to have failed to discharge the burden which lay on them of showing that the meaning of the term "Khoja" is such that it does not include the third defendant, that being the declaration which they have brought their action to obtain. I have considered this submission carefully; but while from the opinions of the witnesses alone it would be difficult to decide what meaning to give to the term "Khoja" as touching the question whether it embraces only those with hereditary qualifications, I find that there is sufficient material outside their personal opinions to enable me to make a finding on the point in the plaintiff's favour, upon a balance of evidence, as regards the meaning of that term as understood among the Shia Ithnasheri communities in Zanzibar.

I turn first of all to the historical judgment of Arnould, J., in the *Aga Khan Case* (1), to which I have already referred. I attach little importance to the mere fact that the Khojas are more than once in this long judgment referred to as a "caste," which suggests the strict Hindu exclusive and hereditary principle, since they are as frequently in other parts of the judgment referred to as a "sect" which is a neutral term, or as a "community," which suggests a class more loosely knit and less exclusive. But towards the conclusion of his judgment, at p. 665 in the report in Appendix II in I. Z.L.R., the learned judge, after an extremely careful review of their historical origin, has framed a definition of the Khojas in the following words, which it must always be remembered were written before the Shia Ithnasheri sub-sect split off from the Shia Ismailis:

> "The court is now in a position to give an adequate description of the Khoja sect: it is a sect of people whose ancestors were Hindus in origin, which was converted to and has throughout abided in the faith of the Shia Imami Ismailis, and which has always been and still is bound by ties of spiritual allegiance to the hereditary Imams of the Ismailis."

This definition seems to my mind necessarily to imply that the bond which today links all members of the Khoja sect and which qualifies them for membership of that sect is a claim to be descended from the original Hindu converts to the Shia Ismaili faith through a chain of ancestors who since that original conversion by Pir Sadrdin (now some five hundred years ago) have adhered to that faith. This definition does not, of course, cover those Khojas of Bombay who since the original conversion have split off and adhered to the Sunni branch of Islam. But so far as the Khojas in Zanzibar are concerned, all of whom are Shia Ithnasheris or Shia Ismailis, it does apply, subject only to the qualification that those Shia Khojas who have since split off from the Ismailis and formed the Ithnasheri sub-sect some eighty years ago have not thereby ceased to be Khojas.

In short, the Khojas are a caste in at least one sense, in that they retain at least one feature of caste in the strict Hindu meaning of the term, namely that of heredity, so that a person must be born into that caste. Roy, in his book on Customs and Customary Law in British India, describes the Khojas, in words taken from the judgment of Sir Erskine Perry in *The Khojas and Memon Cutchees case* (2) (1847), reported in Vol. 4 of the Indian Decisions (Old Series) 707, at p. 708, as follows:

> "The Khojas are a small caste in Western India, who appear to have originally come from Sindh or Cutch, and who by their own traditions, which are probably correct, were converted from Hinduism about four hundred years ago by a Pir Sadrdin."

Here again, the Khojas are described not merely as a community of persons holding or adopting the tenets of the original converts of Pir Sadrdin, but as a caste who were converted by him. This again implies a bond of heredity and not merely of religious belief and practice.

It is contended for the third defendant that such a rigid and exclusive conception of caste is peculiarly a Hindu one, and that it would be contrary to the more catholic

doctrines and outlook of Islam to say: “because you were not born one of us, you are not one of us.” And it is quite true that the rigid caste system is not a Muslim concept. But with regard to the contention that the Khojas should therefore not be held to be a hereditary caste, two points must be observed. First, the Khojas are a peculiar group of Muslims in that they have in some other respects, despite their conversion from Hinduism to Islam, retained Hindu concepts; they are in general, for instance, still governed by the Hindu laws of succession and inheritance and not by the Mahomedan law: see the *Case of the Khojas and Memons* (2) (*supra*), and *Hirbai v. Gorbai* (3) (1875), 12 Bom. 294. That they should retain another feature of Hinduism, namely the concept of hereditary status, is not therefore incompatible with their having embraced the Muslim faith. Secondly, and this has particular point in relation to the third defendant, the Muslim spirit of liberality and its antagonism to the rigid bars of hereditary status has ample scope for play, and has in fact operated in his case, by extending to one who has adopted the Ithnasheri tenets and identified himself with the Khoja community the facilities and privileges enjoyed by Khojas strictly so called, and by treating him as if he were a Khoja, notwithstanding that he is no true Khoja by reason of not having been born one. I therefore hold the argument advanced for the wider interpretation of the term Khoja, in so far as it is based upon the catholicity of the Muslim outlook to be unconvincing.

Another argument has been advanced against the suggestion that the Khojas are exclusively a hereditary class of persons confined to the descendants of the original converts of Pir Sadrdin some five hundred years ago, namely that if that were so then very few of those calling themselves Khojas could establish their claim, since it is unlikely that any save a few of them could prove their paternal ancestry back for five hundred years. To this I would say, first, that I am by no means convinced that most Khojas, if challenged, could not so establish their claims, and secondly that I would define the term as including not only persons who are proved to be so descended but also any person who claims to be so descended and whose claim is *prima facie* a good one and is unrefuted. This surely is the only reasonable and practicable test of inclusion in and exclusion from any hereditary caste, Hindu or otherwise. In any case, the task of this court is not to frame a general definition for testing the claims of other persons to be Khojas. but rather to ascertain whether the third defendant is a Khoja. Since he admits that his parents were Memons and not Khojas, he does not even seek to claim any hereditary qualification, and he cannot therefore be held to be a Khoja within the true meaning of the term.

There is one further piece of evidence that I would refer to in connection with the third defendant’s claim. In brief his contention is that he has become a Khoja by adoption and by his recognition as such for many years by the great majority of the members of the Khoja Shia Ithnasheri Kuwwatul Islam Jamat of Zanzibar, as evidenced by their admitting and incorporating him as an ordinary (i.e. full) member of that Jamat. A Jamat is an organized association of a Muslim community whose main functions are to perform various religious ceremonies and also marriages and divorces, and to hear and settle matrimonial disputes. But in order to succeed in this contention the third defendant must explain, or explain away, the meaning of a very significant clause in the printed Constitution of his Jamat, which was drawn up on May 26, 1954, by a sub-committee of the Jamat consisting of three persons of whom the third defendant himself, as President of the Jamat, was one. This Constitution has been produced as exhibit G, and cl. 6 of it, which is headed “Membership”, reads as follows:

> “6. (*a*) Any Khoja male person of Shia Ithna-Asheri Sect over the age of eighteen years shall be eligible to become an Ordinary Member of the Jamat with the approval of the Managing Committee and shall pay a subscription of Shs. 1/ per month for every six calendar months in advance.

(*b*) Any Shia Ithna-Asheri male person, other than Khoja, over the age of eighteen years, who has already been incorporated in the Jamat as an ordinary member, shall be continued to be regarded as such and shall pay a subscription

of Shs. 1/- per month for every six calendar months in advance.

(*c*) Any Shia Ithna-Asheri male person other than Khoja over the age of eighteen years may be eligible to become an Honorary Member of the Jamat with the approval of the Managing Committee and shall pay a subscription of Shs. 1/- per month for every six calendar months in advance and shall be entitled to enjoy all the privileges of Ordinary Members except that they shall have no right in the Management nor any right to vote at any meeting."

In spite of the ingenious endeavours of the third and fourth defendants and their witnesses and of their learned counsel to interpret this clause otherwise, it appears to me that the clause, and para. (*b*) of it in particular, clearly recognizes that a person may have been fully incorporated in the Jamat as an ordinary member notwithstanding that he is not a Khoja, and provides that he shall continue to be regarded as such; while para. (*c*) makes provision for the future by laying down that hence-forward a non-Khoja may only be admitted as an honorary member. In other words, cl. 6 (*b*), which may well have been drafted with the third defendant himself in mind and which (along with the rest of the Constitution) certainly bears his signature, negatives any contention that a person will become a Khoja "by adoption" by virtue of being incorporated in the Jamat. It is true that a clause in a Constitution of a Jamat which was drawn up in 1954 cannot be applied directly as a key to he interpretation of the meaning of the term "Khoja" in an instrument of Wakf drawn up in 1911. But it does indicate that, to the minds of at least some prominent members of the Shia Ithnasheri community in Zanzibar, including on the face of it that of the third defendant himself, the expression "a Khoja following the faith of a Shia-Ithnasheri" would mean in 1954, and may therefore be reasonably assumed to have meant in 1911, something more than merely a person who has been adopted into the Khoja Shia-Ithnasheri community and become a full member of one of their Jamats, since it recognizes that such a person may still be and still remain a non-Khoja; and this fact strongly favours the plaintiffs' contention that to be a Khoja necessitates something more, namely a birth qualification.

For these reasons I hold that the third defendant is not a Khoja, and I now turn to the next question, namely whether this court as an automatic consequence must, or alternatively whether in the circumstances it ought to, order his removal from the office of mutawalli of the wakf; or whether, on the other hand, the court has and should exercise a discretion, despite the terms of the wakf deed, to refrain from making such an order in his particular case and to retain the status quo, in view of his past and present association and identification with the Khoja Community and with the Jamat and in the interests of the wakf and its beneficiaries.

Now the extent to which a court can, in relation to the administration of a wakf deed, overlook its strict provisions in the general interests of its beneficiaries depends largely on whether the wakf is of a public or a private nature: *Mahomed Ismail Ariff v. Ahmed Moola Dawood* (4) (1916), 43 Cal. 1085. And on this point too the plaintiffs and the defendants are at issue, the plaintiffs contending that this is a private wakf and the defendants that it is a public one. The first point for decision, then, is whether the wakf created by the dedicator Datubhai Hemani in 1911 by the wakf deed exhibit B is of a public or a private nature. The plaintiffs, it is true, have applied for and obtained the written consent of the attorney-general to the institution of this suit, which consent is by s. 69 of the Civil Procedure Decree (Cap. 4) required only in the case of trusts "for public purposes of a charitable or religious nature". But it is clear that their application was merely a safeguard, lest this court should hold the wakf to be one for public purposes, and constitutes no admission on the point, their contention being that it is a private wakf.

The three main features of this wakf which are important in determining whether it is of a public or a

private nature are, it seems to me, the following. First, the dedication is of an imambara, that is to say a house set apart for prayer and for the performance of certain religious ceremonies, not being a public mosque or temple. Secondly, the beneficiaries of the wakf are not merely the dedicator or his family or

descendants but are the whole Khoja Shia Ithnasheri community. Thirdly, the dedicator expressly divests himself and his heirs of all rights as beneficiaries under the wakf, and merely nominates himself as one of the four original mutawallis appointed to manage it.

Now there has been more than one Indian case in which an imambara has been held to be a private and not a public place of worship, so that if it is the subject of a wakf then the wakf will be a private and not a public one for the purpose of s. 92 of the Indian Code of Civil Procedure, which is reproduced in s. 69 of the Civil Procedure Decree of Zanzibar to which I have earlier referred. And the following two passages from leading text books on Mahomedan law appear to be based on those decisions. In Mulla's Principles of Mahomedan Law, (14th Edn.) there appears this passage at p. 207:–

> "An imambara is an apartment in a private house or a building set apart like a private chapel for religious purposes. It is intended for the use of the owner and members of his family, though the public may be admitted with the permission of the owner. It may be the object of a valid wakf . . . Such a wakf is a private wakf and not a public wakf nor a trust for the purposes of s. 92 of the Code of Civil Procedure."

And in Saxena's Muslim Law, (3rd Edn.), at p. 548, the position is stated thus:

> "It is common for a muslim owner of a house to attach a separate imambara for the use of himself and the members of the family. So an imambara is not a public place of worship, as is a mosque or temple, but an apartment in a private house set apart for the performance of certain Moharrum ceremonies. And even if there be any dedication, the trust is not of a public nature, such as is contemplated by s. 92 of the Civil Procedure Code."

Now from these two passages which I have quoted it might appear that in no case can a wakf of an imambara be a wakf of a public nature. But if that is the sense which they are intended to convey, then the passages are misleading and go beyond what was decided in the judgments upon which they are based. For not one of those judgments is concerned with a wakf of an imambara where the dedication is in favour of a whole community, as in the case now before us; they are concerned with imambaras of the more usual kind, in favour of the family of the dedicator. They do not decide that whenever a room or building is made by wakf into an imambara the wakf must be a private one; each case decides rather that the particular wakf with which it is concerned is a private one by reason not of the building being an imambara but of the purposes of private family worship for which the imambara is to be used. Those decisions will repay examination.

In *Delroos Banoo Begum v. Nawab Syud Ashgur Ally Khan* (5) (1875), 15 B.L.R. 167, the imambara in dispute, which was a room in a private house, was held to be a private and not a public place of worship because it was in fact for purposes of family worship exclusively. The general observation upon imambaras contained in the following passage from the judgment in that case must be read in its context as being confined to imambaras of such a nature. The passage, which concerns the object of the dedicatrix as expressed in the deed of wakf, reads thus:–

> "It was to perpetuate certain ceremonies in commemoration of her mother's death according to the custom of the family, which was of the Shiah sect, and in the regular performance of which the defendant, who had married a husband of the Sunni sect, probably saw some future difficulty. The prayers, etc., to be recited were not to be made in any mosque or regular place of worship, but in the defendant's own imambara (a building admittedly within the precincts of her dwelling-house), and the expenses of the first ten days of the Mohurrum were matters of an essentially private character. Mahomedans of both Sunni and Shiah sects are in the habit of performing these Mohurrum ceremonies according to their means, and the richer class of them no doubt spend large sums in commemoration of the deaths of Hussan and Hossein: but these ceremonies are personal matters only, and the general public have no right to take part in them.

> An imambara, moreover, is not a public place of worship as is a mosque or temple, but an apartment in a private house set apart no doubt for the performance of certain Mohurrum ceremonies, but no more open to the general public than a private oratory in England would be. As a matter of fact strangers are ordinarily excluded from these celebrations. Doles of a particular kind of provision are no doubt distributed at this time to the fakirs and beggars in attendance, but this is a matter of individual charity; there is no general distribution in which all the poor have a claim to share."

That the learned judge had in mind the difference between the kind of worship to be performed privately in the imambara with which he was directly concerned and worship of a more public nature, and was confining his general observations on imambaras to those dedicated for private worship, is strongly suggested by the following significant passage appearing earlier in his judgment, at p. 184:–

> "A public endowment for religious uses is one which distributes its benefits to all men of all classes professing a defined form of religion: a similar endowment for pious and charitable purposes generally would include all members of the community who chose to avail themselves of the means afforded them by the appropriator; everyone would have an equal right to participate, and that at all times and at all seasons. Now what is the case here?"

The learned judge then proceeds to contrast with a public endowment as so described by him – a description bearing a close affinity to the objects of the wakf in the case now before me – the wholly private family wakf of the imambara that is the subject of the case before him. In these circumstances, and in spite of the general observation on the private nature of imambaras which it contains, this judgment cannot be held to be any authority for the proposition that a wakf of an imambara of the kind now before me is a private wakf. The judgment was appealed to the Privy Council as *Ashgar Ali v. Delroos Banoo Begum* (6) (1878), 3 Cal. 324. when their Lordships, in dismissing the appeal which was concerned mainly with questions of fact, held briefly that they saw no reason for disagreeing with that part of the judgment below which decided that the wakf in question was not of a public nature.

The decision in the *Delroos Banoo Begum* case (5) (*supra*) was followed in *Muhammad Yusuf and others v. Muhammad Shafi and others* (7) (1935), 153 I.C. 344, where a wakf of an imambara dedicated for the use of the dedicator (Allah Rakhu) and his family, just as in the earlier case, and to which neither the public nor any section of the public were allowed access without the permission of the mutawallis, and in which the dedicator had not divested himself of his proprietary interest, was similarly held on those grounds not to be a wakf of a public nature. The grounds for the decision appear clearly from the following passage in the judgment at p. 345, where after referring to the general observations in the earlier case upon imambaras, to which I have earlier referred, the learned judge continues:–

> "With these observations we are in full agreement. It is true that that particular case was concerned with an imambara which was a room within a house; but it is common for a Muhammadan owner of a house to build a separate imambara for the use of himself and the members of his family, and the remarks of the Calcutta High Court, referred to above, would apply with equal force to such an imambara. The plaintiffs have totally failed to prove that members of the public are at liberty to place their own tazias in the imambara in dispute or to convene a majlis therein at their own pleasure and without the permission of the defendants, the utmost that has been proved is that members of the public are allowed inside the imambara when the defendants choose to hold a majlis or perform any other ceremony and throw the imambara open to the public. It has not been shown that acts of the managers in respect of the imambara in dispute are in any way inconsistent with the theory of a private wakf having been created for the benefit of the members of Allah Rakhu's family."

Here again it is strongly implied that if the imambara has been dedicated for the religious use not merely of the dedicator and his family but of the public, or even a

section of the public, and had the dedicator divested himself of all proprietary interest in it, in short had the dedication been of the nature which I am considering in the instant case, then the wakf would have been of a public nature. And such a distinction was clearly in the mind of the court in another Indian case, *Syed Shah Muhammad Kazim v. Syed Abi Saghir* (8) (1932), 11 Pat. 288. That case was concerned, it is true, with a wakf not of an imambara but of a khankah, or Mahomedan institution for the imparting of religious instruction. It dealt moreover with a number of questions not relevant to the present case. But at p. 344, where the question whether the wakf was a public or a private one was considered, the following passage in the judgment, in referring to the earlier cases on imambaras which I have examined, strongly suggests the distinction between the two different kinds of imambaras which I have drawn, and confines those decisions to imambaras of a truly private nature. The passage reads thus:–

> "I now take up the question of the maintainability of the suit. Sir Abdur Rahim's contentions are that (1) even if the property is wakf or trust, it is of a private nature and s. 92 does not apply; and (2) if it is a private property burdened with obligations in favour of the public, s. 92 has no application. After what I have said above, I do not think it is necessary to consider this point. It is a settled law that the word 'public' means a section of the public and it cannot be disputed that provisions for maintenance of khankahs and for distribution of alms and charities, etc., are objects of a public nature, and s. 92 has full application in such cases. Most of the cases referred to above are cases of khankahs and shrines and no question was raised that they were not trusts of a public nature. Reliance has been placed upon the case of *Delroos Banoo Begum v. Ashgur Ally Khan* and the decision of their Lordships of the Privy Council on appeal in *Ashgur Ally v. Delroos Banoo Begum*. But there the Imambara in question was of a private character and the case has been distinguished in the case of *Ram Charan Lal v. Fatma Begum*. Reliance has also been placed upon the case of *Abdul Hasan v. Saiyed Aziz Ahmed*. There their Lordships expressly refrained from deciding whether the property was or was not a wakf, but they held that it was not a public trust. There is nothing in the report to show that any section of the public was in any way to be benefited by that institution. On these grounds I hold that it is a wakf of a public nature and s. 92 is applicable."

In the above passage it will be noted that the learned judge observes that it is settled law, as indeed it is, that the word "public", where the question is whether the public are the beneficiaries of the wakf concerned, includes a section of the public. If then the beneficiaries under the wakf in the present case, namely all Khoja Shia Ithnasheris, can be held to constitute a section of the public, there can be no doubt that the wakf is of a public nature, since as I have said the mere fact that it concerns an imambara is inconclusive. Indeed the very fact that the dedicator's family are not among the beneficiaries would seem to exclude it from the category of private wakfs, and thereby to bring it within the category of public wakfs, if the distinction drawn between the two categories in Saxena's Muslim Law, (3rd Edn.), at p. 446, is to be followed. The passage reads thus:

> "In order to avoid the conflict mentioned above, wakfs may be divided into two classes, viz: (1) public and (2) private, and the latter may again be subdivided into: (i) wakf, exclusively for the benefit of the settlor's family, children and descendants in perpetuity, and (ii) wakf for the benefit of the wakif's family, children and descendants, and for charity."

And with regard to the question whether "all Khoja Shia Ithnasheris" can be held to constitute a section of the public, I think there is no doubt that they can. In the Zanzibar Protectorate they alone number about three thousand persons in all walks of life and constitute a fair cross-section of the general population, being distinguished from the rest only by their common bond of religious tenets and hereditary descent. It may be noted that Arnould J. in his judgment in the historical *Aga Khan* case (1) (*supra*)

refers to the Khojas at p. 667 as a "public community". Such undoubtedly they are.

For these reasons I hold that the wakf in this case is of a public nature. That being so, I turn to the important Privy Council judgment in *Mahomed Ismail Ariff v. Ahmed Moola Dawood* (4), wherein it is laid down to what extent a court, in a question concerning the administration or management of a public wakf or trust, may depart from the wishes of the dedicator or creator of the trust as expressed in the wakf or trust deed, in the interest of the beneficiaries. For there now remain two questions for decision with regard to the third defendant; first whether the court has any discretion at all to allow him to remain a mutawalli in view of the fact that he is not a true Khoja, and secondly whether, if the court has such a discretion, it is in the interests of the beneficiaries that it should be exercised in the third defendant's favour. The guiding rule for the court in the case of public wakfs is laid down by their Lordships of the Privy Council in their judgment at p. 1100 in the following words:–

> "It has further been contended that under the Mahomedan law the Court has no discretion in the matter and that it must give effect to the rule laid down by the founder in all matters relating to the appointment and succession of trustees or mutwallees. Their Lordships cannot help thinking that the extreme proposition urged on behalf of the appellants is based on a misconception. The Mussulman law like the English law draws a wide distinction between public and private trusts. Generally speaking, in the case of a wakf or trust created for specific individuals or a determinate body of individuals, the Kazi, whose place in the British Indian system is taken by the Civil Court, has in carrying the trust into execution to give effect so far as possible to the expressed wishes of the founder. With respect, however, to the public, religious or charitable trusts, of which a public mosque is a common and well-known example, the Kazi's discretion is very wide. He may not depart from the intentions of the founder or from any rule fixed by him as to the objects of the benefaction; but as regards management which must be governed by circumstances he has complete discretion. He may defer to the wishes of the founder so far as they are conformable to changed conditions and circumstances, but his primary duty is to consider the interest of the general body of the public for whose benefit the trust is created. He may in his judicial discretion vary any rule of management which he may find either not practicable or not in the best interest of the institution."

Then, after setting out the terms of s. 539 (now s. 92) of the Indian Civil Procedure Code, reproduced in s. 69 of the Civil Procedure Decree, under which both the plaintiffs and the defendants have applied in the present case, and which empowers two or more beneficiaries to seek the direction of the court in the administration of a public charitable or religious trust regarding the appointment of new trustees or the settling of a scheme of management or the obtaining of further or other relief, their Lordships continue at p. 1101 of their judgment in the following words:–

> "In giving effect to the provisions of the section and in appointing new trustees and settling a scheme, the court is entitled to take into consideration not merely the wishes of the founder, so far as they can be ascertained, but also the past history of the institution, and the way in which the management has been carried on heretofore, in conjunction with other existing conditions that may have grown up since its foundation."

From the passages which I have cited there is no doubt at all in my mind that this court has a discretion, if it is in the general interests of the beneficiaries, namely the Khoja Shia Ithnasheri community, to refuse to order that the third defendant be removed from the office of mutawalli of the wakf in dispute or to appoint another mutawalli in his place, notwithstanding that the dedicator in the wakf deed requires that the mutawallis shall be Khojas and the third defendant is not a Khoja. Indeed, even in the case of a private wakf the court retains some discretion in departing from the strict requirements of the wakf deed regarding the eligibility of any person to be a mutawalli, though in such a case these requirements will be given effect to as far as possible and the discretion will not be exercised in disregard of such stipulations

unless it is for the manifest benefit of the endowment: see *Khajeh Salimullah v. Abul Khair M. Mustafa* (9) (1910), 37 Cal. 263, a case where, although it is not stated in the judgment whether the wakf was of a public or a private nature, it is clear from the facts that it was a private one. But where, as here, the wakf is a public one, the court's discretion is considerably wider, and may be exercised wherever it would be in the general interests of the beneficiaries to do so. It only remains, therefore, to see whether the removal of the third defendant from the office of mutawalli would or would not be in the interests of the beneficiaries.

On this point, after careful consideration, I have no hesitation in thinking that it would be more beneficial to the well-being and the unity of the Khoja Shia Ithnasheri community if the third defendant were not removed from his office of mutawalli, which at present he holds by virtue of being the President of the Khoja Shia Ithnasheri Kuwatul Islam Jamat. I have reached this conclusion for a number of reasons.

First, it is common ground that the plaintiffs' party, who desire his removal, represent only about one-quarter of the members of the Jamat, the remaining three-quarters upholding his continuation in the office of mutawalli. His retention would therefore accord with the wishes of the majority, and would thus presumably be more conducive to the internal harmony and well-being of the Khoja community of that Jamat than would a decision which violated the wishes of three-quarters of them. It is pointed out by learned counsel for the plaintiffs, and was established by evidence, that only about two-thirds of the Khoja Shia Ithnasheris of Zanzibar belong to the Jamat of which the third defendant is President, namely the Kuwatul Islam Jamat, and that the remaining one-third belong to the Hujjatul Islam Jamat, no member of which has been made a party to this suit and whose views on the question of the third defendant's mutawalliship have not been put forward or ascertained, although all Khojas in the Protectorate, whether they belong to the Kuwatul Islam or to the Hujjatul Islam Jamat, are equally beneficiaries under the wakf. It is accordingly urged that the third defendant, a non-Khoja, should not be allowed to remain a mutawalli, since this would affect beneficiaries who are not parties, through a representative or otherwise, to this suit. To this I can only say that whatever order I make with regard to the mutawalliship of the third defendant would, in theory at least, affect members of the Hujjatul Islam Jamat as well as those of the Kuwatul Islam Jamat, and that I have no reason to suppose, nor has it been on any cogent ground suggested, that a decision in the third defendant's favour would adversely affect, or be contrary to the wishes of a majority of, the members of that Jamat. For three-quarters of the Kuwatul Jamat are in favour of his retention as a mutawalli even if he is not strictly a Khoja; and there are no religious or doctrinal differences between the two Jamats.

Secondly, it has not been suggested that the third defendant, in his capacity as mutawalli of the wakf, has acted inefficiently or in any manner detrimentally to the interests of the beneficiaries. On the contrary, the fourth defendant has testified that the present arrangement works well and has never been the subject of any complaints and that the majority of the community agree to it, while the first plaintiff has himself admitted in cross-examination that he has no complaint about the management of the wakf, and that while the first and second defendants, who in fact support the plaintiffs in the present dispute, do not co-operate with the third and fourth defendants, the objects of the wakf are nevertheless being carried out.

Thirdly, it would in my view be grossly inequitable and uncharitable to deprive the third defendant of his mutawalliship at this late stage, having in view the fact that he has devoted half a lifetime in active furtherance of the interests of the Khoja community and is still doing so, and having also in view the fact

that in everything save hereditary qualification he has identified himself as one of them, has considered himself to be one of them, and has been accepted by the majority of them as one of their leading members and entrusted by them with the high offices which I have earlier referred to and enumerated. It is here, as I have also mentioned earlier, that the spirit of Islam, which is liberal and is against rigid and exclusive barriers, has the opportunity of revealing itself by practical demonstration, and has until now in fact so revealed itself,

namely by treating the third defendant in every way as if he were a true Khoja in view of his identification with and services to the Khoja community, notwithstanding that he is strictly not a Khoja. And it would, I conceive, be wholly in conformity with the spirit of Islam that he should continue to be so treated, and that the requirement of the wakf deed that every mutawalli shall be a Khoja should accordingly be modified in his particular case so as to include him among those eligible to be mutawallis. Such, it would appear, was the opinion expressed by a Committee of the Central Council of the Federation of Khoja Shia Ithnasheri Jamats to whom in June, 1954, the question was referred as to whether the third defendant might be considered an ordinary (i.e. full) member of his Jamat and entitled to all the privileges of such a member. Although they were not asked to decide the question whether the third defendant was or was not a Khoja, it is clear from their written decision delivered on April 17, 1955, upon the question that was referred to them, which has been produced as exhibit two, that whether or not he was a true Khoja he ought by reason of his record to be treated on the footing that he was one.

Fourthly, a decision in the third defendant's favour need create no undesirable precedent, since it relates only to his individual case and is based on circumstances that are peculiar and unlikely to recur. For the first plaintiff has himself admitted in evidence that never before has a non-Khoja (that is to say one who was not born a Khoja) been elected as President of the Kuwatul Islam Jamat, and that during the last fifty years only about three other non-Khojas have been admitted as members of the Kuwatul Islam Jamat at all. The election of such a non-Khoja to the office of President need never be repeated, nor need any such a non-Khoja be ever elected to the office of secretary. The first plaintiff, through his counsel, has protested that his motive in bringing this action is purely to establish a principle, and denies that it is rooted in any jealousy or personal antagonism towards the third defendant as an individual, as the latter in evidence has suggested. Human motives are seldom unmixed, and it may well be that those of the plaintiffs are no exception to the rule. But if it is true that the first plaintiffs motive is simply to establish a principle, and that he demands the ousting of the third defendant merely as a corollary to its establishment and not through any personal animosity towards him, then it is difficult to see what objection he can have to the retention of the third defendant as a mutawalli for peculiar reasons and as a rare exception to the principle, while leaving the principle itself untouched. For the plaintiffs have established that nobody can become a Khoja by adoption and that none can be a Khoja who was not born one; and they have obtained a decision that on this account the third defendant is not a Khoja. Any desire on their part that for this reason the wakf deed should be interpreted strictly against him, even though his very exceptional case calls, if ever a case did call, for a broader and more equitable interpretation which need create no precedent and which is approved by the majority of the Jamat, could only be rooted, it would seem, in personal antagonism of a kind which the plaintiffs protest that they do not harbour. For the rest, during his mutawalliship the wakf has been efficiently managed; his retention of that office has the approval of at least half of the beneficiaries, even presuming that every one of the members of the Hujjatul Islam Jamat were opposed to it (and the probability, as I have said earlier, is against any such presumption); and, in view of his life-long identification with the Khoja community, his tenure of the office of mutawalli is within the spirit, even though not within the letter, of the requirement in the wakf that every mutawalli shall be a Khoja.

For all these reasons I hold that it is in the general interests of the beneficiaries of this wakf that the status quo of its administration and management should not be disturbed by the removal of the third defendant from his office as one of the four mutawallis so long as he remains President of the Jamat. While, therefore, I declare that the appointment of a non-Khoja as a mutawalli is contrary to the terms of the said wakf (indeed the wakf speaks for itself on that point) I decline to declare that the appointment of

the third defendant as a mutawalli is null and void or to order his removal from that office, but on the contrary I declare that his appointment to the office of mutawalli of the wakf, whether it be an ex officio appointment as at present

or in the contingency of his being hereafter appointed to it in his individual capacity, is, by reason of his peculiar association and identification with the Khoja community and for the other reasons which have I earlier set out, a valid appointment notwithstanding the requirement in the wakf deed that every mutawalli shall be a Khoja.

That concludes this case, save for one further and minor prayer, namely that contained in paragraph (*e*) of the prayers in the plaint, for an order

> "that the said wakf be managed by yearly turns according to the directions contained in the said wakf deed",

that is to say by one trustee at a time. It is conceded by learned counsel for the third and fourth defendants that the wakf is not being so managed as required in the wakf deed, but that the President of the Jamat (as mutawalli) keeps the accounts while he and the secretary (as mutawalli) are the "managing trustees". There has been no evidence from either side (for the first plaintiff merely touched on the point while the fourth defendant's evidence was inconclusive) to establish that the present irregular practice in this regard is more beneficial than the one prescribed in the wakf deed. In order to justify a departure from the practice so prescribed, it is for the defence to show that the irregularity is more beneficial than the prescribed procedure. Since they have failed to do this, the plaintiffs are entitled to the relief which they seek, and I make order accordingly that the wakf shall hereafter be managed in yearly turns according to the directions contained in the wakf deed.

With regard to the costs in this action, the relief that I have just granted under paragraph (*e*) of the prayers in the plaint concerns a small issue, little evidence or argument being adduced upon it, compared to the issues that I have disposed of earlier, and the plaintiffs' success on that one minor issue can affect in only a small degree any order as to costs, which depends primarily on the result on those other issues. On these, while the third and fourth defendants put forward a common defence, the plaintiffs have failed in their only claim against the fourth defendant personally, on the ground of limitation. As regards the first and second defendants, no order for payment of their costs would be justified since in fact they have supported the plaintiffs in this action. As regard the third defendant, the plaintiffs have succeeded on the issue whether or not he is a Khoja but have failed on the issue whether on that ground he should be removed from office, and I think the fairest course would be to make no order either for the payment of his costs by the plaintiffs or of the plaintiffs' costs by him. In the event, then, I make no order for costs in this action save that the plaintiffs will be required to pay one half of the costs of the fourth defendant.

Order accordingly.

For the plaintiffs:
PS Talati
Wiggins & Stephens, Zanzibar

For the first and second defendants:
JS Balsara
Balsara & Co, Zanzibar

For the third and fourth defendants:
WD Fraser-Murray and *MC Patel*
MC Patel, Zanzibar

Valji Keshav Oza v CP Jani & Sons

[1957] 1 EA 184 (HCZ)

Division:	HM High Court for Zanzibar at Zanzibar
Date of judgment:	25 January 1957
Case Number:	2/1957
Before:	Windham CJ
Sourced by:	LawAfrica

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[1] Rent restriction – Jurisdiction – Tenant's application to High Court for injunction – Whether proceedings competent in High Court – Rent Restriction Decree 1953 *s.* 33 (*Z.*).

Editor's Summary

The Rent Restriction Decree, 1953 s. 33 (1) and (2) gave the magistrate's court jurisdiction in respect of (*a*) criminal offences and (*b*) with the leave of the Rent Restriction Board proceedings for recovery of possession and arrears of rent affecting premises to which the Decree applies, and empowered the High Court to entertain any proceedings that could be brought in the magistrate's court. Sub-s. 3 specifically provided that the High Court and magistrate's court should transfer to the board any proceedings affecting premises to which the Decree applies unless satisfied that jurisdiction is specifically conferred on them by s. 33 to entertain such proceedings. The plaintiff commenced proceedings in the High Court claiming a perpetual injunction against the defendants, his landlords, to restrain them from demolishing certain premises adjoining and having a common wall with those occupied by the plaintiff, and damages in respect of demolition work already effected. The plaintiff then applied in the High Court for an interlocutory injunction pending trial of the action and defendants opposed the application on the ground that the High Court had no jurisdiction except in respect of actions for recovery of possession and for arrears of rent. It was common ground that the Rent Restriction Decree applied to the premises.

Held – The High Court had no jurisdiction to entertain the application for an interlocutory injunction and accordingly ordered that the proceedings be transferred to the Rent Restriction Board for disposal.

Order accordingly.

No cases referred to in judgment

Judgment

Windham CJ: The plaintiff-applicant, who is the tenant of the defendant-respondent in respect of certain premises to which the Rent Restriction Decree, 1953, applies, makes this application for an interlocutory injunction to restrain the defendant from carrying on any further demolition work on his immediately adjoining premises which have one common wall with the plaintiff's, such as might damage the plaintiff's premises and might in particular cause them to collapse while the plaintiff and others are

still in occupation of them. The injunction now asked for is interlocutory, pending the determination of the action which the plaintiff has lodged against the defendant for a perpetual injunction and damages in respect of the same demolition operations.

In addition to opposing this application on its merits, in respect of which merits evidence has been adduced on both sides and the court has inspected the premises, the defendant has raised the point that the High Court has no jurisdiction to entertain it. For the sake of convenience and despatch the evidence was taken and the inspection made instead of the point of jurisdiction being first disposed of in limine: but I must now deal with the question of jurisdiction before entering upon the merits of the application.

Now since the Rent Restriction Decree, 1953, admittedly applies to the premises concerned, it seems to me that the question whether or not the High Court has jurisdiction to entertain this application for an interlocutory injunction is to be determined from the provisions of s. 33 of that Decree. Section 33 reads as follows:

> "33(1) The court shall have jurisdiction to deal with any offence under this Decree and with any proceedings for recovery of possession or arrears of rent affecting premises to which this Decree applies for the bringing of which in the court leave has been granted by a board in accordance with para. (*s*) of sub-s. (1)

of s. 7 notwithstanding that by reason of the amount of penalty, claim or otherwise the case would not but for this provision be within the jurisdiction of the court. The court may order that any costs incurred by a party be taxed on the scale applicable to proceedings before a board.

"(2) If a person takes proceedings under this Decree in the High Court which he could have taken in the court, the High Court may entertain the proceedings and shall have the same powers as the court under this Decree, but such person shall, if successful, be entitled to recover costs only on the subordinate court scale, or the scale applicable to proceedings before a board, as the High Court may order.

"(3) The High Court and the court shall conform to this Decree in any proceedings arising under this Decree between landlords and tenants, and, in the case of any proceedings affecting premises to which this decree applies, the High Court or the court, unless satisfied that under this section it may entertain such proceedings, shall transfer the same to a board having jurisdiction for disposal or the granting of any necessary leave under para. (s) of sub-s. (1) of s. 7, and the board may either dispose of such proceedings or grant the necessary leave to bring such proceedings in the High Court or the court."

In s. 33, the expression "the court" means by definition a subordinate court of the first class, that is to say a magistrate's court.

Now as I see it, the effect of the three sub-sections of s. 33 is as follows. Sub-s. (1) confers on the magistrate's court a limited jurisdiction only, namely to deal with offences (that is criminal offences) under the Decree, and with proceedings for recovery of possession or arrears of rent; and even this limited jurisdiction it can exercise, as regards recovery of possession or arrears of rent, only with the leave of the Board. The proceedings in the present case could not, therefore, have been brought before the magistrate's court, because they are neither criminal proceedings nor proceedings for recovery of possession or arrears of rent. They could not have been so brought even by leave of the board. That being so, we turn to sub-s. (2). This subsection empowers the High Court to entertain such proceedings as could have been brought in the magistrate's court. It therefore confers on the High Court no power to entertain the present proceedings. We turn lastly to sub-s. (3) of s. 33. This sub-section provides specifically that

"in the case of any proceedings affecting premises to which this Decree applies, the High Court or the court, unless satisfied that *under this section* it may entertain such proceedings, shall transfer the same to a board having jurisdiction . . ."

This provision appears to exclude any concurrent jurisdiction of the High Court founded on any provision of the law outside s. 33 or on any inherent jurisdiction; and we have just seen that under s. 33 the High Court is given no power to entertain the present proceedings. Nor can there be any doubt that the present proceedings do affect premises to which the Decree applies. Accordingly, by the terms of sub s. (3) the High Court is not merely empowered but is required to transfer the proceedings to the board; and since as we have seen these are not proceedings for the recovery of possession or arrears of rent, there is no question of the board's granting leave, under sub-s. (1) or under s. 7 (1) (*s*), to bring the proceedings in the magistrate's court. Under s. 33 (3), therefore, this court is required to transfer the proceedings to the board having jurisdiction "for disposal." That the board has jurisdiction to entertain and dispose of an application for an interlocutory injunction such as the present one, affecting premises to which the Decree applies, is in my view made sufficiently clear by para. (*t*) of s. 7 (1) of the Decree, which empowers the board "to exercise jurisdiction in all civil matters on questions arising out of this Decree," read together with para. (1) and para. (4) of s. 8, which empower the board to investigate any dispute, or any facts which are likely to lead to a dispute between a landlord and a tenant.

I accordingly hold myself bound to transfer, and I do hereby transfer, the present proceedings for an

interlocutory injunction to the Rent Restriction Board for disposal,

with a direction that they be disposed of as expeditiously as possible. The respondent will have his costs of the application in this court.

Order accordingly.

For the plaintiff:
DF Karai
DF Karai, Zanzibar

For the defendant:
PS Talati
Wiggins & Stephens, Zanzibar

NA Patwa & Sons v The Hindoo Dispensary, Zanzibar
[1957] 1 EA 186 (HCZ)

Division:	HM High Court for Zanzibar at Zanzibar
Date of judgment:	28 February 1957
Case Number:	1/1957
Before:	Windham CJ
Sourced by:	LawAfrica

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[1] Rent restriction – Jurisdiction – Residential flat unoccupied without "good cause" – Allocation by board to a body corporate – Whether body corporate "suitable tenant" – Rent Restriction Decree, 1953, *s.* 7 (1) (i) (*Z.*).

Editor's Summary

The Zanzibar Rent Restriction Board in the exercise of its powers under s. 7 (1) (1) (i) of the Rent Restriction Decree, 1953, found that a residential flat in a house which belonged to the appellants had remained unoccupied for a period exceeding one month without good cause and accordingly allocated it to the respondents, corporate body, who required it for the purpose of housing a doctor whom they proposed to employ. The appellants appealed against the decision of the board on the grounds *inter alia* that the board had no power under the Rent Restriction Decree to allocate unoccupied residential premises to the respondents who since they could not occupy the premises personally could not be a "suitable tenant" as defined in the Decree.

Held–

(i) a body corporate cannot be a "suitable tenant" of a dwelling for the purposes of s. 7 (1) (1) (i) of the Rent Restriction Decree.

Hiller v. United Dairies (*London*) *Ltd.*, [1934] 1 K.B. 57, applied;

Kampala Cotton Co. Ltd. v. Pravinlal V. Madhvani, 21 E.A.C.A. 129, considered.

(ii) in purporting to allocate the appellants' unoccupied flat to the respondents for occupation at a future date by the respondents' employee the board acted without jurisdiction.

Appeal allowed.

Cases referred to:

(1) *Hiller v. United Dairies* (*London*) *Ltd.*, [1934] 1 K.B. 57.

(2) *Kampala Cotton Co. Ltd. v. Pravinlal V. Madhvani*, 21 E.A.C.A. 129.

(3) *Wabe v. Taylor*, [1952] 2 All E.R. 420; [1952] 2 Q.B. 735.

Judgment

Law J: This is an appeal by N. A. Patwa and Sons, a firm whose partners own a house at Kiponda, Zanzibar, from an order by the Zanzibar Rent Restriction Board dated December 8, 1956, in Application No. 129 of 1956, allocating a residential flat in the said house to the present respondents, the Hindoo Dispensary, Zanzibar. The board in the exercise of its power under s. 7 (1) (1) (i) of the Rent Restriction Decree, 1953, found that the flat in question had remained unoccupied for a period exceeding one month without good cause, and allocated it to the Hindoo Dispensary, who require it for the purpose of housing a doctor whom they propose to employ, but who is not yet in the Protectorate. This finding is the subject of the first three grounds of appeal, which allege that there was no evidence at all on which the board could find as it did; that on the contrary the board should have found on the evidence that the appellants had occupied the flat by moving furniture into it, and that the appellants intended to occupy the flat and had refused to let it to other persons. The appellants were represented before the board by one of their partners, Mr. Kassamali Noorbhai Patwa, who has lived with his family in

Mombasa since 1948. The following are extracts taken from the record of his evidence–

> "I want to occupy it (the flat) for my own use . . . I want to repair it . . . I cannot say what repairs will be done . . . I cannot say if it will be for my own use . . . I may stay either in Mombasa or Zanzibar . . . If I do not use the house myself I will let it out . . . I want to live in Zanzibar . . . I have arranged the furniture in the house . . . I have arranged the furniture because a marriage party from Tanga is expected . . ."

Having regard to this conflicting testimony, it is not surprising that the board commented on the record that "this witness refuses to give answers straightforwardly." He was the only witness called on behalf of the appellants on the issue as to whether or not there was "good cause" for the flat remaining unoccupied. The board were unimpressed with this evidence, in my opinion rightly. The board's findings that the flat had remained unoccupied without any good cause, and their refusal to believe Mr. Patwa's statement that he intended to occupy the flat himself, were justified having regard to the evidence before the board, and the first three grounds of appeal accordingly fail. The fourth ground of appeal, that the board did not ascertain the fact of employment, also fails, as Mr. Kapadia's statement in evidence that "another doctor will be coming soon. He has no accommodation" was not rebutted, nor did the appellant's advocate cross-examine Mr. Kapadia on this point or ask that he be re-called for cross-examination. The substantial grounds of appeal are No. 5 and No. 6, as amplified in argument before me, which can be summarized as follows – that the board had no power under the Rent Restriction Decree to allocate unoccupied residential premises to the respondents the Hindoo Dispensary, who are incapable of occupying the premises personally.

Section 7 (1) (1) (i) of the Rent Restriction Decree empowers the board–

> "to allocate to any suitable tenant at such rent as the board may fix any house or portion thereof which without good cause has been left unoccupied for a period exceeding one month . . ."

Mr. Chowdhary for the appellants has vigorously submitted that the Hindoo Dispensary cannot be "a suitable tenant" for the purposes of the above cited provision, arguing that only a physical person can become a statutory tenant of residential property. It is not disputed that the Hindoo Dispensary is a charitable body which has been registered under the provisions of s. 2 of the Land (Perpetual Succession) Decree (Cap. 103) as a body corporate with power *inter alia*

> "to sue and be sued in its corporate name and to hold and acquire. . . any land or any interest therein."

For the purposes of this case therefore the respondents the Hindoo Dispensary are a body corporate and thus a legal person. The question which now falls to be decided is whether a body corporate can be a "suitable tenant" within the meaning of s. 7 (1) (1) (i) of the Rent Restriction Decree, 1953.

Mr. Chowdhary for the appellants, the landlords, relies on the English case of *Hiller v. United Dairies* (*London*) *Ltd*. (1), [1934] 1 K.B. 57, which lays down that a limited company is not entitled to the protection of the Rent Restriction Acts as a statutory tenant, as it cannot fulfil the requirement of personal occupation of residential premises as a house. Mr. Talati for the respondents relies on *Kampala Cotton Co. Ltd. v. Pravinlal V. Madhvani* (2), 21 E.A.C.A. 129, which lays down that a dwelling-house, used as such by the tenant's employee, is none the less let for business purposes if it is in fact let to, and used by, the tenant, even a limited company tenant, as one of the features of the tenant's business operations. He argues that the respondents require the premises to house a doctor who is to be employed for the purposes of their business, which is to conduct a dispensary, and that therefore the respondents, although a body corporate, can become the statutory tenant and occupy the premises vicariously through their doctor-employee. As Briggs, J.A., said in the course of his judgment in the *Kampala Cotton Co.*

case (2),

> "the Uganda statute differs from the English Acts in two important respects. It protects business premises as well as dwellings, and it does not contain any provision similar to the words 'so long as he retains possession' appearing in s. 15 of the 1920 Act."

The Zanzibar Decree likewise extends the protection of the Rent Restriction legislation to business premises, but at the same time retains provision (in s. 24) similar to that in s. 15 of the 1920 Act. The position in Zanzibar is therefore not the same as that obtaining in Uganda, and it would seem that the legislature in Zanzibar intended, so far as dwelling-houses are concerned, to confer purely personal rights, and to restrict the protection of the Decree to tenants who are in and retain physical possession, and consequently for the purposes of s. 7 (1) (1) (i) of the Decree to tenants who are capable of occupying residential premises in a personal and physical capacity. Mr. Talati has submitted that a limited company tenant in Zanzibar would be entitled to the protection of the Decree in respect of a dwelling-house occupied by an employee for the purposes of the company's business. That might well be so, if the employee was in possession of the dwelling in consequence of a contractual tenancy between the landlord and the company, and was holding over on the expiry of that contractual tenancy, and if it had been part of that contractual tenancy that the occupation was to be of a vicarious nature. In such a case the company might claim the protection of the Decree as a statutory tenant under the doctrine of vicarious occupation – *Wabe v. Taylor* (3), [1952] 2 All E.R. 420; [1952] 2 Q.B. 735. But that is a very different state of affairs from the position in this case, which is that a body corporate is seeking to obtain possession, as a statutory tenant, of a dwelling-house to be occupied in future by an employee for the purpose of its business. There is no existing or prior contractual relationship between the landlords and the body corporate, so far as the dwelling is concerned, and there is completely lacking that element of physical possession by an individual which in my opinion is requisite before the protection of the Decree can be invoked by a body corporate in relation to a dwelling.

In my view the contentions raised on behalf of the appellants are well founded and must prevail. I hold that a body corporate cannot be a "suitable tenant" of a dwelling for the purposes of s. 7 (1) (1) (i) of the Decree, and that in purporting to allocate the appellant's unoccupied flat to the respondents for occupation at a future date by the respondents' employee, the board acted without jurisdiction. It follows that for these reasons the appeal must succeed, and the order of the board dated December 8, 1956, in Application No. 129 of 1956, must be set aside, and I order accordingly. The appellant will have the costs of this appeal.

Appeal allowed.

For the appellants:
SM Chowdhary
SM Chowdhary, Zanzibar

For the respondents:
KS Talati
Wiggins & Stephens, Zanzibar

Musa Bin Khamis Bin Juma El Nofli v Kaporo Bin Kasibu Mnyamwezi

[1957] 1 EA 189 (SCZ)

Division:	His Highness The Sultan's Court for Zanzibar at Pemba
Date of judgment:	2 April 1957
Case Number:	65/1955
Before:	Windham CJ
Sourced by:	LawAfrica

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[1] Estoppel – Estoppel by record – Judgment in default of attendance at trial – Subsequent action arising from same cause of action barred – Civil Procedure Decree, s. 6 (*Z.*) *– Civil Procedure Rules, O.* 9, *r.* 8 *and r.* 9 (*Z.*).

Editor's Summary

The appellant brought an action in the Kadhi's Court against the respondent for a declaration of title to thirteen clove trees forming part of a larger shamba (estate) and alleged that these trees were wrongfully seized by the respondent. The plaintiff denied under cross-examination and in answer to questions from the court that these disputed trees had been the subject of a suit for a declaration of title, but stated that they had been the subject of an action in trespass. The Kadhi accordingly appointed a commissioner who after hearing evidence reported in favour of the plaintiff. The respondent lodged objections to the report contending that the dispute had already been decided in previous litigation between the parties and that the issue was, therefore, res judicata. On resumption of the enquiry before the Kadhi, the appellant admitted that there had been another earlier case between the parties for a declaration of title to the disputed trees, but stated that that action had been dismissed not on merits but owing to his own default in attending at the trial. Although the Kadhi who dismissed this action did not expressly say so, it was dismissed under O. 9, r. 8, of the Civil Procedure Rules. The appellant did not appeal.

In these circumstances, the Kadhi in the present case set aside the commissioner's report and gave judgment for the respondent. The appellant appealed against this judgment and contended that, firstly, the respondent had raised the question of res judicata too late and secondly, that the earlier judgment did not constitute res judicata because it was obtained by default and not on merits and therefore not covered by s. 6 of the Civil Procedure Decree.

Held–

(i) by the obvious trend of his questions in cross-examination of the appellant, the respondent had at a very early stage raised the point concerning earlier litigation over the same subject matter; and in view of his deceptive answers to those questions the appellant could not be allowed to argue that it was then too late to raise this line of defence.

(ii) as the present suit arose from the same cause of action as the earlier suit which was dismissed, it was barred under O. 9, r. 9.

Appeal dismissed.

Cases referred to in judgment:

(1) *Maharaja Radha Parshad Singh v. Lal Sahab Rai* (1889–90), 17 I.A. 150.

Judgment

Windham CJ: The plaintiff-appellant brought an action against the respondent for a declaration of title to thirteen clove trees forming part of a larger shamba, the thirteen trees having been allegedly wrongfully seized by the respondent. After hearing the plaintiff give evidence, the learned Kadhi, by consent, referred to a commissioner the question to whom the thirteen trees belonged. Before he did this the plaintiff was cross-examined by the respondent's wakyl, and then questioned by the court, on the subject of a previous suit or suits between the parties concerning these same disputed trees, and in answer to their questions he stated that he had brought only one such suit, that it had been dismissed, but that it was for trespass and not for a declaration of title. Thus assured, the Kadhi appointed the commissioner, who after hearing evidence duly made a report in favour of the plaintiff's ownership of the disputed trees. The respondent thereupon lodged objections to the report, one of which was not so much an attack on the report itself, but rather a reiteration of the allegation, already foreshadowed in his previous cross-examination of the plaintiff

to which I have earlier referred, that the dispute had already been decided in previous litigation between the parties. The learned Kadhi, who had up to this point relied on the plaintiff's sworn assurances that there was only one such previous action, and that it did not concern the question of title and thus did not constitute a res judicata, now decided, in my view quite properly, to look into the matter more carefully, and the result of his enquiry was that another earlier case between the two parties and concerning the same disputed trees was brought to light and was admitted by the plaintiff, and that unlike the one which the plaintiff had earlier referred to, it was an action brought by the plaintiff for a declaration of title and had been dismissed, not on merits but by default, owing to the plaintiff's failure to attend at the trial. In short it had been dismissed under O. 9, r. 8 of the Civil Procedure Rules, although the Kadhi who dismissed it had not mentioned the rule under which he dismissed it. The plaintiff never appealed against the judgment in default.

In these circumstances the Kadhi in the present case straightway gave a judgment in which, after observing that the plaintiff had "fooled" him, he set aside the commissioner's report and gave judgment for the defendant on the strength of the earlier default judgment in the latter's favour upon the action for a declaration of title to the same property. The plaintiff – appellant appeals against his judgment.

The first contention is that the defendant was too late in raising the question of res judicata for the first time only after the commissioner's report had been submitted, and learned counsel for the plaintiff refers appositely in this connection to Ord. 8, r. 2 of the Civil Procedure Rules, which requires a defendant to raise such matters "in his pleading". It is however, not the practice in Kadhi's courts for written statements of defence to be filed, and the rule could not therefore be applied literally. It seems to me that, by the obvious trend of his questions in his cross-examination of the plaintiff, the defendant did at a very early stage raise the point concerning the earlier litigation over the same subject-matter; and in view of the plaintiff's deceptive answers to those questions he (the plaintiff) cannot now be allowed to argue that it was even then too late to raise this line of defence.

Secondly, it is contended that the earlier judgment did not in any case constitute res judicata because the judgment was by default and not on merits, and that it is not therefore covered by s. 6 of the Civil Procedure Decree, which lays down what previous litigation can constitute res judicata. That is perfectly true so far as it goes. Mulla's Commentary on the Indian Civil Procedure Code, (9th Edn.) at p. 70, commenting on the corresponding s. 11 in the Indian Civil Procedure Code, makes this clear. A judge dismissing the plaintiff's suit in default of the plaintiff's appearance cannot be said to have "heard and finally determined" the matter in dispute for the purpose of constituting res judicata under the section: *Maharaja Radha Parshad Singh v. Lal Sahab Raj* (1) (1890), 17 I.A. 150 and other cases there cited. But, as pointed out in the same commentary, where the suit is so dismissed, under the Indian Ord. 9, r. 8, which is reproduced in the Zanzibar O. 9, r. 8, under which this plaintiff's earlier suit was dismissed, then a fresh suit on the same causes of action may be barred under O. 9, r. 9. Such was the position here, the two suits being on the same cause of action, for O. 9, r. 9 of Civil Procedure Rules provides that where a suit has been wholly or partly dismissed under r. 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action.

The learned Kadhi was therefore right in dismissing the plaintiff's suit. His judgment must be upheld and this appeal is dismissed with costs.

Appeal dismissed.

For the appellant:

MA Tiwani (wakyl)
MA Tiwani, Zanzibar

For the respondent:
Sheikh Ali bin Said (wakyl)
Sheikh Ali bin Said, Zanzibar

Saleh Bin Kombo Bin Faki v Administrator General, Zanzibar

[1957] 1 EA 191 (HCZ)

Division:	HM High Court for Zanzibar at Pemba
Date of judgment:	2 April 1957
Case Number:	32/1956
Before:	Windham CJ
Sourced by:	LawAfrica

(Administrator of the estate of Kassamali Alibhai Kakal Bhora)

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[1] Res judicata – Person party in two suits in different capacity – Whether issue decided in first case constitutes res judicata in the second – Meaning of "litigating under the same title" – Civil Procedure Decree, s. 6 (*Z.*).

Editor's Summary

The plaintiff sued the Administrator General as administrator of the estate of a deceased broker named Kassamali Alibhai, for Shs. 6,200/-, alleging that this sum was paid by the plaintiff to the deceased towards the purchase price of certain shambas which the deceased as broker sold to the plaintiff by public auction in January, 1954, on the instructions of the Administrator General as administrator of the estate of the late Hassanbhai Dadabhai. The plaintiff claimed that he had not been credited with that payment as being made towards the purchase price of the shambas out of Hassanbhai Dadabhai's estate. In support of his contention the plaintiff produced four receipts for sums totalling Shs. 6,200/- made out by the deceased. The defendant contended that in a case in the previous year the court had held that these four receipts were not proved to relate to the present plaintiff's purchase of the deceased Hassanbhai Dadabhai's shamba property through the broker Kassamali Alibhai and that the issue was therefore res judicata. In that case the present defendant in his capacity as administrator of the late Hassanbhai Dadabhai was the plaintiff and the present plaintiff was the defendant.

Held–

(i) the defendant's contention as to res judicata must fail as although in each of the two cases the (plaintiff as) Administrator General was a party, he was not in both cases "litigating under the same title" for the purpose of s. 6 of the Civil Procedure Decree: in the former case he sued as administrator of the estate of the late Hassanbhai Dadabhai and in the present case he had been

sued as administrator of the late Kassamali Alibhai.

(ii) however, the plaintiff had failed to prove that the four receipts related to the sale to him in January, 1954, of the shambas belonging to the estate of the late Hassanbhai Dadabhai.

Judgment for the defendant.

No cases referred to in judgment

Judgment

Windham CJ: The plaintiff sues the Administrator General, in the latter's capacity as administrator of the estate of a deceased broker named Kassamali Alibhai, for Shs. 6,200/-, alleging that this sum was paid by him (the plaintiff) to Kassamali towards the purchase price of certain shambas which Kassamali, as broker, sold to him by public auction in January, 1954, on the instructions of the Administrator General in the latter's capacity as administrator of the estate of the late Hassanbhai Dadabhai, the owner of the shambas. The plaintiff has produced, as evidence of his payment of the Shs. 6,200/- to Kassamali, the latter's receipt for four sums totalling Shs. 6,200/-, as exhibit A. His suit, which strictly on the face of the plaint seems to disclose no cause of action at all, appears to be based on the contention that he was not duly credited with that payment as being towards the purchase price of the shambas out of Hassanbhai Dadabhai's estate.

The defence has relied largely, though by no means entirely, on the submission that the issue in the present case is res judicata, as having been in issue, and disposed of upon merits by a judgment of this court, last year in Civil Case No. 41 of 1955. Now in that case, where the Administrator General was plaintiff and the present plaintiff was defendant, the question whether these four receipts now produced as exhibit A related to the present plaintiff's purchase, through the broker Kassamali, of the shamba property of the estate of Hassanbhai Dadabhai, was certainly the principal issue in

the case, and this court decided that the present plaintiff had failed to prove that the four receipts related to that sale. At first sight, then, the matter might appear to be res judicata. The defendant's contention must, however, fail on one point, namely that although in each of the two cases the Administrator General was a party, he was not in both cases "litigating under the same title" for the purpose of s. 6 of the Civil Procedure Decree, which deals with res judicata. For in the former case he sued as administrator of the estate of the clove shamba owner Hasanbhai Dadabhai, whereas in the present case he is sued as administrator of the broker Kassamali Alibhai. Mulla, in his Commentary on the Indian Civil Procedure Code, (9th Edn.) at p. 62 makes it clear, citing Indian decisions in support of his views, that the expression "the same title" in s. 11 of the Indian Code (which is reproduced in s. 6 of the Zanzibar Decree) means "the same capacity", that is to say the same representative capacity. The Administrator General having been a party in a different representative capacity in the two cases, the defence of res judicata must fail, notwithstanding that the matter is indeed res judicata in every other respect.

That, however, will be of small solace to the plaintiff, for when I turn to consider this case on its merits and upon the evidence adduced, I find, just as I found in the earlier case, that the plaintiff had failed to satisfy me that the four receipts, which he has again produced, related to the sale to him in January, 1954, of the shamba property from the estate of Hassanbhai Dadabhai. On his own admission he had numerous dealings with the broker Kassamali; and none of these four receipts is expressed to relate to any sale of shambas from Hassanbhai's estate. I accept the evidence of the defendant's Pemba agent, Mr. Lalji, when he says:–

> "I deal with many brokers. When they give receipts, their practice is to give details of the transaction or property to which they relate, and mention the name of the estate, if it is a deceased's estate. I have never seen a receipt of a broker without such details. I was and still am satisfied that these four receipts did not relate to the estate of Hasanbhai Dadabhai."

His evidence on this point is corroborated by that of the first class Pemba broker, Purshottam D. Patel, who stated that such is his own invariable practice when issuing receipts at auctions.

On these grounds I hold that the plaintiff has failed to prove his case, and his suit must be dismissed with costs. I would add, as possible consolation to the plaintiff, that I do not doubt that the four receipts are genuine ones. I merely find that he has not proved that they relate to the transaction to which he alleges that they do relate.

Judgment for the defendant.

The plaintiff in person.

For the defendant:
JC Patel
JC Patel, Zanzibar

Hussein Bachoo v The Clove Growers Association of Zanzibar
[1957] 1 EA 193 (HCZ)

Division: HM High Court for Zanzibar at Zanzibar

Date of judgment:	17 May 1957
Case Number:	6/1957
Before:	Windham CJ
Sourced by:	LawAfrica

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[1] Sale of goods – Effect of breach of warranty and fraud – Case unprovided for by local legislation – Resort to Sale of Goods Act, 1893 *– Contract Decree, s.* 17*, s.* 19*, s.* 117 *and s.* 119 (*Z.*)*.*

Editor's Summary

The appellant contracted to sell to the respondents forty-seven bags of "fair-quality cloves." Upon delivery the respondents found that the contents of seven of these bags were not "fair-quality cloves." They accordingly rejected and refused to pay for these seven bags but accepted and paid for the others. The appellant refused to take back the seven bags and sued for their purchase price. The respondents in defence pleaded (*a*) breach of warranty in respect of the rejected bags; and (*b*) fraudulent misrepresentation by the appellant with regard to the contents of those bags. Both parties relied on the Contract Decree in support of their contentions. The trial magistrate found for the respondents on both these issues and relied on s. 119 of the Decree. The appellant appealed (*inter alia*) on the grounds that even if there was a breach of warranty the respondents were not entitled to reject the seven offending bags but should have accepted and paid for them and then (if they desired) sued for damages on the warranty, and that there was no specific finding of, and in any case insufficient evidence to establish any active fraud by the appellant.

Held–

(i) s. 119 of the Contract Decree did not apply, but as the Contract Decree contained no provision covering the circumstances of this case, the Appellate Court would, by virtue of art. 24 of the Zanzibar Order in Council, 1924, have resort to the English Sale of Goods Act, 1893, s. 30 (3).

(ii) the trial magistrate, although wrongly relying upon s. 119 of the Contract Decree, was justified in holding that the respondents were entitled to reject the seven bags.

(iii) the trial magistrate, having found active fraud by the appellant, was correct in holding that the contract was void-able at the option of the respondent.

Appeal dismissed.

Cases referred to:

(1) *Moore & Co. v. Landauer & Co.*, [1921] 1 K.B. 73; [1921] 2 K.B. 519.

(2) *Pan African Trading Agencies v. Chande Brothers, Ltd.*, 19 E.A.C.A. 141.

Judgment

Windham CJ: The appellant contracted to sell to the respondents (the Clove Growers Association) forty-seven bags of fair-quality cloves at the price of Shs. 200/- per 100 lbs. of cloves. The appellant

delivered to the respondents forty-seven bags. Upon delivery the latter found that while forty of the bags contained fair-quality cloves as contracted for, the remaining seven bags did not, three of them containing clove stems only while the other four contained undried cloves, neither of which fall under the description of "fair-quality cloves." The respondents accordingly accepted and paid for the forty bags but rejected and refused to pay for the remaining seven bags. The appellant, having refused to take back the seven bags, thereupon sued the respondents for their price, namely Shs. 1,614/-. The respondents pleaded (*a*) breach of warranty in respect of the seven rejected bags; (*b*) fraudulent misrepresentation on the plaintiff's part with regard to the contents of those bags. The learned trial magistrate found in favour of the respondents on both those issues and accordingly dismissed the plaintiff's claim, holding that the respondents had a legal right to reject the seven bags.

The main grounds of appeal appear to be these: first, that even if there was a breach of warranty this did not give the respondents the right to reject the seven offending bags but that they should have accepted and paid for them and then (if they desired)

sued for damages on the warranty; secondly, that there was no specific finding of, and in any case insufficient evidence to establish, any active fraud on the appellant's part. Both sides rely in support of their contentions upon sections of the Contract Decree to which I shall presently refer.

Before turning to the law, I will deal with the facts and findings on the issue of fraud. That there was at least a breach of warranty in respect of the seven offending bags is not disputed. But the vital finding and conclusion appears at the end of the judgment and is in the following terms:

> "I think the defendants were entitled under s. 119 of the Contract Decree to refuse to accept the seven bags. This is not merely a case of breach of warranty as to quality and, having regard to the evidence of other similar transactions admitted under s. 15 of the Evidence Decree, this would appear to be a case covered by s. 17 of the Contract Decree and that under s. 19 of that Decree the defendants have an option to avoid the contract. I do not consider the first exception to s. 19 applies as this was not merely a case of misrepresentation or silence but of active acts of deception. I accordingly find that the defendants were entitled to avoid the contract in respect of the seven bags, which they in fact did, immediately on learning of the fraud. The suit is accordingly dismissed with costs."

In the above passage there is in my view a definite finding of active fraud on the appellant's part in knowingly delivering seven bags containing something other than the fair-quality cloves contracted for. It is also clear from the learned trial magistrate's findings and appraisement of the evidence in the earlier parts of his judgment, and from a perusal of all the evidence on the record, but all forty-seven bags, or at least the top portions of them, had contained fair-quality cloves when they were examined and passed in the plaintiff's presence by the Produce Inspector at the Central Clove Market, and that the plaintiff's act of fraud lay in substituting for seven of those good bags the seven bad ones at some time between then and the subsequent delivery of forty-seven bags to the respondents at their go-down. The evidence, oral and documentary and circumstantial, amply supported a conclusion that during that period the plaintiff, and he alone, had the opportunity of making, and must as the only reasonably possible inference be held to have made, the fraudulent substitution.

On these facts and findings let us turn to the law. The learned trial magistrate held, as we have seen, that the respondents were entitled to refuse to accept the seven bags under s. 119 of the Contract Decree (Cap. 80). Now s. 119 provides that–

> "Where the seller sends to the buyer goods not ordered with goods ordered, the buyer may refuse to accept any of the goods so sent, if there is risk or trouble in separating the goods ordered from the goods not ordered."

But in the present case it is uncontested that there was no risk or trouble in effecting such a separation, that is to say in separating the seven bags whose contents were not ordered from the remaining forty bags whose contents were ordered. That being so, s. 119 clearly has no application at all, since the conditional clause at the end of it limits its application to cases where there is such a risk or trouble in effecting the separation, the section providing that in such a case the buyer may reject the whole consignment, the good with the bad. But the section leaves untouched the case where the separation would be easy and without risk. And a perusal of the whole of the Contract Decree shows that it contains no provision covering such a case of laying down what the buyer's rights would then be. Nor does such a provision appear elsewhere in the legislation of the Zanzibar Protectorate. In order to supplement this lacuna in the Zanzibar legislation resort may accordingly be had, by virtue of Art. 24 of the Zanzibar Order in Council, 1924, to

> "the substance of the common law, the doctrines of equity, and the statutes of general application in force in

England on the 7th day of July, 1897."

Now the relevant English statute of general application in 1897 was, as it still is, the Sale of Goods Act, 1893; and sub-s. (3) of s. 30 of that Act does cover the case, for it provides as follows:–

> "Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole."

It has been held that the expression "mixed with" in this sub-section means no more than "accompanied by," per Rowlatt, J., in *Moore & Co. v. Landauer & Co*. (1), [1921] 1 K.B. 73 at p. 76, affirmed on appeal [1921] 2 K.B. 519.

Reading this English s. 30 (3) together with s. 119 of the Zanzibar Contract Decree, it is clear that the English section makes no distinction between cases where there is risk or trouble in separating the goods ordered from the goods not ordered and cases where there is not, and places both on an equal footing, giving the buyer the option in either case of rejecting the whole or only the bad part. To this extent s. 119 of the Contract Decree must, of course, prevail over the English section, since over the field covered by s. 119 there is a conflict between the two sections; and the result will be that the buyer's right to reject the whole of the goods delivered, as distinct from only such of the goods as were not ordered, will be limited to cases where separation is risky or troublesome, which is the case dealt with by s. 119. But where the separation is not risky or troublesome s. 119, as we have seen, does not apply at all, and the field is left clear for the operation of the English s. 30 (3), since the Zanzibar legislation leaves such a case unprovided for. The result, therefore, will be that in such a case, which is the one dealt with in the present appeal, while the buyer will not be free to reject the whole of the goods delivered, he will be free to reject such of them as were not ordered. That is what the respondent did in the present case. It is interesting to note that in Tanganyika Territory the Sale of Goods Ordinance contains no provision corresponding to s. 119 of the Zanzibar Contract Decree, but that it does contain a provision, s. 32 (3), exactly reproducing s. 30 (3) of the English Sale of Goods Act, 1893, and that this s. 32 (3) was applied and interpreted by the Court of Appeal for Eastern Africa in *Pan African Trading Agencies v. Chande Brothers Ltd*. (2), 19 E.A.C.A. 141, at pp. 145–7. In that judgment the difference was discussed between goods of a "different description" (which are the words used in the section) and goods merely of an "inferior quality." In that connection I would observe that in the present case the contents of the seven rejected bags, namely clove stems and undried cloves, were not merely of an inferior quality from the "fair-quality cloves" contracted for, but that, since in the trade the expression "fair-quality cloves" means dried and budded cloves of a certain quality, they were of a different description.

The learned trial magistrate, although wrongly relying for the purpose upon s. 119, was therefore in my view justified in holding that the respondents were legally entitled to reject the seven offending bags. He was also justified in holding that there was in this case more than a mere breach of warranty as to quality, and in accordingly rejecting the appellant's argument that the section of the Contract Decree which ought to have been applied was s. 117, which provides that where a specific article is sold subject to a warranty which has been broken, the buyer's only remedy is to accept the article and sue for damages on the warranty. In any case, what was sold here was not a specific article but a quantity of goods by description, so that s. 117 could not be applicable.

Lastly, the learned magistrate, having found (as I stated earlier he must be deemed to have found) active fraud on the appellant's part in substituting the seven bad bags between the inspection of all the forty-seven bags in the Central Clove Market and their delivery to the respondents' go-down, was correct in holding that the contract was voidable at the option of the respondent. It is argued that the learned magistrate ought to have applied the first "exception" to s. 19 of the Contract Decree and to have held accordingly that the contract was not voidable. That argument cannot succeed, if only for the reason that the "exception" applies only to non-fraudulent misrepresentation or to mere silence, and does not apply

to cases of active fraud, such as the physical substitution in the present case of seven bags whose contents did not conform with the contract for seven bags which did conform, vide Mulla's

Commentary on the Indian Contract Act (6th Edn.) at p. 130, where in commenting on the identical "exception" in the Indian Act it is observed that

> "the exception does not apply to cases of active fraud as distinguished from misrepresentation which is not fraudulent."

Read in the context of the whole section, and also of s. 17 of the Contract Decree, this "exception" in s. 19 can only reasonably be construed as if the first comma in it appeared after the word "misrepresentation" and not (as it does) after the word "silence."

On all these grounds I hold that the respondents were within their rights in rejecting the seven bags which did not contain fair-quality cloves, and that the appellant's action for the price of those seven bags was rightly dismissed. The appeal is dismissed with costs.

Appeal dismissed.

For the appellant:
DF Karai
DF Karai, Zanzibar

For the respondents:
KS Talati
Wiggins & Stephens, Zanzibar

Silverio Peola v R
[1957] 1 EA 196 (HCZ)

Division:	HM High Court for Zanzibar at Zanzibar
Date of judgment:	17 May 1957
Case Number:	9/1957
Before:	Windham CJ
Sourced by:	LawAfrica

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[1] Criminal Law – Jurisdiction – Offence committed in British ship – Particulars of offence specifying place of commission – Findings of magistrate inconsistent with particulars – Prevention of Cruelty to Animals Decree Cap. 127 (*Z*).

Editor's Summary

The appellant was the master of a vessel, the m.v. "Munir," which in January 1957 carried 120 cows from Mogadishu to Zanzibar calling at the ports of Malindi and Mombasa on the way. During the voyage thirty-nine cows died due to overcrowding in the hatch and exhaustion from lack of water. The appellant

was charged with cruelty to animals pursuant to s. 36 of the Prevention of Cruelty to Animals Decree (*Z*) (Cap. 127) in that he subjected the animals to unnecessary pain or suffering. The particulars of the offence stated that the appellant

> "on Saturday, 12th day of January, 1957, at Zanzibar Harbour . . . carried animals . . . in such a manner as to subject the animals to unnecessary pain or suffering."

The magistrate found that all the cattle save one died between Mogadishu and Mombasa but did not state the precise stage of the voyage where the cruelty occurred, or whether the cruelty occurred on the high seas or within Zanzibar territorial waters, because he held that art. 5 and art. 25 of the Zanzibar Order in Council 1924 and s. 686 of the Merchant Shipping Act, 1894, brought the offence within his jurisdiction as one committed in a British ship. He found that there was gross overcrowding and lack of water between Mogadishu and Mombasa and accordingly convicted the appellant and fined him Shs. 500/-. On appeal it was argued for the appellant that the evidence did not support a conviction of cruelty at Zanzibar, and if art. 5, art. 25 and art. 26 of the Zanzibar Order in Council, 1924, and s. 686 of the Merchant Shipping Act, 1894, were relied on, these, whilst bringing within the jurisdiction of the Zanzibar Courts an offence committed by a foreigner in a British ship on the high seas, are concerned wholly with venue and do not provide that an act which would be an offence under the law of Zanzibar if committed within Zanzibar harbour or within its territorial waters, is an offence if committed in a British ship on the high seas, and that in any event, this was not the charge against the appellant.

Held–

(i) The charge sheet ought to have averred, if an offence outside the territorial waters of Zanzibar was being relied on, that the offence was committed on

the high seas, and since the charge sheet did not do so, the burden lay on the Crown of proving that the offence took place in Zanzibar Harbour or within Zanzibar territorial waters.

(ii) Since the magistrate found that all save one of the thirty-nine cattle had died between Mogadishu and Mombasa and there was no proof of overcrowding or lack of water between Mombasa and Zanzibar, no cruelty was proved between Mombasa and Zanzibar or at Zanzibar.

Appeal allowed.

Cases referred to:

(1) *R. v. Martin and Others*, [1956] 2 All E.R. 86.

Judgment

Windham CJ: This appeal raises a point of considerable interest and no little difficulty regarding the criminal liability of a foreigner for an act committed on board a British ship outside Zanzibar territorial waters, where that act is an offence under the laws of the Zanzibar Protectorate. The appellant is an Italian subject, and he was charged with, and upon pleading not guilty was tried and convicted of, an offence of cruelty to animals contrary to s. 3 (*b*) of the Prevention of Cruelty to Animals Decree (Cap. 127), s. 3 (*b*) providing that any person shall be guilty of an offence who

> "binds or carries any animal in such a manner or position as to subject the animal to unnecessary pain or suffering."

The particulars of the charge were framed as follows:

> "Silverio Peola on Saturday 12th day of January, 1957 at Zanzibar Harbour, being a Captain of M.V. Munir, carried animals in the said M.V. Munir in such a manner as to subject the animals to unnecessary pain or suffering, to wit he carried 120 Cows out of these 39 Cows died on the way due to lack of sufficient space in the hatch and exhaustion from lack of water."

The appellant, upon pleading not guilty, was tried and convicted in the first class magistrate's court and sentenced to a fine of Shs. 500/-. In his judgment the learned magistrate found that there had been overcrowding of cattle on the vessel as alleged, amounting to cruelty under the section, but he made no finding on the question whether the offence had been committed within Zanzibar harbour, or within Zanzibar territorial waters, or upon the high seas, or at any particular stage or stages of the vessel's journey from Mogadishu, where 120 cattle had been loaded, via Mombasa to Zanzibar, where the 80 survivors of them were landed, holding that the provisions of art. 5 (2) and art. 25 (2) of the Zanzibar Order in Council, 1924 (to which he might have added art. 26 (2) also), read together with s. 686 (1) of the Merchant Shipping Act, 1894, brought the offence within his jurisdiction by reason of its having been committed on a British ship and therefore rendered such a finding unnecessary.

One of the arguments on appeal was that the appellant's admitted act in carrying the cattle in very overcrowded conditions on at least some stage of the voyage was not an act such as would constitute an offence at all under the charging section, s. 3 (*b*) of the Prevention of Cruelty to Animals Decree, even if committed in Zanzibar. But this point was not argued strongly or convincingly and in my view it has no merit. Transporting cattle in such overcrowded condition that one-third of them die from the congestion and from thirst is clearly a carrying of them in such a manner as to subject them to unnecessary suffering. There remain, however, three substantial grounds of appeal.

The first, and legally the most interesting contention, is that art. 5 (2), art. 25 (2) and art. 26 (2) of the Zanzibar Order in Council, 1924, and s. 686 (1) of the Merchant Shipping Act, 1894, while admittedly their effect is to bring within the jurisdiction of the Zanzibar courts any offence committed by a foreigner on a British ship upon the high seas, so that he can be tried for it when in Zanzibar, are concerned with venue and jurisdiction only, and do not in themselves provide, or have the effect of providing,

that an act which would be an offence under the laws of Zanzibar if committed in Zanzibar (including its territorial waters) shall be deemed to be an offence if committed on a British ship upon the high seas. In short, the contention is that in order to make the appellant's act of carrying cattle in overcrowded conditions upon the high seas into an offence against the laws of Zanzibar at all, then either (*a*) there would have to be some specific or inclusive provision in the Prevention of Cruelty to Animals Decree, or elsewhere, providing that an offence against s. 3 (*b*) of that Decree shall be deemed to be an offence if committed upon a British ship upon the high seas-which admittedly there is not; or alternatively (*b*) the offence should be one so universally recognized as an infringement of the moral law and therefore as a crime wherever committed (e.g. such an offence as murder or theft), that no foreigner travelling to Zanzibar could in reason be heard to say that he did not know that the act was a crime under the Zanzibar laws.

Now upon a careful perusal of the terms of the relevant legislation, and in the light of the very pertinent observations and decision in the recent case of *R. v. Martin and Others* (1), [1956] 2 All E.R. 86, a decision to which it is fair to observe that the learned trial magistrate's attention was not drawn, it seems to me that there is nothing in art. 26 (2) of the Zanzibar Order in Council, 1924, or in s. 686 (1) of the Merchant Shipping Act, 1894 (a section made applicable in Zanzibar by art. 25 (2) of that Order in Council) which provides, or whose effect is, that any act which would be an offence in Zanzibar shall be deemed to be an offence against the laws of Zanzibar if committed on the high seas on a British ship. Article 26 (2) provides as follows:

> "26 (2). In the case of any offence committed on the high seas or within the Admiralty jurisdiction, by any person subject to this Order, who at the time of committing such offence was on board a British ship, or on board a foreign ship to which he did not belong, a court acting under this Order shall have jurisdiction as if the offence had been committed within Zanzibar."

All that the above provision lays down, as I read it, is that if an act is done which under some other provision of the Zanzibar legislation, or by operation of some legal principle or presumption, has been made an offence against the laws of Zanzibar if committed on a British ship on the high seas, then the offender may be tried for it in Zanzibar just as if it had been committed by him in Zanzibar. But in order that art. 26 (2) shall operate on the act at all, the act must have been made (independently of the Article) an offence when committed on a British ship on the high seas, since art. 26 (2) does not itself provide that any act so committed on the high seas shall be deemed to be an offence if it would have been an offence when committed in Zanzibar. The wording of art. 26 (2) is, in this connection, not essentially different from that of s. 62 (1) of the Civil Aviation Act, 1949, with which the judgment in *R. v. Martin and Others* (1), was concerned. Section 62 (1) of that Act provides as follows:

> "62 (1). Any offence whatever committed on a British aircraft shall, for the purpose of conferring jurisdiction, be deemed to have been committed in any place where the offender may for the time being be."

It was held that s. 62 (1) could not be construed as itself providing that an act which if committed in England would be an offence shall be deemed to be an offence (i.e. against the laws of England) as if it had been done in England. Devlin, J., in his judgment *R. v. Martin and Others* (1), [1956] 2 All E.R. 86, at p. 90 said:

> "The prosecution say that, apart from these few statutes, s. 62 is the only enactment that can make a criminal act done in the air an offence. Accordingly the prosecution say that s. 62 must be given a construction which is wide enough to make it an offence-creating section. It begins with the words 'Any offence whatever committed on a British aircraft,' and, since it thus starts by apparently assuming that the act to be considered

is an offence before the words of the section operate on it, the prosecution say that the word ‘offence’ must be construed as if it read ‘any act which if done in England would be an offence.’ No doubt so wide a construction would sustain the prosecution’s submission.

> The defence say that construction is not permissible. They point to the large number of statutes (some of which I have already cited) which make that sort of provision in specific terms, saying that an act committed in such-and-such a place should be treated in the same way as if it had been an act committed in England or in the place where the man was apprehended or tried. Those are the sort of words, counsel for the defendant Martin submitted, that are used by the legislature when it intends to achieve the result the prosecution contends for here; such words are not present in this Act."

The learned judge goes on to recapitulate and to hold (at p. 91) as follows:

> "In my judgment, if the prosecution is to succeed, it can only succeed if a very free construction is applied to the words of the statute. It can only succeed if in lieu of the words 'any offence whatever' there is read 'any act which if done in England would be an offence'. That is a free construction. It is not a construction which emerges from the grammar of the Civil Aviation Act, 1949, and it is not one which I find myself willing to accept. What the Act appears to postulate is this, that before the section operates at all there must be inquiry whether any offence has been committed; if an offence has been committed, then s. 62 (1) of the Civil Aviation Act, 1949, determines the place where it should be tried. If, however, it is conceded, as it is in this case, that apart from s. 62 (1) no offence has been committed, it must follow that the section has no operation at all."

The same construction as was so applied to the words "any offence" in s. 62 (1) of the Civil Aviation Act, 1949, must in my view be applied to the words "any offence" in art. 26 (2) of the Zanzibar Order in Council, 1924, and with a similar result, namely that we must look elsewhere for some specific or implied provision of the law making an act which would be an offence against s. 3 (*b*) of the Prevention of Cruelty to Animals Decree if committed in Zanzibar into an offence if committed on a British ship on the high seas. A similar construction must also be placed upon the words "an offence" in s. 60 of the Criminal Procedure Decree, which likewise deals only with jurisdiction and venue and itself creates no offence. Now there is admittedly no such specific provision, either in the Prevention of Cruelty to Animals Decree or elsewhere. And if we turn to s. 686 (1) of the Merchant Shipping Act, 1894, which must be read not only mutatis mutandis for the purpose of its application to the Zanzibar Protectorate but also subject to art. 26 (2) of the Zanzibar Order in Council, 1924, then again we find that it is concerned with jurisdiction only, and does not itself make into an offence any act that would not otherwise be an offence. Section 686 (1) reads as follows:

> "686 (1). Where any person, being a British subject, is charged with having committed any offence on board any British ship on the high seas or in any foreign port or harbour or on board any foreign ship to which he does not belong, or, not being a British subject, is charged with having committed any offence on board any British ship on the high seas, and that person is found within the jurisdiction of any court in Her Majesty's dominions, which would have had cognizance of the offence if it had been committed on board a British ship within the limits of its ordinary jurisdiction, that court shall have jurisdiction to try the offence as if it had been so committed."

I will deal presently with the particular passage in this section which reads–

> "or, not being a British subject, is charged with having committed any offence on board any British ship on the high seas";

but for the moment I would simply observe that on the face of it the section deals only with jurisdiction to try in any court in Her Majesty's dominions an "offence" committed on the high seas, without providing that any acts there committed shall be deemed to be offences if they would be offences if committed in the dominion concerned.

At this point the question arises – do the provisions of art. 26 (2) of the Zanzibar Order in Council, 1924, and of s. 686 (1) of the Merchant Shipping Act, 1894, become

in effect a dead letter as a result of the above construction placed upon them? Obviously the legislature could never have intended such a result. This difficulty was foreseen and discussed in another part of the judgment in *R. v. Martin and Others* (1), in the following words at pp. 91–93, which, while they were dealing specifically with unlawful possession of drugs contrary to the British Dangerous Drugs Regulations, 1953, upon a British aircraft, are in their more general aspect applicable to the present case:

> "Having reached this conclusion" the learned judge resumes, "I wish to make it clear that I do not think that it necessarily follows that any act that is committed on board a British aircraft cannot be made subject to British criminal law. I propose to explain the distinction that I have in mind, not only because I must satisfy myself that this case does not fall within it, but also because it would be most undesirable if it were thought it necessarily followed from this decision that anything could be done on board a British aircraft with impunity. There is a distinction in my judgment between what I may call the nature of an offence and the ingredients which have to be present before an offence is committed at all on the one hand, and, on the other hand, the question of what courts are to assume, or are to be given, jurisdiction when the offence has been committed. I can perhaps explain the distinction more easily in relation to civil law than in relation to criminal law."

After a brief explanation the learned judge continued (at p. 92):

> "A similar distinction may be made in criminal law. In a crime that is the creation of statute, regard must be had to the terms of the statute for a definition of the nature of the crime; and if the effect of the statute is limited territorially, then so is the nature of the crime. Crimes conceived by the common law, however, which are mostly offences against the moral law, such crimes as murder and theft, are not thought of as having territorial limits. They are universal offences. Murder is a crime whether done in France or in England; but if done in France the English courts would not under the common law assume jurisdiction to punish it because that would be an infringement of French sovereignty. It looks as if this principle was at the back of the application of English law to English ships on the high seas. It will have been observed from the terms of the old statute which I quoted – the Offences at Sea Act, 1536 – that it does not say that certain things which if done in England would be treasons, felonies, robberies, and so on, are also to be treasons, felonies, robberies, and so on, if committed on a British ship. The statute assumed that they were felonies and that the only question was whether the admiral had jurisdiction over them. A distinction may therefore be drawn between the sort of situation where an act is to be regarded as an offence wherever it is committed and the sort of statutory offence which is created only in relation to a particular place. Murders are offences against the moral law in the broad sense wherever they are committed; but if a statute provides that something may not be done in a public house, it is an offence only if it is committed in a public house. . . . Broadly speaking, therefore, distinction can be drawn between offences which are offences against the moral law and to be regarded as wrong wherever they are committed, and offences which are merely breaches of regulations that are made for the better order or government of a particular place such as a public house, or a particular area such as the county of Middlesex, or a particular country such as England."

The learned judge then went on to hold that the act with which he was dealing, namely possession of dangerous drugs, fell in the second of these two categories, and was therefore not an offence if committed in a British aircraft outside England since there was no provision of the law making it so. But he went on to narrow the scope of his judgment by concluding:

> "I am not saying that s. 62 applies to offences at common law. I have not heard that point argued and it may have to be argued hereafter. What I am

> saying is that s. 62 does not apply to a statutory offence which by the terms of the statute that creates it is local and not universal in character."

In which of the above two categories of offences, if in either, does the offence of cruelty to animals fall? It is an interesting speculation. Certainly it is not a mere technical statutory offence created only in relation to a particular place, such as the act of possessing dangerous drugs contrary to a particular regulation was, in the light of the particular terms of that regulation, held to be. It possesses more of the element of an infringement of the moral law than that act did. At the same time cruelty to animals is not yet universally regarded as a crime, as for instance theft or murder are. Increasingly enlightenment may eventually bring about such a result, but it has not done so yet, and there are regrettably large portions of the inhabited world today where it is not regarded as a crime or even as morally wrong to maltreat anything not human. For my part I incline to think that, looking on the world as it is and not as it ought to be, cruelty to animals is not yet an act of such a kind that a foreigner unconversant with the laws of (in this case) Zanzibar ought to know that it must constitute a crime under those laws or ought not to be allowed to protest his ignorance of that fact. But, like Devlin, J., in *R. v. Martin and Others* (1), I refrain from deciding this appeal on that controversial issue, since I think it must in any case be allowed on another ground, to which I now turn.

This second ground of appeal is that, even if the offence of cruelty to animals is an offence under the laws of Zanzibar if committed on a British ship on the high seas, there was no allegation in the charge sheet that this offence was so committed, nor any finding to that effect or sufficient evidence to support such a finding. With regard to the charge sheet, there is no mention in it of the offence having been committed on the "high seas," nor indeed of its having been committed "within the Admiralty jurisdiction." The charge avers, on the contrary, that the offence was committed "at Zanzibar harbour." It goes on, it is true, to state that owing to the manner in which the 120 cattle were carried 39 cows "died on the way." But there is no mention of where they died, or whether it was on the high seas. Now it is true that s. 128 of the Criminal Procedure Decree (Cap. 8) provides that

> "Every formal charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

And it is true that this section reproduces almost verbatim s. 3 (1) of the Indictments Act, 1915, upon which section the following observation is to be found in Archbold's Criminal Pleading (32nd Edn.), at p. 34:

> "The provisions of the Admiralty Offences Act, 1844, are left unrepealed by the Indictments Act, 1915, but it is clear from the express language of s. 3 of the latter Act that an offence committed within the jurisdiction of the Admiralty need not now even be averred to have taken place 'on the high seas' ".

Nevertheless, it must be noted that s. 686 (1) of the Merchant Shipping Act, 1894, according to its own wording, only has application at all, in the case of a foreigner,

> "where any person, . . . not being a British subject, is charged with having committed any offence on board any British ship on the high seas . . ."

I have stressed the important words. There are no similar words, it is true, in art. 26 (2) of the Zanzibar Order in Council, 1924; and the terms of art. 26 (4) must not be overlooked, which provide that – "The foregoing provisions" – that is to say including those of art. 26 (2) – "shall be deemed to be adoptions for the purposes of this Order . . . of" (*inter alia*) "the Merchant Shipping Act, 1894, s. 686." Nevertheless I do not think the effect of art. 26 (4) is to render inapplicable such parts of s. 686 as are not touched by

art. 26 (2). Article 25 (2) merely states that the Merchant Shipping Act, 1894, shall extend to Zanzibar "subject to the provisions of this Order." If the intention had been entirely to replace and supersede s. 686 by art. 26 (2) I think that intention would have been expressed more clearly.

I hold, therefore, that the charge sheet ought to have averred, if a commission of the offence outside the territorial waters of Zanzibar was being relied on, that the offence was committed on the high seas, and that since it did not do so, the burden lay on the Crown of proving, what they failed to prove, namely that the act of cruelty, or even the last phase of a continuing act of cruelty, took place in Zanzibar harbour, or at least within Zanzibar territorial waters.

But that is not all. The evidence disclosed, and the learned trial magistrate found, that all save one of the 39 head of cattle that died on the voyage died between Magadishu, where all 120 were loaded, and Mombasa, and that while there was gross overcrowding and lack of water for them at and between those places, there was (owing to the death of the 39 cattle) no overcrowding nor any proof of lack of water between Mombasa and Zanzibar; in short, no cruelty was proved between Mombasa and Zanzibar, or at Zanzibar. The point has been made for the appellant, and in a criminal charge where the burden lies throughout on the Crown I think the point is a good one, that there was no evidence that between Mogadishu and Mombasa the vessel was ever on the high seas at all, that is to say no evidence that it did not sail coastwise within three miles of the African coast for that stage of its journey, in which case art. 26 (2) of the Zanzibar Order in Council, 1924 would have no application at all. The vessel certainly put in at Malindi, on the coast, between Mogadishu and Mombasa.

In brief, I hold that the Crown failed to prove any act of cruelty within the territorial waters of Zanzibar, that they failed to aver in the charge sheet, as they should have done if they relied on it, any act of cruelty on the high seas, and that there was in any case insufficient proof of any act of cruelty on the high seas, as opposed to the territorial waters of either Zanzibar or of African mainland territories. On these grounds this appeal must be allowed, the conviction quashed, and the fine, if paid, refunded to the appellant.

Appeal allowed.

For the appellant:
KS Talati
Wiggins & Stephens, Zanzibar

For the respondent:
JF Jassavala (Ag. Crown Counsel, Zanzibar)
The Attorney-General, Zanzibar

Gokuldas Khimji Hindoo v R
[1957] 1 EA 203 (HCZ)

Division:	HM High Court for Zanzibar at Zanzibar
Date of judgment:	31 May 1957
Case Number:	30/1957
Before:	Windham CJ
Sourced by:	LawAfrica

[1] Customs – Unlawful importation of gold – Meaning of "importation" – Customs Management Decree (*Cap*. 9), *s.* 3, *s.* 46, *s.* 47 *and s.* 51 (*Z.*).

Editor's Summary

The appellant boarded the s.s. "Karanja" at Zanzibar, where in pursuit of his trade he sold a passenger eleven watches. The passenger took the watches and having no cash, went away to find the purchase price somewhere in the ship, leaving with the appellant as security two pieces of gold weighing about eleven ounces troy. By the time the appellant had to disembark, the passenger had not returned, and so the appellant, having spoken to the purser about the transaction, went ashore with the gold. The appellant subsequently claimed that at the Customs he declared the gold, but three Customs officers disputed this and said that the appellant had at first denied having anything to declare, then, under interrogation, produced one piece of gold, whilst a search of the appellant led to the finding of the second piece of gold. The appellant, having been prosecuted and convicted on three counts in respect of the unlawful importation of the gold, appealed, when it was argued on his behalf that the magistrate had misdirected himself in preferring the evidence of the Customs officers to that of the appellant, and that, in any event, in the circumstances of the case, the appellant had not imported the gold within the meaning of "importation" contained in the Customs Management Decree, s. 3, and the Interpretation Decree, 1953, s. 2.

Held–

(i) the magistrate was wholly justified in preferring the prosecution evidence, since acceptance of the appellant's evidence would have amounted to a finding that three responsible Customs officials had deliberately given false evidence.

(ii) the definition of "importation" must be construed in the context and having regard to the general object of the enactment in which it is defined.

(iii) in the circumstances, notwithstanding the definition in the Customs Management Decree, importation is a continuing act beginning at the limit of Zanzibar territorial waters which is only completed when the goods are landed and, where a Customs post exists, passed by the Customs.

Appeal dismissed.

No cases referred to in judgment

Judgment

Windham CJ: The appellant was convicted on three counts in respect of the illegal importation into the Protectorate of two pieces of gold weighing together about eleven troy ounces and having a value of about Shs. 2,763/-, and was sentenced to fines totalling Shs. 600/-. He was acquitted on two other counts. The counts on which he was convicted were the following. First, importing the gold without a licence to do so, contrary to s. 4 of the Imports Control Decree, 1954; secondly, unlawfully importing restricted goods (i.e. the gold) without a licence to do so, contrary to s. 49 of the Customs Management Decree (Cap. 91); thirdly, smuggling the gold, by way of unlawfully importing it with intent to evade the regulation of its importation, contrary to s. 199 (1) of the Customs Management Decree (Cap. 91).

The appellant is a hawker and money-changer in Zanzibar whose custom it is to go on board ships in Zanzibar harbour and set up his stall and sell his wares there while they are in harbour. This he did on the s.s. “Karanja” on September 14, 1956. The ship was lying out in the harbour. There the appellant sold to a passenger eleven watches for Shs. 2,550/-. The passenger took the watches but said that he was unable to pay for them in cash then and there; he therefore left with the appellant as security the two pieces of gold in respect of which the appellant was later charged while he (the passenger) went to find the purchase price in cash somewhere on the ship. Just before the ship sailed the passenger had still not returned with the money, and the appellant, since he had to go ashore immediately without either the watches or their price, took with him the gold, after having told the ship’s purser what had happened

and asked his advice. Up to this point there was necessarily no conflict of evidence, because the story of the appellant himself, corroborated on some points and contradicted on none by a fellow-hawker whom he called, was the only evidence as to what happened on the ship. The appellant went ashore from the "Karanja" on a small boat plying in the harbour.

From this point onwards the appellant's story of what happened differed materially from that of the prosecution witnesses, who were all Customs officials. The learned trial magistrate accepted their version and rejected that of the accused. According to the version of the Customs officials (including Inspector John Fernandez of the Customs Preventative Force), whose stories were consistent with each other in all essential particulars, the appellant, having disembarked from the small boat with his goods and come ashore and entered the baggage room for Customs examination, was asked by Inspector Fernandez if he had anything to declare, whereupon he answered that he had only his brief case containing cash, which he emptied out. The inspector then drew attention to his bulging pockets, whereupon the appellant replied that they contained money in notes, which he then likewise emptied out. The inspector continued his evidence in these words:

> "I asked him if he had anything else and he said he hadn't. I then said I wasn't satisfied and I wanted to search his person. When I said this the accused put his hand in his pocket and took out a piece of gold, saying 'I have got this.' I produce this piece of gold (exhibit A). I again said I was not satisfied and I wanted to search his person. I felt his hip-pocket and I felt something. I told the accused to wrench it out and he produced another small piece of gold (exhibit B)."

Assuming for the moment that the learned trial magistrate's findings of fact were justified, including his finding that the appellant, at least on arrival at the Customs, intended to bring the two pieces of gold past the barrier without declaring them, and assuming also that on the facts as found the appellant can be said to have "imported" the gold within the meaning of that expression in the charging sections, then it is conceded that the appellant was properly convicted under the three counts to which I have earlier referred, since he admittedly had no licence to import the gold, either under s. 4 of the Imports Control Decree, 1954, or under s. 49 of the Customs Management Decree. But two grounds of appeal have been argued; first, that the magistrate erred and misdirected himself in accepting the prosecution story and rejecting the accused's evidence that he did freely declare the gold and at no stage intended not to do so; secondly, that he cannot be said to have "imported" the gold at all in the legal sense. I will deal first with the question of fact.

Under this head it is urged that the learned trial magistrate misdirected himself in holding, as he did hold in his judgment, that the question how the appellant came to obtain possession of the two pieces of gold on board the "Karanja" was immaterial, since the question at issue was his subsequent conduct when he came ashore. It is argued that the episode on board the "Karanja," indicating as it did that at that stage the appellant had not yet formed any intention not to declare the gold at the Customs, was relevant as showing the probability of his story of what later happened, namely that, according to him, he did declare the gold at the Customs and had always intended to do so. I do not think this argument can succeed, for it is quite clear from the learned trial magistrate's carefully considered judgment that, in the absence of any other version of what happened on the "Karanja," he accepted the appellant's version, which included an assertion that he acted quite openly and with innocent intentions at that stage, but that he found that the appellant, however innocently he may have acted then, formulated between then and his interrogation at the Customs the intention not to declare the gold. In short, when the learned trial magistrate in effect stated in his judgment that the appellant's honest state of mind on board the "Karanja" was irrelevant, he was not overlooking that honest state of mind but was merely holding that it

was not inconsistent with the formation of a criminal intention at a later state, as indeed it was not.

The second limb of this ground of appeal is that, in preferring the prosecution version of what happened at the Customs barrier to that of the appellant, the learned trial magistrate recorded no adequate reasons for doing so. But such was not the case. One quite valid reason which he gave was that, since there was no reconciling the two versions, an acceptance of the appellant's story would amount to a finding that three responsible Customs officials were deliberately giving false evidence, which he was not prepared to find. The learned magistrate in his judgment carefully reviewed all the evidence in the case, taking into account discrepancies as between the several prosecution witnesses, and his conclusion on facts and credibility was wholly justified. This ground of appeal must accordingly fail.

The remaining ground of appeal involves a point of law and interpretation. An essential element in all three counts on which the appellant was convicted was that he "imported" the gold. The definitions of "importing" and "to import" in s. 3 of the Customs Management Decree, which applies to the two counts under that Decree, and in s. 2 of the Interpretation Decree, 1953, which applies to the count under the Imports Control Decree, 1954, are similar though not identical in terms. The former defines the expression as meaning

> "the bringing of goods into, or within the Protectorate by sea or air from a foreign port."

The latter defines it as meaning

> "to bring goods into or within the limits of the Protectorate from a foreign port."

Now since the territorial limits of the Zanzibar Protectorate extend, as the Crown concedes, to include the territorial waters up to the three-mile limit, it is argued that the appellant did not import, nor take any part in importing, the two pieces of gold into the Protectorate, since they had already been imported as soon as the "Karanja" came within three miles of the Zanzibar shores, and therefore could not be imported over again. This is an attractive forensic argument, and if the statutory definitions are to be construed literally it might seem to have substance. But all definitions, including those in criminal statutes, must, though without doing violence to their language, be construed in the light of their context and of the general objects of the enactments in which they appear; and moreover these definitions in particular are by express provision only to be applied to the expressions defined "unless there is something in the subject or context repugnant to such construction." The relevant principles of construction will be found set out in Maxwell's Interpretation of Statutes (10th Edn.), at pp. 262–285. Now it is quite clear from a general perusal of the Customs Management Decree, and of the Imports Control Decree, 1954, that a paramount object of each of them is to prevent certain kinds of goods from entering the Protectorate, that is to say entering the actual island of Zanzibar (or Pemba) and not merely the territorial waters, without the payment of duty or the possession of a licence by the person whom I will loosely term the importer, that is to say the person who brings or seeks to bring the goods ashore. Such an object could be defeated in a very easy and widespread manner wholly at variance with the purpose of the legislation if the interpretation which learned counsel for the appellant seeks to place upon the expression "to import" were to be adopted, namely that the importation takes place once and for all, so far as importation by sea is concerned, the moment that the vessel bearing the goods comes within three miles of the Zanzibar coast. For if that were so, then any person going on board the ship upon her coming into harbour could with impunity take the goods ashore without declaring them, since he would not be "importing" them at all because they would have already been imported three miles out to sea, long before he ever boarded the vessel or saw them. That would be the case, as the learned trial magistrate pointed out, whenever a person went on board and bought controlled or dutiable articles from a ship's shop and came ashore without declaring them. Clearly this would defeat the intention of the legislature. That the legislature's

intention was otherwise appears, moreover, not merely from a general perusal of the Customs Management Decree, but from a reference to more than one

particular section of it. Section 46, for instance, provides that:

> "for the purpose of securing the due importation of goods . . . the goods shall be entered, unshipped and may be examined."

This necessarily implies that the importation of the goods has not taken place, or at least has not been completed, until they are unshipped, which is quite incompatible with any argument that the importation must be deemed to have taken place once and for all three miles out at sea. Again, s. 47 (1) empowers the British Resident to prohibit or regulate the

> "importation into the Protectorate, or any area or place therein, of any goods or class of goods."

Any "area or place" necessarily implies somewhere ashore, or at least somewhere well within the three-mile territorial water limit. But if the importation had occurred once and for all three miles out at sea there could be no importation into such an "area or place." And the provisions of s. 51, which have been relied on by both sides in support of their respective contentions, are very revealing. The section reads as follows:–

> "51. Goods the importation of which is prohibited, restricted or regulated on board a ship calling at any port in the Zanzibar Protectorate, but intended for and consigned to some port or place outside the Zanzibar Protectorate, shall not be deemed to be unlawfully imported into the Zanzibar Protectorate if the goods are specified on the ship's manifest, and are not transhipped or landed in the Zanzibar Protectorate, or are transhipped or landed by authority."

Section 51 certainly implies that goods can be "imported" before they come ashore, for otherwise its provisions would be unnecessary. But it also clearly implies, to my mind, that if prohibited or restricted goods from the ship in harbour *are* transhipped or landed in the Zanzibar Protectorate without authority then they will be deemed to have been unlawfully imported. But if the importation took place once and for all three miles out at sea, before anything unlawful had been done in respect of them (the section providing that their mere presence on the ship does not make them unlawful imports) then there could be no subsequent unlawful importation, since there could be no subsequent importation at all. Clearly the appellant's interpretation cannot be reconciled with s. 51.

Upon a careful consideration of the manifest objects of the legislature and the provisions of particular sections such as I have examined, it seems clear to me that "importation" for the purpose of the Customs Management Decree – and the same considerations apply to the Imports Control Decree, 1954 – is a continuing act which, while it may begin when the vessel containing the goods in question enters the territorial waters of the Protectorate, continues until the goods, if landed at all, have been landed and, where there is a Customs post, have passed the Customs barrier. If the word is so interpreted, then the appellant certainly imported the two pieces of gold in question.

This interpretation does not in my view do violence to the definitions of the expressions "to import" or "importing" in the Customs Management Decree and the Interpretation Decree, 1953, even assuming, what I think there is no need to assume, namely that there is nothing in the context of the charging sections that is repugnant to those expressions being limited strictly to the framework of the definitions. For each of those definitions defines the expression as meaning the bringing of goods "into or within the limits of the Protectorate." The meaning of the words "or within" is not quite clear, but they must be assumed to have some meaning and must, at least *prima facie*, be assumed to have a meaning different from the word "into" and not to be merely redundant or tautologous. They may in my view properly be held to cover the act of the appellant in the present case in bringing the pieces of gold ashore, even if the word "into" be limited (though I see no reason for limiting it) to the first bringing of them within the

territorial waters of the Protectorate.

For these reasons this second ground of appeal must also fail, and the appeal is accordingly dismissed.

Appeal dismissed.

For the appellant:
WD Fraser-Murray
Fraser-Murray & Co, Dar-es-Salaam

For the respondent:
JS Balsara
The Attorney-General, Zanzibar

Abdulla Ali Nathoo v Walji Hirji
[1957] 1 EA 207 (HCZ)

Division:	HM High Court for Zanzibar at Zanzibar
Date of judgment:	20 September 1957
Case Number:	14/1957
Before:	Windham CJ
Sourced by:	LawAfrica

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[1] Sale of goods – Implied warranty – Buyer's opportunity to inspect goods before delivery – Whether doctrine of "caveat emptor" applies – The Contract Decree (*Cap.* 80), *s.* 111, *s.* 113 *and s.* 114 (*Z.*).

Editor's Summary

The respondent purchased from an importer on February 6, 1956, one hundred bags of onions which had just arrived by sea from Egypt. On February 7 he sold fifty of these bags to the appellant for Shs. 2,698/54. The agent of the purchaser was present when all one hundred bags were weighed and he had the opportunity if he so wished to examine the bags and their contents before taking delivery on February 7. Although the respondent was aware that the appellant was a merchant purchasing the onions for re-sale for human consumption, the respondent gave no express warranty either as to the description or quality of the goods or in any other respect. On February 8 the appellant examined the bags and found that most of the onions were so bad as to be unsaleable and he informed the respondent by letter dated February 10 that he rejected the goods and called upon the respondent to take them back. The respondent ignored the letter, whereupon the appellant wrote again notifying the respondent that unless he took delivery within twenty-four hours, the appellant would sell the goods and hold the respondent liable for any loss. The respondent still took no action and on 14th February the appellant sold the onions by public auction, which realised Shs. 1,244/99. The appellant then paid the respondent Shs. 831/56, representing the price realised less the expenses incurred in the sale by auction. The respondent then sued the appellant for the

price of fifty bags of onions and the appellant in his defence claimed that the transaction was governed by an implied warranty that the goods were to be fit for human consumption and that there had been a breach of such warranty. The appellant relied on s. 111, s. 113 and s. 114 of the Contract Decree in support of his contention. The magistrate held that there was no implied warranty because the goods were sold merely as "onions" and that the Contract Decree did not assist the appellant, since, as the magistrate found, the fifty bags of onions had been selected by the appellant's agent, who had the opportunity of examining these. On appeal the appellant made no attack on the magistrate's findings of fact, but claimed that he had erred in declining to hold that there had been a breach of warranty by the respondent, and argued that in the transaction in question a warranty was by the Contract Decree implied.

Held–

(i) the appellant, having had an opportunity of inspecting the onions before taking delivery, there was no implied warranty and the doctrine of caveat emptor applied.

(ii) since the Contract Decree is silent as to the doctrine of caveat emptor, the court was entitled, pursuant to art. 24 of the Zanzibar Order in Council of 1924, to resort to the law of England relative to the sale of goods.

Hussein Bachoo v. Clove Growers Association of Zanzibar, [1957] E.A. 193 (Z.) followed.

Appeal dismissed.

Cases referred to:

(1) *Nurmohamed Murji and another v. Husseinali Gulamhussein Dattu,* 22 E.A.C.A. 294.

(2) *Jones v. Just* (1867–1868), L.R. 3 Q.B. 197.

(3) *Emmerton v. Mathews* (1862), 7 H. & N. 586; 158 E.R. 604.

(4) *Hussein Bachoo v. Clove Growers Association of Zanzibar,* [1957] E.A. 193 (Z.).

Judgment

Windham CJ: The respondent sued the appellant in the first class subordinate court for Shs. 2,698/54, being the price of fifty bags of onions which he had sold and delivered to the appellant. The appellant had bought the onions for the purpose of re-sale. After their delivery to him he found that most of them were unfit for human consumption, and he could only get Shs. 1244/99. for them on re-sale. Out of this sum he paid to the respondent a cheque for Shs. 831/56., which represented the Shs. 1,244/99 less the expenses which he had incurred in reselling them and less also the damages which he claimed, by way of set-off, to have suffered through the respondent's breach of warranty in selling him bad onions. The learned trial magistrate found that in the circumstances of the case and upon the law there had been no breach of warranty, and he accordingly gave judgment in the respondent's favour for Shs. 1,866/59, namely the difference between the contract price of Shs. 2,698/54 and the Shs. 831/56 which the appellant had paid to him by cheque, together with interest and costs.

Against this judgment the appellant appeals, on the ground that the learned trial magistrate erred in not holding that there had been a breach of warranty on the respondent's part under one or more of those sections in the Contract Decree (Cap. 80) which impose implied warranties upon the sale of goods in certain circumstances, in particular s. 111, s. 113 and s. 114. The learned magistrate's findings of fact are not attacked.

According to these findings the appellant on February 7, 1956, bought the fifty bags of onions from the respondent out of a consignment of one hundred bags which the respondent had bought from one Jaffer Aloo and which had arrived by sea from Egypt on the previous day. The respondent knew that the appellant, who was a merchant, was buying them for re-sale for human consumption, but he gave no express warranty regarding either their description or their quality or of any other kind. Next day, on examining the bags, the appellant found that most of them were so bad as to be unsaleable, whereupon he notified the respondent of their condition, by letter dated February 10, intimating that he rejected them and that the respondent should immediately take them back from his go-down. Upon the respondent's failure to do so or to reply, the appellant next day wrote informing him that unless he took delivery of them within 24 hours he (the appellant) would "sell the same at your risk and you will be responsible for any loss". Upon further failure of the respondent to do anything the appellant on February 14 sold by public auction such of the onions as were saleable, and as we have seen he obtained a price of Shs. 1,244/99. There was a further unchallenged finding of fact that when on February 7 the respondent sold the fifty bags of onions to the appellant, neither of them knew that any of them were bad. There was thus no question of fraud on the respondent's part.

Those were some of the essential findings of fact. But there remains one further finding, arrived at by the learned magistrate after the weighing of conflicting evidence, which has likewise not been challenged

in the memorandum of appeal and which, in my view, is a crucial one in relation to the resulting legal position. This finding concerns the circumstances in which the fifty bags of onions were selected from the one hundred bags which the respondent had just bought from Jaffer Aloo. Accepting on this point the evidence of a witness whom he considered to be reliable and impartial, one Jivabhai Dhanji Ghadvi, which tipped the scale that was otherwise evenly balanced by conflicting and biassed testimony, the learned magistrate found that one Mohamed Ali, who was conceded to be acting as the agent of the appellant, was present on

February 7 at the weighing of the one hundred bags of onions, that he was taking delivery of the appellant's fifty bags on the spot, and that he had the opportunity, had he chosen to avail himself of it, of there examining the bags and their contents before taking delivery of them.

In these circumstances it is clear that, when he wrote the letter dated February 10 purporting to reject the fifty bags of onions and to repudiate the contract, the property in them had already passed to the appellant, so that it was in law too late for him to reject them, and that the course which he proposed and of which he notified the respondent in his letter written next day, and which he proceeded to carry out, namely that of selling the onions and then claiming, by way of set-off, for loss suffered through the respondent's breach of implied warranty (always assuming that there had been such a breach) was the correct course of action in law, having in view the terms of s. 118 of the Contract Decree (in particular the latter part of the section) and the decision of the Court of Appeal for Eastern Africa in *Nurmohamed Murji and another v. Husseinali Gulamhussein Dattu* (1), 22 E.A.C.A. 294. The main point for decision in this appeal, however, is whether the respondent had been guilty of any breach of implied warranty at all.

The sections of the Contract Decree under one or all of which it is contended for the appellant that an implied warranty was imposed regarding the description or quality of the onions sold are, as I have earlier mentioned, s. 111, s. 113 and s. 114. Section 113 provides that

> "where goods are sold as being of a certain denomination, there is an implied warranty that they are such goods as are commercially known by that denomination . . .".

The learned magistrate held that this section was not applicable because the goods were sold merely as "onions" without further qualification or specification, and the goods, whatever their state, were in fact onions. In this I think he was quite right. It is argued that the term "onions", in commercial circles, means and implies onions fit for human consumption. But no evidence to that effect was adduced, nor is the proposition self-evident, since onions are not necessarily sold for human consumption. Whether the term "onions" be considered as a "denomination" or as a "description", therefore, the contention must fail. The fact that the vendor knew that these onions were bought for human consumption, and that fact that they were not fit for that purpose, may be relevant for the purpose of the application of s. 111 or s. 114, which I will now turn to consider, but they are not relevant to s. 113.

I turn, then, to s. 114, which provides that

> "where goods have been ordered for a specified purpose, for which goods of the denomination mentioned in the order are usually sold, there is an implied warranty by the seller that the goods supplied are fit for that purpose."

The learned magistrate held that s. 114 did not apply because, as he had justifiably found on the evidence, the fifty bags of onions had been selected from the one hundred bags by the appellant, acting through his agent Mohamed Ali, and Mohamed had then had the opportunity of ascertaining their quality. In so holding he relied on a passage from the judgment in *Jones v. Just* (2)(1867–1868), L.R. 3 Q.B. 197, at p. 202, in which the legal position under the English common law, before the Sale of Goods Act, 1893, was set out in these terms:

> "Where there is a sale of a definite existing chattel specifically described, the actual condition of which is capable of being ascertained by either party, there is no implied warranty."

In short he held in effect that in the circumstances of the present case the doctrine of caveat emptor applied.

On these same grounds, and relying on a similar statement of the position at common law in *Emmerton v. Mathews* (3) (1862), 7 H. & N. 586, where it was held that

> "the undoubted general law is that, in the absence of all fraud, if a specific article is sold, the buyer having an opportunity to examine it, and selecting it, the rule of caveat emptor applies",

the learned magistrate held that s. 111 of the Contract Decree was likewise inapplicable, which provides that "On the sale of provisions, there is an implied warranty that they are sound."

Now, but for the fact that the appellant, through his agent, selected the fifty bags of onions and had the opportunity, on the spot, of discovering their bad condition, there can be no doubt in my mind that there would have been a breach of implied warranty on the respondent's part, certainly under s. 111 and probably under s. 114. But immediately Mohamed Ali had selected the fifty bags from the one hundred bags they became specific articles, whose condition he had the opportunity of examining, and that being so the common law doctrine of caveat emptor, if applicable at all, would cover the matter. The only question, therefore, is whether that doctrine forms part of the law applicable in the Protectorate in view of the specific terms of s. 111 and s. 114. I find little difficulty in holding that the doctrine does apply, and that those sections must be read subject to it. I have recently held in this court, in *Hussein Bachoo v. Clove Growers Association of Zanzibar*, [1957] E.A. 193 (Z.), that, in pursuance of art. 24 of the Zanzibar Order in Council, 1924, the English common law relating to the sale of goods may be resorted to in respect of matters upon which the Contract Decree is silent; and it is silent regarding the doctrine of caveat emptor. I would further refer to Pollock and Mulla's Commentary on the Indian Contract Act, (5th Edn.) (1924) where at p. 536 and p. 542 respectively the learned authors state clearly their view that s. 111 and s. 114 of that Act (as the Act stood in 1924) which were identical with s. 111 and s. 114 in the Contract Decree, are to be read subject to the doctrine of caveat emptor in the manner I have stated, the two English cases to which I have earlier referred and upon which the learned magistrate relied being cited in this connection. It is true, as learned counsel for the appellant points out, that today the common law doctrine of caveat emptor has a considerably smaller area within which to operate in England than it did when those two cases were decided, because s. 14 of the Sale of Goods Act, 1893, now covers a considerable part of that field by statute law. But s. 14 is not reproduced in the Zanzibar Contract Decree, and in the Protectorate therefore it is to the uncodified common law that we are entitled and obliged to resort, in respect of matters not covered by that Decree.

For these reasons I hold that the learned trial magistrate rightly applied the law in holding that there had been no breach of implied warranty by the respondent, and this appeal must be dismissed with costs.

Appeal dismissed.

For the appellant:
KS Talati
Wiggins & Stephens, Zanzibar

For the respondent:
CD Jesrani
CD Jesrani, Zanzibar

Rashid Bin Salim Bin Mohamed v Mohamed Bin Said Bin Abeid
[1957] 1 EA 211 (HCZ)

Division: HM High Court for Zanzibar at Pemba

Date of judgment:	2 April 1957
Case Number:	25/1956
Before:	Windham CJ
Sourced by:	LawAfrica

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[1] Sale of land – Oral contract – Part performance by purchaser – Whether purchaser entitled to order for specific performance – Transfer of Property Decree, s. 55 (*Z.*).

Editor's Summary

The plaintiff made an oral contract with the defendant to purchase a small shamba for the sum of Shs. 300/-. In pursuance of the contract the plaintiff paid the price but the defendant refused to execute a conveyance. The plaintiff then sued for and obtained in the Kadhi's Court an order for the execution by the defendant of a conveyance of the land, whereupon the defendant appealed. The main grounds of appeal were that the contract was oral and unenforceable.

Held – the plaintiff was entitled to the order requiring defendant to execute a conveyance since neither the Transfer of Property Decree, s. 55, nor any provision of the Contract Decree made an oral contract for the sale of land unenforceable where there had been part performance.

Appeal dismissed.

Cases referred to in judgment:

(1) *Hamadi bin Athman v. Mbwana bin Haji*, 7 Z.L.R. 109.

Judgment

Windham CJ: The defendant appeals from a judgment of the Kadhi's Court ordering him to execute in favour of the respondent-plaintiff a registered conveyance of a small shamba which he, the appellant, had agreed to sell to the respondent. The main ground of appeal is that the agreement was only oral. The agreement was certainly oral, but the learned Kadhi was rightly satisfied from the evidence, which included the bland admissions of the defendant himself, that the contract had been made, that the purchase price had been agreed at Shs. 300/-, and that the respondent had duly paid the whole of this price to the appellant. Such an oral contract for sale of land, wholly performed on the purchaser's side by the payment of the purchase price, entitles the purchaser to sue for specific performance by requiring the vendor to execute a proper conveyance of the property. This right is conferred upon the purchaser by para. (i) (*d*) of s. 55 of the Transfer of Property Decree (Cap. 82), and is in conformity with the doctrine of part performance. There is nothing in that Decree, nor in the Contract Decree (Cap. 80), nor elsewhere, which lays down that an oral contract for the sale of land shall, even where there has been part performance, be unenforceable in the courts. Lastly, the undisputed fact that the consent of the Land Alienation Board to the proposed sale was duly applied for and obtained, being produced as exhibit A, distinguishes this case from that of *Hamadi bin Athman v. Mbwana bin Haji* (1), 7 Z.L.R. 109, where it was held that specific performance of a contract for the sale of land could not be ordered unless and until the Board's consent to the sale had been obtained. For these reasons this appeal is dismissed with costs.

Appeal dismissed.

For the appellant:
Sheikh Suleman (Wakyl)
Sheikh Suleman, Zanzibar

The respondent in person.

PS Fernandes v R
[1957] 1 EA 212 (HCZ)

Division:	HM High Court for Zanzibar at Zanzibar
Date of judgment:	23 May 1957
Case Number:	12/1956
Before:	Windham CJ
Sourced by:	LawAfrica

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[1] Criminal law – Review of conviction and sentence – Criminal and civil cases concerning same persons – Whether different findings in subsequent civil proceedings can affect result of criminal case – Evidence Decree, s. 40*, s.* 41*, s.* 42 *and s.* 43 (*Z.*).

Editor's Summary

The applicant was convicted in the Magistrate's Court on a charge of assaulting the complainant and causing bodily harm and was bound over for a year in the sum of Shs. 100/-. Having had his application for leave to appeal out of time dismissed, he applied after a lapse of four months by way of revision to have his conviction set aside. During the intervening period the complainant sued the applicant for damages in the Resident Magistrate's Court, but before another magistrate, and in this case each of the parties told substantially the same story as in the criminal case. The magistrate believed the applicant and found that the complainant not merely rushed at the applicant immediately before the latter caught hold of him, but that he actually pushed the applicant, so that if there was any assault it was in self defence against an assault by the complainant, and accordingly dismissed the action.

One of the points raised by the applicant in his application for revision was that in view of the findings of the magistrate in the civil proceedings, the findings and conviction of the magistrate in the criminal case ought to be reversed and set aside because a reasonable doubt on credibility had arisen ex post facto by the judgment in the subsequent civil case.

Held–

(i) the court when acting in revision is not confined to the question whether the judgment (or sentence) in the criminal court was correct when made, but may consider also the broader question whether it ought subsequently to be set aside even if correct when made.

(ii) the court could not accept the applicant's proposition on credibility as, quite apart from the resulting uncertainty and confusion, the decision of the court on such a question would depend upon an assessment of the capacities and experience of the two magistrates themselves which it would be impossible and wholly improper to attempt.

Araj Sarkar and Others v. Emperor (1913), 18 Cal. W.N. 646, considered.

Application dismissed.

Cases referred to in judgment:

(1) *Araj Sarkar and Others v. Emperor* (1913), 18 Cal. W.N. 646.

Judgment

Windham CJ: This is an application to this court to exercise its revisionary powers to quash a conviction of the applicant on a charge of assaulting the complainant and causing him actual bodily harm, for which offence the applicant was bound over for one year in the sum of Shs. 100/-. He applied to this court out of time for leave to appeal against his conviction, but in view of the nature of the sentence and of the provisions of s. 334 (2) of the Criminal Procedure Decree his application was dismissed on the ground that no appeal lay. After a lapse of over four months from that dismissal he has applied again to this court to set aside his conviction, but this time by way of revision.

During those four months the complainant sued the applicant in the Resident Magistrate's Court for damages in respect of the very same assault, and the learned magistrate, who was not the same magistrate that had convicted him on the criminal charge, dismissed the complainant's action.

The position, in brief, was as follows. In the criminal case the first magistrate, after hearing evidence, which in view of the trial being a summary one was not recorded save in his judgment itself, held that the accused had been quarrelling with the complainant,

who was his sub-tenant, over the latter's refusal to vacate a room sublet to him, and that the quarrel culminated when the complainant "rushed on the accused gesticulating refusal to vacate" whereupon the accused, enraged, caught hold of him and forcibly pulled him from the room, causing him to lose his balance and fall on his face receiving injuries. It is now suggested that this was itself a finding that the complainant was on the point of striking the accused when the latter, in self defence, struck him. But it seems to me to be nothing of the sort. The suggestion that the words "rushed on the accused" mean that the complainant was on the point of striking him is negatived by the statement that the complainant was "gesticulating refusal to vacate" at that moment. Gesticulation, even in respect of the position and action of the hands or arms which it connotes, is incompatible with rushing at an antagonist to assault him. Clearly the finding of the court in the criminal case was that the accused was the first to use or threaten physical violence in that quarrel, and that he did not assault the complainant in self defence.

The next point raised in this application, and the one most strenuously argued, is a novel one. The contention is that the findings and conviction of the first magistrate in the criminal case, who in short believed the complainant and disbelieved the accused, ought to be reversed and set aside because a reasonable doubt on the point of credibility has been raised ex post facto by the judgment in the ensuing civil proceedings before another magistrate concerning the same assault, in which the second magistrate believed the accused and disbelieved the complainant, each of whom told substantially the same story as he had told in the criminal case, and found that the latter not merely rushed at the accused immediately before the latter caught hold of him, but that he actually pushed the accused, so that if there was any assault on the accused's part it was in self defence against a prior assault by the complainant.

I confess that this contention is a startling one. It is true that the court's powers when acting in revision are very wide, and learned counsel for the applicant has referred in this connection to the exhaustive analysis of the subject in Sohoni's Indian Code of Criminal Procedure (12th Edn.) from p. 942 to p. 959. He has even cited an Indian case, *Araj Sarkar and Others v. Emperor* (1) (1913), 18 Cal. W.N. 646, in which a sentence of eighteen months imprisonment imposed on the applicants for rioting during a dispute with a rival faction over the right to possession of a piece of land was reduced in revision in the light of subsequent civil proceedings in which it was found that the applicants' party were in possession of the land, whereas in the criminal proceedings it had been found that the rival party was in possession. In that case the court, in reducing the sentence, said–

> "We think that the sentence was in any case too severe, and particularly so in view of the decision of the Settlement Court,"

that is to say in the subsequent civil proceedings. That decision is certainly an illustration of the proposition, which I take to be a correct one, and which the applicant must fall back upon if he is not to fail on a point of elementary logic, namely that when acting in revision the court is not confined to the question whether the judgment (or sentence) of the criminal court was correct when made, but may consider also the broader question whether it ought now (even if correct when made) to be set aside. Such is the contention made on the applicants' behalf in the present case. No instance, however, has been cited to me of a revising court not merely reducing a sentence but upsetting a conviction on the sole ground (and in the present case it would be the sole ground) that whereas in the criminal proceedings the accused's story had been disbelieved, in subsequent proceedings it was believed. It is urged that the result of the civil proceedings throws at least a reasonable doubt on the question which of the two persons, the accused or the complainant, supported by their respective witnesses, had been speaking the truth in the earlier criminal proceedings. This proposition, however, would result in such uncertainty and

confusion that it cannot be acceded to. Furthermore, the raising or non-raising of a reasonable doubt in the mind of this court on such a question of pure credibility would depend upon an assessment which it would be impossible and wholly improper for it to attempt, namely the assessment of the relative capacities and experience of the two magistrates in arriving at the truth upon

bare and conflicting testimony.

Lastly, with regard to the legal relevance of the judgment in the civil suit, it is to be noted that s. 40, s. 41 and s. 42 of the Evidence Decree (Cap. 10) are inapplicable to the present case, and that s. 43 provides that

> "judgments orders or decrees, other than those mentioned in s. 40, s. 41 and s. 42, are irrelevant, unless the existence of such judgment, order or decree is a fact in issue, or is relevant under some other provision of this Decree."

It has not been suggested that the civil judgment is relevant under any provision of the Decree. Section 43 is, of course, concerned with judgments already in existence at the time of trial. But if such a judgment is irrelevant, then a judgment delivered subsequently, but before the revision proceedings, must for the purpose of those proceedings be at least equally irrelevant.

I would make this final observation. Upon the dismissal of his application for leave to appeal from his conviction the applicant delayed for over four months before applying by way of revision, and this delay was patently in order to await the result of the civil proceedings which the complainant had brought against him in respect of the same assault, so that he might, if he succeeded in those proceedings, use them as he has now used them, as material in support of his application in revision. This is a form of litigious gambling which it would be improper for this court to encourage, and it affords no good excuse for the delay. Although no time limit is prescribed in the Criminal Procedure Code within which a convicted person must move the court to act in revision, the court will nevertheless take into account any unreasonable and unjustified delay and, possessing as it does an unfettered discretion whether or not to exercise its revisionary powers in any particular case, it will be the more reluctant to exercise them where there has been such delay.

For all these reasons I make no order in revision upon this application.

Application dismissed.

For the applicant:
GM Pillai
GM Pillai, Zanzibar

For the respondent:
JS Balsara
The Attorney-General, Zanzibar

Tanitalia Ltd v Mawa Handels Anstalt
[1957] 1 EA 215 (HCZ)

Division:	HM High Court for Zanzibar at Zanzibar
Date of judgment:	15 March 1957
Case Number:	32/1956
Before:	Windham CJ

Sourced by: LawAfrica

[1] Review – Application for review of part of decree ordering costs on higher scale – Whether application for review competent – Civil Procedure Rules, O. XLVIII (*Z.*) *– Civil Procedure Decree, s.* 80 (*Z.*).

[2] Costs – Consent judgment for defendant with costs – Order for costs on higher scale on immediate application by defendant's counsel – Whether court functus officio when judgment entered with costs.

Editor's Summary

In this action judgment by consent was entered for the defendant on the plaintiff's claim with costs and also on the counterclaim of the defendant with costs. Immediately after this judgment had been recorded by the court, counsel for the defendant applied that costs should be allowed on the higher scale. Counsel for the plaintiff company merely stated that he had no instructions either to agree or to oppose this application and since he did not ask for an adjournment to obtain instructions, the court on consideration of the merits of the application made an order under the powers conferred by r. 83 of the Rules of Court (Z.) that the costs should be on the higher scale on account of the importance and unusual nature of the case and the labour involved in its preparation. An application was subsequently made to the court on behalf of the plaintiff under O. XLVIII of the Civil Procedure Rules to review that part of the decree which ordered costs on the higher scale and in support of this application counsel for the plaintiff contended that an order for costs meant costs on the ordinary scale and that when the judgment by consent with costs was recorded the court was functus officio on the question of costs. For the defendant it was argued that that an order for costs means such costs as the court may order. The competence of the procedure invoked by the plaintiff in seeking a review was only briefly referred to in argument.

Held–

(i) the plaintiff could have appealed to the Court of Appeal for Eastern Africa against the order for costs on the higher scale, more especially since the contention that the court of trial was functus officio involved a point of law.

(ii) by r. 1 of O. XLVIII, the Civil Procedure Rules, an application for a review is open to a person only where there has been a discovery of new and important matter of evidence, a mistake or error apparent on the face of the record or "for other sufficient reason," but these words must be construed ejusdem generis with or analogous to one or other of the two other reasons and the grounds put forward appeared to be outside the ambit of the rule.

Application dismissed.

Cases referred to:

(1) *Friis v. Paramount Bagwash Co. Ltd*., [1940] 1 All E.R. 595; [1940] 1 K.B. 611.

(2) *Ali and Abdulkarim v. Amritlal Ujamshi Sheth,* 17 E.A.C.A. 88.

(3) *Ismail Sunderji Hirani v. Noorali Esmail Kassam*, 19 E.A.C.A. 131.

(4) *Bernard & Co. v. Souza Junior & Dias* (1911–12), 4 E.A.L.R. 54.

(5) *Alibhai Bhanji v. Essa Thawer* (1911–12), 4 E.A.L.R. 59.

(6) *Mohammad Bakhsh v. Pirthi Chand* (1933), 143 I.C. 768.

(7) *Chhajju Ram v. Neki and Others* (1922), 3 Lah. 127.

Judgment

Windham CJ: This is an application, by the plaintiff in an action which was settled in terms of a consent-judgment of this court, for a review of that part of this court's decree which ordered that the costs payable by the plaintiff should be on the higher scale. The application is made under O. XLVIII of the Civil Procedure Rules, which gives power to a court which has made an order or decree to review it in certain circumstances. It may be here observed that s. 80 of

the Civil Procedure Decree (Cap. 4) makes provision for the remedy by way of review without the inclusion of such qualifying words as are to be found in O. XLVIII of the Rules. But s. 80 is expressed to be "subject as aforesaid," which by reference to the preceding section means "subject to such conditions and limitations as may be prescribed," sc. by Rules. Section 80 must therefore be read subject to the limitations imposed by O. XLVIII.

The action and counterclaim, both of which were settled, concerned the right of the defendant to salvage the wreck of a ship "Pegasus" which lay in Zanzibar harbour. The relevant terms of the consent-judgment, which was very brief, were as follows:–

> "Plaintiff's suit to be dismissed with costs; defendant's counterclaim to be allowed with costs . . ."

Immediately upon the recording of this consent-judgment by this court, the defendant's advocate asked that the costs should be on the higher scale, that is to say on the scale of fees which the court is empowered to allow, under r. 83 of the Rules of Court, 1922 to 1934,

> "on special grounds arising out of the nature, importance or difficulty of the case."

Learned counsel for the plaintiff, Mr. Talati, said that he was not instructed on this point nor was he in any position to oppose or to agree to the suggestion. He did not ask for an adjournment to consult his client. This court thereupon, after considering on its merits the application of learned defence counsel that costs should be on the higher scale, acceded to it and made the order accordingly, on the grounds of

> "the importance and the very unusual nature of this case, and what must have been the considerable labour of preparing it."

The consent-judgment and this order fixing costs on the higher scale, which order was of course not by consent, were then duly embodied in a decree.

In applying to this court to review that part of the decree ordering costs to be on the higher scale, learned counsel for the plaintiff, Mr. Harris (who was not in Zanzibar when Mr. Talati on his behalf had attended for the recording of the consent-judgment) has not attacked the order on its merits, that is to say he has not argued that the case was not of such a nature as to justify costs on the higher scale; but he has argued that once the consent-judgment had been recorded, in which his client agreed to his suit being dismissed and the counterclaim being allowed "with costs," this court was immediately functus officio on the question of costs and had no power to order that they should be on the higher scale, since he contends that the expression "costs" without further qualification means costs on the ordinary scale. In support of this proposition he relies on *Friis v. Paramount Bagwash Co. Ltd*. (1), [1940] 1 K.B. 611. In that case the order regarding costs which was held to be bad as having been made after the court was functus officio was made some five weeks after the original order for "costs" and not, as here, immediately afterwards and before the court rose; but learned counsel contends that the principle is the same, and that even the recognised practice whereby counsel immediately after delivery of a judgment asks for a particular order regarding costs is a bad one and that any such order would be bad. I would observe that I think he would find it difficult to sustain this contention in the face of the judgments of the majority of the Court of Appeal for Eastern Africa in *Ali and Abdulkarim v. Amritlal Ujamshi Sheth* (2), 17 E.A.C.A. 88. But his real and serious argument hinges, as I see it, on the contention that the words "dismissed with costs" mean "with costs on the ordinary scale." On this point learned defence counsel joins issue with him, arguing that the words mean "with such costs as may be ordered by the court." If the present application for a review could properly be determined upon that issue, then the fact that the expressions "dismissed with costs" and "allowed with costs" appear in a consent-judgment and not in an ordinary judgment

between the parties might be a vital one; for it might well be argued that if the words “with costs” mean “with costs on the ordinary scale” then the plaintiff would never have settled the action at all save upon the footing that costs should be on the ordinary scale, and

that accordingly the court could not later vary such an essential term of the new contract between the parties, which is what a judgment by consent amounts to: vide the judgment of the Court of Appeal for Eastern Africa in *Ismail Sunderji Hirani v. Noorali Esmail Kassam* (3), 19 E.A.C.A. 131.

But after carefully considering every aspect of the present application for a review, I find that it must be decided on a point that was touched on only very briefly in argument before me, namely the question whether the remedy by way of review, as opposed to that of an appeal to the Court of Appeal for Eastern Africa, is open to the applicant at all. Learned counsel for the applicant submits that, while an appeal may be open to him, or may have been open, he has an alternative remedy by way of review by virtue of r. 1 (1) of O. XLVIII of the Civil Procedure Rules. Rule 1 (1) reads as follows:–

> "1.(1) Any person considering himself aggrieved–
>
> "(*a*) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred;
>
> "(*b*) by a decree or order from which no appeal is allowed; or
>
> "(*c*) by a decision on a reference from a subordinate court and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order."

Now there can, I think, be little doubt that an appeal to the Court of Appeal for Eastern Africa was open to the plaintiff-applicant from this court's order awarding to the defendant costs on the higher scale. Under s. 79 (*A*) of the Civil Procedure Decree (Cap. 4) as enacted by the Civil Procedure (Amendment) Decree, 1952,

> "an appeal shall lie to the Court of Appeal from any decree or any part of any decree or from any order of the High Court passed or made in the exercise of its original jurisdiction under this Decree."

And an order as to costs is undoubtedly part of the judgment or decree to which it relates. That was laid down in the clearest terms by the Court of Appeal for Eastern Africa in *Ali and Abdulkarim v. Amritlal Ujamshi Sheth* (2), 17 E.A.C.A. 88 at p. 90. And it had been earlier laid down by the same court, both in *Bernard & Co. v. Souza Junior & Dias* (4), (1911–12), 4 E.A.L.R. 54 and in *Alibhai Bhanji v. Essa Thawer* (5), (1911–12), 4 E.A.L.R. 59, that they would entertain an appeal that was only against an order for costs, provided that a question of principle was involved or that there had been a misapprehension of law or fact. In the present case, if the plaintiff's contention is correct that this court was functus officio and thus had no power to make the order for costs on the higher scale at all, then a question of principle was certainly involved and also a misapprehension of law.

An appeal to the Court of Appeal for Eastern Africa, then, would certainly seem to have been open to the plaintiff. Paragraph (*a*) of r. 1 (1) of O. XLVIII of the Civil Procedure Rules would thus be the relevant paragraph, since it deals with a review where an appeal lies but has not been preferred. But r. 1 (1) must be read as a whole; and from such a reading it is clear that, while the remedy by way of review may be open to the aggrieved party (*a*) where an appeal is allowed, (*b*) where an appeal is not allowed, or (*c*) on a reference from a subordinate court, it will only be open to him, in any of these three cases, if there has been a "discovery of new and important matter or evidence" or "on account of some mistake or error apparent on the face of the record" or for "any other sufficient reason." That this is the correct

interpretation of r. 1 (1) of O. XLVIII is clear not only from the plainwords of the rule itself but from abundant Indian decisions upon the corresponding and (in every essential) identically worded O. XLVII, r. 1 (1) of the Indian Code of Civil Procedure, a commentary on which appears in Mulla's Commentary (11th Edn.) at pp. 1228

et seq. The judgment in *Mohammad Bakhsh v. Pirthi Chand* (6) (1933), 143 I.C. 768, for example, illustrates both the proposition that a review will lie even where an appeal was open, and also the proposition that it will lie only in one of the three circumstances set out in the rule, the circumstance in that particular case being an error of fact apparent upon the record.

Now the present case is certainly not one where there was any discovery of new and important matter or evidence after the passing of the decree sought to be reviewed. Nor is this a case where there was any mistake or error apparent on the face of the record. An error of law on the part of this court there mayor may not have been, according to whether the plaintiff's contentions on the issue of functus officio are good or bad; but certainly no such error is patent on the record. There remains, then, the question whether the plaintiff can show that there is "any other sufficient reason" for obtaining a review. At first sight those words might appear to be so wide as to permit of the remedy by way of review in every case where an appeal would lie. But it has been laid down by the highest authority that such is not the case and that the words must be construed ejusdem generis with one or other of the two preceding classes of case, namely where new matter or evidence has been discovered or where there is an error of fact or law apparent on the record. In *Chhajju Ram v. Neki and Others* (7) (1922), 3 Lah. 127, the Privy Council, in construing the words "any other sufficient reason" in the corresponding Indian rule, and after considering the conflicting previous authorities, held that these words must be limited to

> "a reason sufficient on grounds at least analogous to those specified immediately previously."

Since that decision the courts have not always found it easy to apply the test of analogy to cases coming before them, as a reference to the cases reviewed in Mulla, op. cit. at p. 1233 will show. But the test has always been, and must be, applied. Applying it to the present case, I am unable to find any kind of analogy between the grounds on which the plaintiff now seeks a review by this court of its own decision on costs and either of the remaining two categories of cases. Whether it be contended that this court exercised its discretion wrongly or unjudicially in ordering costs on the higher scale, or whether it be contended (as the plaintiff does contend) that the court had no power to make any such order at all, in neither case can there, in my view, be said to be any analogy with any discovery of new material or evidence, or with any mistake or error apparent on the face of the record. Both of these two categories, and also any category held to be analogous to them, would seem to suggest circumstances which, if they had existed and also been present to the mind of the court when the court gave its decision, would obviously, or at least very probably, have caused the court to give a different decision. The grounds on which the plaintiff now asks this court to review its own decision appear to me to fall well outside any such class of circumstance, and therefore to fall outside the ambit of r. 1 (1) of O. XLVIII. For these reasons I hold that this application for a review is misconceived and must be dismissed with costs.

Application dismissed.

For the applicant:
JPG Harris
Robson, Harris & Co, Nairobi

For the respondent:
HG Dodd
Dodd & Co, Dar-es-Salaam

Bakar Bin Ali v R

[1957] 1 EA 219 (HCZ)

Division:	HM High Court for Zanzibar at Zanzibar
Date of judgment:	19 July 1957
Case Number:	54/1957
Before:	Windham CJ
Sourced by:	LawAfrica

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[1] Criminal law – Possession of property suspected to have been stolen or unlawfully obtained – Omission of finding in judgment regarding circumstances of detention of appellant – Penal Decree, s. 310 (A) (*Z.*).

Editor's Summary

The appellant was charged, in the Resident Magistrate's Court under s. 310 (*A*) of the Penal Decree, with being found in possession of two umbrellas suspected to have been stolen or unlawfully obtained and was convicted. The appellant appealed against the Resident Magistrate's decision on the ground that he had acquired the umbrellas lawfully. The magistrate had failed to make a finding in his judgment whether the police officer who stopped the appellant then suspected that the umbrellas were stolen or that the circumstances were calculated to excite such suspicion and that such suspicion was reasonable.

Held–

(i) in order to bring a case within s. 310 (*A*) there ought to be evidence that the accused was detained in circumstances giving rise to suspicion that he was in possession of property stolen or unlawfully obtained.

(ii) the absence of such evidence, and of any finding to that effect in the judgment, was not in the particular circumstances of this case an omission justifying quashing of the conviction.

Appeal dismissed.

No cases referred to in judgment

Judgment

Windham CJ: The appellant was charged in the Resident Magistrate's Court under s. 310 (*A*) of the Penal Decree with being found in possession of two umbrellas suspected to have been stolen or unlawfully obtained, and upon trial was convicted of that offence and, after admitting ten previous convictions, was sentenced to four months imprisonment with hard labour. In his memorandum of appeal he does no more than repeat the defence which he raised at the trial, namely that the umbrellas were acquired by him lawfully, one having been bought from an Indian shopkeeper. At the trial he had stated

that he had borrowed the other umbrella from his brother; he had not told the police this, and did not call his brother to corroborate him. The learned trial magistrate rejected his story and accepted the evidence of the Indian shopkeeper, who denied ever having sold the first umbrella to him. In these circumstances I find no reason for holding that the learned magistrate erred in rejecting the appellant's explanation of how he came by the two umbrellas.

Two points, however, not raised by the appellant, call in my view for comment. The first concerns the requirement in the charging section that the property shall be such as "may reasonably be suspected of having been stolen or unlawfully obtained." Now in order to satisfy this element of the offence there ought first to be evidence on the record to show that there are grounds for such suspicion, grounds which appear reasonable to the court of trial. Secondly, there ought to be a finding in the judgment, even though it be a brief one, that such suspicion either existed in the mind of somebody (e.g. a police officer) or that the circumstances were calculated to excite such a suspicion, and that such a suspicion was (or would be) a reasonable one. In the present case there was no such finding by the court of trial. Nevertheless, if the evidence is such as would have supported such a finding, the conviction will not be quashed by reason of its absence. In the present case the police officer did not state in his evidence that he entertained such a suspicion. Formal evidence to that effect, however, though always desirable, is not legally necessary if reasonable grounds for suspicion may be inferred from the other evidence. Here the police officer asked the appellant how he came by the two umbrellas and, upon being told that he had bought one of them from a certain Indian shopkeeper, he took the appellant and the umbrella to the latter, who denied having sold it. Now it is true that the evidence did not disclose

what had excited the police officer's suspicions in the first place (no doubt it was in fact a knowledge of the appellant's previous convictions, which knowledge was of course inadmissible in evidence at the trial); but the Indian shopkeeper's denial of the sale was sufficient to excite or to confirm in his mind a suspicion that the appellant had come by it unlawfully. A finding of the existence of reasonable grounds for suspicion may therefore be read into the judgment, since on the evidence that was accepted it would be the only reasonably possible finding.

The second point on which the judgment is silent with regard to an essential ingredient of the offence charged concerns the requirement of s. 310 (*A*) that the person charged shall have been

> "detained as the result of the exercise of the powers conferred by s. 18 (*A*) of the Criminal Procedure Decree."

That section empowers any police officer to

> "stop, search and detain (*inter alia*) any person who may reasonably be suspected of having in his possession . . . anything stolen or unlawfully obtained."

In order to bring the case within s. 310 (*A*), therefore, there ought to be formal evidence that the accused was detained in such circumstances by a police officer. In the present case there is no such evidence on the record, since the police witness makes no mention of having arrested or detained the appellant at all. Here again, however, a perusal of the case file, though not of the evidence, shows that the appellant was in fact arrested without warrant at 2.30 p.m. on the same day as he had been taken by the police officer to the Indian shopkeeper when the latter denied the sale of the umbrella, and it may be reasonably inferred that this same police officer detained him then and there upon his suspicions being aroused or confirmed. In the circumstances, therefore, the absence of formal evidence to that effect, and of any finding to that effect in the judgment, is not such an omission as would justify a quashing of the conviction.

For these reasons this appeal is dismissed.

Appeal dismissed.

The appellant did not appear and was not represented.

For the respondent:
NP Carrick-Allan (Ag. Attorney-General, Zanzibar)
The Attorney-General, Zanzibar

Sureshbhai Dahyabhai Patel v The Principal Immigration Officer
[1957] 1 EA 221 (HCT)

Division:	HM High Court of Tanganyika at Dar-Es-Salaam
Date of judgment:	20 February 1957
Case Number:	264/1956
Before:	Davies CJ
Sourced by:	LawAfrica

[1] Immigration – Application for entry permit as a permanent resident – Whether person born in Tanganyika Territory is entitled to permit – Definition of "permanent resident" – Immigration (*Control*) *Ordinance s.* 2 (1) *proviso* (iii) (*T.*).

Editor's Summary

The father of the appellant was employed by the Tanganyika Railways & Port Services from 1929 until 1951 when his services were terminated on medical grounds whilst he was on sick leave in India. His employment was on overseas terms which entitled him after each tour of forty-three months residential service to a free passage to India and five months' leave. The mother of the appellant was not born in Tanganyika but came from India in 1931, joined her husband and resided with him, except for occasional visits to India, until her death at Dar-es-Salaam in 1942. The appellant himself having been born at Dar-es-Salaam in 1939 applied to the Principal Immigration Officer for an Entry Permit Class A (1) on the ground that he was a permanent resident under s. 2 of the Immigration (Control) Ordinance. At the time of this application the father of the appellant was in India. The Principal Immigration Officer refused to issue to the appellant the Permit applied for whereupon the appellant appealed to the High Court under s. 7 (3) of the Ordinance. The appellant's case was that "permanent resident" in s. 2 of the Ordinance is defined as *inter alia* "a person born in the Territory" but proviso (iii) of sub-s. 1 of the same section made certain exceptions to the scope of the definition and, in particular, provided that a person should not be a "permanent resident" by birth in the Territory if his mother was not (*a*) a person born in the Territory or (*b*) a person who permanently resides in the Territory.

Held–

(i) by any reasonable test and having regard to the general purpose of the Ordinance a person who is employed on overseas terms which provide for regular absences from the Territory to his country of origin or his country of domicile and who regularly leaves the Territory in those circumstances cannot properly be said to be permanently residing in the Territory.

(ii) it necessarily follows that the wife of such person who resides with him and accompanies him on his absences cannot be said to be permanently residing in the Territory.

Appeal dismissed.

Cases referred to in judgment:

(1) *J. G. Mehta v. R.*, Tanganyika High Court Criminal Appeal No. 215 of 1955 (unreported).

Judgment

Davies CJ: This is an appeal under the provision of s. 7 (3) of the Immigration (Control) Ordinance (Cap. 251), the appellant being aggrieved by the refusal of the Principal Immigration Officer to issue to him an Entry Permit to enter this Territory.

The application made to the Principal Immigration Officer was for an Entry Permit Class A (1) on the ground that the applicant was a permanent resident. The facts supporting the application are not in dispute. They are briefly these: The applicant was the son of one Dahyabhai Javerbhai Patel, who was employed in the services of the Tanganyika Railways and Port Services from June 4, 1929 until May 6, 1951 when his services were terminated on medical grounds while he was in India on sick leave. The

father was employed on “Overseas” terms of service and was entitled to five months’ leave and free passages to India after each tour of forty-three months’ residential service. At the date of the application he was resident in India. The

mother of the applicant came from India, joined her husband in 1931 and resided with him, except for occasional visits to India until she died in Dar-es-Salaam in 1942. The appellant was born in Dar-es-Salaam on September 21, 1939.

The case submitted on behalf of the appellant is that he is entitled to an entry permit by reason of his being a "permanent resident" within the meaning of that term as defined in s. 2 of the Immigration (Control) Ordinance.

"Permanent resident" under that section means *inter alia* "a person born in the Territory" unless the Principal Immigration Officer can show that he comes within the scope of the proviso to the definition.

The case submitted on behalf of the Principal Immigration Officer is that the appellant comes within the scope of the (iii) category of the proviso by reason of the fact that at the time of his birth his mother was not:

(*a*) a person born in the Territory, or

(*b*) a person who permanently resides in the Territory, or

(*c*) a person who is in possession of, or entitled to be issued with, a valid certificate of permanent residence issued under the provision of any regulations made under the Ordinance.

It is conceded by Counsel for the appellant that the mother was not born in this Territory. His Counsel however claimed that she was at the time of the birth of the appellant a person who permanently resided in the Territory and alternatively was a person who was entitled to be issued with a valid certificate of permanent residence.

There is in my view no merit in the alternative claim that the mother was entitled to a valid certificate of permanent residence under the provision of regulations made under the Ordinance in as much as the Ordinance was not in force at the time of the appellant's birth.

The only issue left for decision is whether the mother permanently resided in the Territory at the date of the birth of the appellant.

It has already been decided by this court in *J. G. Mehta v. R.* (1), Tanganyika High Court Criminal Appeal No. 215 of 1955 (unreported), on facts almost identical with those in this case, that the wife of a government servant employed on overseas terms and who lives with her husband is not permanently residing in the territory. The Principal Immigration Officer was bound by and did follow that decision in rejecting the application of the appellant in this case.

In *J. G. Mehta v. R.* (1) to which I have referred, the learned Judge expressed the view that

> "to be permanently resident in the territory a person must, in my opinion, not only have his home and usual place of abode in that territory but be domiciled there also."

While I am not, with respect, prepared to accept the proposition that in order to be permanently resident in the territory within the meaning of that expression in the Ordinance it is necessary to be domiciled there as well – a proposition which was challenged by Counsel for the Appellant – I do not think that by any reasonable test and having regard to the general purpose of the Ordinance a person who is employed on overseas terms which provide for regular absences from the territory to his country of origin or to his country of domicile and who regularly leaves the territory in those circumstances can properly be said to be permanently residing in the territory.

It necessarily follows that the wife of such person who resides with him and accompanies him on his

absences from the territory cannot be said to be permanently residing in the territory.

No authority directly or indeed remotely in point and which is binding on me was referred to me by either Counsel; nor am I aware of any such authority.

I find that the Principal Immigration Officer was justified in rejecting the application and the appeal therefore fails and is dismissed.

Appeal dismissed.

For the appellant:
RU Patel
RU Patel, Dar-es-Salaam

For the respondent:
JO Ballard (Crown Counsel, Tanganyika)
The Attorney-General, Tanganyika

Khimji Gordhandas and another v Chandrasen Narotam and others
[1957] 1 EA 223 (HCZ)

Division:	HM High Court for Zanzibar at Zanzibar
Date of judgment:	23 May 1957
Case Number:	2/1956
Before:	Windham CJ
Sourced by:	LawAfrica

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[1] Rent restriction – Order of board requiring landlord to reopen door closed by him and to restore staircase of dwelling – No express power to make order conferred by Rent Restriction Decree 1953 (*Z.*) *– Whether power implied.*

Editor's Summary

The respondents who were ten occupants of a dwelling applied to the Rent Restriction Board to investigate and make appropriate orders in respect of *inter alia* their complaints that the appellants, their landlords, had closed a door on the premises which ought to be reopened and that a staircase required restoration. In addition to hearing evidence the Board asked the Superintendent of the Zanzibar Fire Brigade to report upon the desirability of reopening the door as a possible exit in case of fire. The Superintendent reported to the Board by letter that in view of the many persons living in the premises it was most essential that the door which had been closed and another door should be kept unlocked at all times. The Superintendent was not called as a witness but no objection was taken during the proceedings to his letter being considered. Subsequently the Board ordered the landlords to reopen the door and restore the staircase. The landlords then appealed on the grounds that the Board had no power to make the order, that the order was unreasonable and that the Superintendent's letter was inadmissible. In

support of the appeal it was argued that s. 8 of the Rent Restriction Decree, 1953, only gave the Board power to "investigate" complaints and disputes; that there was no express power elsewhere in the Decree to make an order after investigation; and since the powers conferred were statutory the Board could not assume powers not specifically granted.

Held–

(i) since s. 7 (1) of the Rent Restriction Decree gives the Board power to exercise jurisdiction in all civil matters arising out of the Decree, the exercise of such jurisdiction implies the power to adjudicate on the matters investigated.

(ii) a duty imposed or power granted by the legislation carries with it the power necessary for its performance or execution.

(iii) since the Board is empowered by s. 9 (3) of the Decree to act on evidence which would not be admissible under the law of evidence the Board was fully justified in considering the letter from the Superintendent and it was not open to the appellants to raise on appeal an objection to the reception of the letter which they had not taken before the Board.

Appeal dismissed.

No cases referred to in judgment

Judgment

Windham CJ: This is an appeal by a landlord against an order of the Rent Restriction Board relating to dwelling premises let by him to the respondent, requiring him (the appellant) to reopen a door which he had closed, to restore a staircase, and to install a water-tank. The respondent had referred to the Board these matters, together with a number of other complaints against the appellant relating to the premises for investigation and for consequential orders against him. At the hearing some of these other matters were settled, and the Board's order, which related to the matters not so settled, was given after hearing evidence on both sides.

As regards the installation of the water-tank, it is admitted by counsel for the appellant that this question is now academic since the tank has by now been duly installed. The appeal is thus concerned with the Board's order that he should reopen the door and restore the staircase. It is uncontested that these were among the matters referred to the Board for investigation. But the appeal against the Board's order is

based on two grounds; first, that the Board had no power to make the order; secondly, that it was unreasonable.

With regard to the first point, it is not seriously contested that the disputes referred to the Board for investigation were referred under s. 8 of the Rent Restriction Decree, 1953. Sub-s. (1) of that section provides that

> "in addition to any other powers specifically conferred on it by this Decree, a Board may investigate any complaint relating to the tenancy of premises made to it either by a tenant or landlord of such premises."

Sub-section (4) provides that:

> "where a complaint has been made against a tenant or against a landlord . . . or where the Board has taken cognizance of any dispute or any facts which are likely to lead to a dispute between a tenant and a landlord, the Board may order the parties or the landlord or tenant, as the case may be, to appear before the Board at a time and place specified in such order for the purpose of investigating such complaint or dispute."

It is contended for the appellant that since there is no provision in s. 8, nor elsewhere in the Decree, specifically empowering the Board to make an order requiring either party to do anything, consequential upon its investigation of the complaint or dispute that it has been investigating, then the Board has no power to make such an order, since its powers are statutory only.

Now it is, of course, true that the Board's powers are prescribed by statute and are limited to what is so prescribed. And it is worthy of mention that specific power to make such orders as the appellant appeals against is conferred upon certain other East African legislation, as for example s. 9 of the Kenya Increase of Rent (Restriction) Ordinance, 1949, whose first four sub-sections correspond almost verbatim with the four sub-sections of s. 8 of the Zanzibar Decree, but to which a fifth sub-section was added in 1951 to provide that:

> "where the Board investigates any complaint under this section the Board may make such order in the matter as the justice of the case may require."

But the absence of such a specific provision from the Zanzibar Decree certainly does not necessarily mean that the Board has in Zanzibar no such power.

First of all, I think such a power must be implied from para. (*t*) of s. 7 (1) of the Decree, which gives the Board power to

> "exercise jurisdiction in all civil matters on questions arising out of this Decree."

A complaint or dispute referred to the Board under s. 8 and falling within the scope of that section is undoubtedly a question arising out of the Decree. And the exercise of jurisdiction in any matter necessarily presumes, it seems to me, not only the investigating of it but the giving of a judgment or making of an order upon the matter investigated.

Secondly, quite apart from s. 7 of the Decree, the provisions of s. 8 empowering the Board to investigate disputes and to order parties to appear before it for that purpose are themselves such, in my view, as to imply a power to implement such an investigation by making a consequential order upon it, thereby avoiding futility under the maxim:

> "Ubi aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potest."

This rule of interpretation is expressed in the following words in Halsbury's Laws of England (2nd Edn.), Vol. 31, para. 642, at p. 501:

> ‘A duty imposed or a power granted by Parliament carries with it the power necessary for its performance or execution.”

The implied power must be read into the Statute in order to enable the express power, or the jurisdiction expressly conferred, to be effectually exercised. The same rule of

interpretation will be found set out in Maxwell on the Interpretation of Statutes (10th Edn.), at p. 361. It is suggested for the appellant that the object of s. 8 in empowering the Board to investigate disputes is to enable them merely to give advice. It is difficult to see what useful purpose mere advice, legally unenforceable, would serve in disputes of the kind covered by s. 8, and I think this suggestion has scant merit. The first and main ground of appeal therefore fails.

The remaining grounds of appeal are concerned with the reasonableness of the Board's order regarding the reopening of the door and the restoring of the staircase. These are questions of pure fact, and therefore not appealable, unless it can be shown that there was no evidence at all to support the orders, or that the Board in making them acted on wrong principles or manifestly considered irrelevant factors or over looked relevant ones. On perusing the evidence I am unable to find that the Board erred on any of these grounds. Their order was made largely on the strength of a letter dated July 13, 1955, addressed to them by the Superintendent of the Zanzibar Fire Brigade in response to their request for a report on the question whether or not the reopening of the disputed door was desirable from the point of view of its being used as a fire-exit. The letter replied that in view of the large number of people living in the building it was most essential that both the disputed door and another door to the same premises should be kept unlocked at all times. The restoration of the staircase was a necessary corollary to this, since it gave access to the door. It is objected that the letter from the Fire Brigade ought never to have been admitted in evidence or taken into consideration by the Board since the opinion expressed in it was hearsay because the writer of it was not called, as indeed he was not. This might perhaps have been a valid objection to its admittance if the objection had been taken at the time, although even in such a case it would not necessarily have succeeded in view of the terms of s. 9 (3) of the Decree, which empowers the Board to act on evidence which would "not be admissible under the law relating to evidence." But in the present case no objection was raised to its reception at the hearing. The appellant, in giving evidence, disagreed with the opinion expressed in it; but that is quite another thing, and is consistent rather with his having agreed to its admission in evidence. He cannot in these circumstances raise the point now for the first time on appeal. In any event the Board were more than justified in this instance in ignoring the niceties of the laws of evidence and treating as a paramount factor the danger that might result to a large number of the occupants of the building if the door was not reopened or the staircase not restored. Their order was therefore eminently reasonable.

For these reasons this appeal must be dismissed with costs.

Appeal dismissed.

For the appellants:
DF Karai
DF Karai, Zanzibar

For the respondents:
PS Talati
Wiggins & Stephens, Zanzibar

Edward Sargent v A Tisdale-Jones

[1957] 1 EA 226 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	24 July 1957
Case Number:	78/1956
Before:	Sir Newnham Worley P, Sir Ronald Sinclair VP and Bacon JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Harley, Ag. J

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[1] Contract – Gentleman's agreement – Whether any contractual relationship created.

Editor's Summary

The appellant sued the respondent for the sum of Shs. 424,000/- as money lent to the respondent or, alternatively, as money due from the respondent on a promissory note for that amount payable on demand. By his defence the respondent admitted the receipt of the money and the making of the promissory note but alleged that in 1952 he purchased for the appellant as an undisclosed nominee a sisal estate in the Thika District and within the Highlands of Kenya as defined by the Kenya (Highlands) Order in Council, 1939, and that the money was provided by the appellant for this purpose, since the appellant who was not a British subject, was unlikely to be approved by the Land Control Board as a purchaser of an estate in the Highlands. The respondent claimed that the transaction had contravened s. 7 (1) (*b*) of the Land Control Ordinance (K.) and s. 88 (1) of the Crown Lands Ordinance (K.) and consequently the loan was made for an illegal purpose and the appellant was not entitled to recover on the promissory note. The respondent further averred that he would account to the appellant for the net proceeds of sale of the estate when he could dispose of it. At the trial the appellant called as a witness an advocate who had advised the appellant and respondent jointly when the respondent was, on behalf of the appellant, negotiating the purchase. In his judgment the trial judge rejected the evidence of the appellant, referred only briefly to the evidence of the advocate called by the appellant and having formed a favourable view of the respondent's evidence, dismissed the suit.

Held – since the evidence of the advocate was most material, the trial judge should in his judgment have examined and assessed this, and since he had failed to do so, and since this evidence was inconsistent with the findings of the judge, his judgment could not be supported. (Observations of the court on "gentlemen's agreements" and "honour clauses").

[**Editorial Note.** In the present case the Court of Appeal reversed the decision of the Supreme Court substantially on the grounds that the trial judge had failed sufficiently to review the evidence of an advocate who was called as a witness, whose evidence was most material. The judgment of the Court of Appeal examined the whole of the evidence in great detail and the decision was based upon the court's findings on the evidence. The present report is confined to an extract from the judgment of the Lord President on the only substantial point of law involved.]

Appeal allowed.

Cases referred to:

(1) *Rose and Frank Company v. J. R. Crompton and Brothers Ltd*., [1923] 1 K.B. 261.

(2) *Rose and Frank Company v. J. R. Crompton and Brothers Ltd*., [1925] A.C. 445.

(3) *Jones v. Vernon's Pools Ltd*., [1938] 2 All E.R. 626.

(4) *Appleson v. Littlewood* (*H.*) *Ltd*., [1939] 1 All E.R. 464.

Judgment

Sir Newnham Worley P: after summarising certain undisputed facts and referring to the Crown Lands Ordinance, continued: I do not think there is really any dispute as to the law applicable to this case. The relevant statutory provisions have been stated. I accept Mr. Caplan's statement of the mischief struck

at by these sections, as a transaction of acquisition whereby a legal relationship is created between the acquirer and a third party of such a nature that acquisition is made for and on behalf of the third party. Such a relationship must be either one of agency or trusteeship: if it is not legally recognisable as one or the other, there is no acquisition "for and on behalf" of the third party. I apprehend that what has been referred to in the argument as a "nominee transaction" necessarily involves the legal relationship of either agency or trusteeship. Mr. Bechgaard did, indeed, suggest rather faintly, I thought, that nomination or nomineeship constitutes a third class of legal relationship, but he adduced no authority or argument to support this. On the other hand, it is well established that an "honour clause" in an agreement, or a "gentleman's agreement" creates no legal relationship or legally binding obligation, although its existence will be recognised by the court: *Rose and Frank Co. v. J. R. Crompton and Bros. Ltd*. (1), [1923] 2 K.B. 261 and (2), [1925] A.C. 445; *Jones v. Vernon's Pools Ltd*. (3), [1938] 2 All E.R. 626; *Appleson v. Littlewood* (*H.*) *Ltd*. (4), [1939] 1 All E.R. 464.

[His Lordship in the judgment went on to review the evidence in detail and to consider the weight to be attached, in particular, to the evidence of the advocate who had given evidence for the appellant in relation to other evidence in the case. The court unanimously allowed the appeal.]

Appeal allowed.

For the appellant:
L Caplan, QC and *DN Khanna*
DN & RN Khanna, Nairobi

For the respondent:
K Bechgaard and *RDC Wilcock*
Archer & Wilcock, Nairobi

Jenabai Sachoo and another v Shamsa Binti Humud Bin Shamis and another

[1957] 1 EA 227 (HCZ)

Division:	HM High Court for Zanzibar at Zanzibar
Date of judgment:	28 May 1957
Case Number:	15/1956
Before:	Law J
Sourced by:	LawAfrica

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[1] Mortgage – Equitable mortgage by deposit of title deeds – Validity – Mode of creation – Equitable Mortgage Decree (*Cap.* 110) (*Z.*).

[2] Estoppel – Estoppel by Deed – Surety a party to Deed – Effect of recital as to Surety.

Editor's Summary

The plaintiffs as executors of the will of one Ibrahim Ladha, sued the defendants on a mortgage which it was alleged was executed on November 23, 1954, by the first defendant as mortgagor in favour of the testator as mortgagee.

The claim against the first defendant was founded on the mortgage in her capacity as mortgagor and, alternatively, on an alleged equitable mortgage created by the deposit of the title deeds of the mortgaged property with the testator by the first defendant's employee, one Ali Mansoor who it was contended was authorised by the first defendant expressly or impliedly to raise a loan on the security of the said property. The claim against the second defendant was as surety in respect of the mortgage, his liability thereunder being limited to any balance remaining owing after sale of the mortgaged property. A further claim against the second defendant was founded on an alleged breach of warranty by him as to the identity of the mortgagor.

The first defendant contended that she had not executed the said mortgage, nor received the money under it; and, as regards the claim based on an equitable mortgage, while she admitted that Ali Mansoor managed her properties, she denied that she

had ever authorised him expressly or impliedly to raise a loan on her behalf. The second defendant's defence consisted of a complete denial of all the allegations.

Held – As regards the first defendant:

(i) On the facts of the case the suit in so far as it was founded on the mortgage failed.

(ii) The only form of equitable mortgage recognised in the Zanzibar Protectorate was one created by the delivery of the documents of title to immovable property to a banker, and not to any other person, and that this specific mode of creating an equitable mortgage prescribed by the Equitable Mortgage Decree (Cap. 110) precluded the application of the English doctrines of equity, and therefore, the suit also failed on this point.

(iii) The evidence did not support the plaintiffs' proposition that she (the first defendant) had expressly or impliedly authorised her agent, Ali Mansoor, to raise loans on her behalf.

As regards the second defendant:

(iv) He was estopped from denying that he did not request the loan to be made as the recitals in the mortgage to which he was a party expressly embodied the request, but, since the testator chose not to rely on the warranty as to the identity of the mortgagor, the claim against this defendant could not succeed.

Cases referred to in judgment:

(1) *Bank of England v. Cutler*, [1908] 2 K.B. 208.

Judgment

Law J: The plaintiffs in this case are the executors of the will of Ibrahim Ladha, deceased. The first defendant is an Arab lady whom I shall refer to for convenience as Shamsa, and the second defendant Fazel Kassam Velji is an Indian merchant. Both defendants live in Zanzibar, as did Ibrahim Ladha in his life-time.

The claim against Shamsa and F. K. Velji arises out of a deed of mortgage allegedly executed on November 23, 1954, between Ibrahim Ladha as mortgagee, Shamsa as mortgagor, and F. K. Velji as surety, his liability being limited as to the balance (if any) owing after sale of the mortgaged property.

The same relief is sought against both defendants:

(*a*) for 16,544 Shs. 08 Cts. due under the mortgage on November 23, 1955, and further interest on 16,000 Shs. at 12% per annum from March 6, 1956, until the date of redemption and at 6% per annum on the decretal amount from the date of redemption until payment;

(*b*) in default of payment within the time ordered by the court, for an order for sale of the mortgaged property;

(*c*) in case the proceeds of sale are found to be insufficient, for liberty to apply for a money Decree against the defendants; and

(*d*) for costs.

In the case of Shamsa, the claim against her is based both on the deed of mortgage, in her capacity as

mortgagor; and alternatively on an alleged equitable mortgage created by the deposit of the title deeds of the mortgaged property with Ibrahim Ladha by Shamsa's employee Ali Mansoor who was allegedly authorised by Shamsa expressly or impliedly to raise a loan on the security of the said property. The liability of the second defendant F. K. Velji is based on an alleged breach of warranty by him as to the identity of the mortgagor.

Shamsa's defence to the claim is, firstly, a denial that the mortgage deed was executed by her as it purports to have been; a denial that she has received Shs. 16,000/- or any other sum from Ibrahim Ladha as alleged in the plaint; as regards the claim

based on an equitable mortgage she admits that Ali Mansoor was the manager of her properties but denies that she ever authorized him expressly or impliedly to raise a loan on her behalf.

The defence of F. K. Velji is a denial that any loan was made to Shamsa whether at his request or otherwise, or that he guaranteed payment of the balance of the debt, or that he identified the mortgagor to the mortgagee as alleged or otherwise.

Before going into the facts of the case, it is necessary for their proper appreciation for me to say a few words about the first defendant Shamsa. She has deposed, and there is no reason to disbelieve her in this respect, that she came from Muscat to Zanzibar as a married woman with two children during the reign of Seyyid Bargash (1870–1888) together with her father who died in the last year of that reign, leaving her among other things 70 slaves and a large shamba worth a lakh of rupees. Assuming that Shamsa came to Zanzibar in about 1880, she is certainly not less than 90 years old today, and may be nearer 100. Her eyesight is now poor, and she is very deaf; like many deaf people she is voluble and loud in her speech. Altogether she is an unusual, forceful and distinctive personality, with powers of memory remarkable in one of her advanced age. These matters will be material when I come to consider whether it was she who executed the mortgage deed as mortgagor or whether she was impersonated. In the course of time Shamsa has added considerably to her possessions; she has acquired three more shambas and two houses in town, and it is one of these houses (No. 6/92) at Baraste-Kipande that was the subject of the alleged mortgage.

In dealing with the events leading up to the execution of the mortgage deed, the court is at a disadvantage in that of the people who were present – or are on record as having been present – at the formality, only three gave evidence. Of those present, Mr. Patel (the advocate who drew up the deed and was present at its execution) has little recollection of what happened; Ibrahim Ladha the mortgagee is dead; Ali Mansoor who witnessed Shamsa's signature is dead; F. K. Velji for reasons best known to himself did not give evidence; Shamsa denied all knowledge of the execution of the deed; and the only witness with any apparent personal knowledge of what happened was a broker Suleiman Bachoo, who witnessed the signatures of the mortgagee and surety and who is stated at the foot of the deed to have identified the parties when the deed was presented for registration at the office of the Registrar of Documents. Suleiman Bachoo is therefore a most important witness. He deposed that Ibrahim Ladha, in November, 1954, brought Ali Mansoor to him, saying

> "this man wants Shs. 16,000/-, try and get it for him. If you can't, bring him to me, and I will give it. If he agrees to 2% per month, plus brokerage of Shs. 600/-, I will borrow elsewhere and accommodate him."

Ali Mansoor was Shamsa's grandson, and at that time a man of some forty-five years of age. He managed Shamsa's properties, and the extent of his authority in relation to those properties I will discuss at a later stage in this judgment. Ali Mansoor agreed to the terms proposed by Ibrahim Ladha. He said that the suggested security for the advance was to be a house at Baraste-Kipande, and the three men went there to value the property. Suleiman Bachoo deposed further that he remained outside the house, but that Ladha went in with Ali Mansoor and said in a loud voice which could be heard outside

> "Ladies, Ali Mansoor wants Shs. 16,000/- but says the house belongs to you, so which of you?"

Whereupon a lady, whom Bachoo did not see but whose voice he heard, replied saying "I am the owner. I will come and sign and do everything." Later Bachoo advised Ladha that the house was not worth more than Shs. 12,000/-, so Ladha objected to advancing Shs. 16,000/- whereupon Ali Mansoor said he would provide a surety for the balance, and mentioned the name of F. K. Velji the second defendant. Some days later the parties met at the office of Mr. Patel, the advocate, who had drawn up the mortgage deed on the

instructions of Ibrahim Ladha. Mr. Patel read and explained

the contents of the deed. When shown the document Ex. 4 Mr. Patel remembered that F. K. Velji the guarantor had refused to act in that capacity unless he was given a deed of indemnity covering his possible liability. This deed was also drawn up by Mr. Patel and was executed by Ali Mansoor. The mortgagor was not identified to Mr. Patel who cannot say if she was or was not Shamsa the first defendant. She answered to the name of Shamsa and did not give the impression of being deaf. She seems to have said nothing and taken no part in the proceedings, which seems surprising if she was in fact the domineering and garrulous old woman whom we saw in the witness-box. Suleiman Bachoo's evidence on this point is of interest; the woman who executed the deed as Shamsa seemed to hear quite normally and move about with ease. In cross-examination he said

> "I do not think she was the same woman as Shamsa. If she says she never executed the document, it could be true, judging from appearances."

Suleiman Bachoo told Mr. Balsara in cross-examination that F. K. Velji had denied knowing Shamsa personally, whereupon he warned Ibrahim Ladha to be careful, and not to pay out the money except at Shamsa's house in the presence of people who knew her. He was suspicious that the woman was not Shamsa because F. K. Velji refused to sign as surety without a guarantee. Ibrahim Ladha however replied that it was not necessary to take the precautions suggested by Bachoo "so long as Ali Mansoor is there." I believe this evidence of Suleiman Bachoo's to be true. Bachoo, F. K. Velji and Ibrahim Ladha himself all had reason to believe that something irregular was going on. There is further reason for believing that the transaction was irregular, and that is to be found in Ibrahim Ladha's own books, which I accept as accurate in respect of this transaction. It appears from these books that on November 16, 1954, Ladha paid F. K. Velji Shs. 3,000/-, although it is not known for what consideration. On November 23, the date of the execution of the mortgage, appears an entry of the payment of Shs. 16,000/- to Shamsa, against which Ladha credited himself with the Shs. 3,000/- already paid to F. K. Velji, which he thus recouped from Shamsa's Shs. 16,000/-. Ladha had Shs. 1,939/- cash in hand on that day, and borrowed a further Shs. 10,000/- from Pardan Ladhak. All that was actually paid out in respect of the purported advance of Shs. 16,000/- was Shs. 11,080/- made up as follows:

advance	16,000/-		
less	–	3,000/-	credited to Velji
		1,920/-	the first year's interest
	4,920/-	4,920/-	
leaving	11,080/-		

from which Suleiman Bachoo has deposed that the agreed commission of Shs. 600/- was further deducted by Ibrahim Ladha when he paid the money to Ali Mansoor. Now F. K. Velji has not explained why the Shs. 3,000/- paid to him earlier by Ladha should have been deducted from the Shs. 16,000/- allegedly borrowed by Shamsa from Ladha. So far is known, there is no reason why Shamsa should have consented to such a course, if this was a genuine mortgage transaction. Having seen her in the witness box, I do not believe that if she had borrowed Shs. 16,000/- she would have been willing to forego Shs. 3,000/- for the privilege of securing a surety, who (it should be noted) did not guarantee payment of the full advance but

only of the balance – should there be one – found due to Ladha on the eventual sale of the house. The fact that only Shs. 11,000/- or so was actually paid over in respect of a nominal loan of Shs. 16,000/- makes one think that Shamsa was not a party to this transaction. There was no need at all for her, the owner of solid and substantial properties, to have borrowed money on such unfavourable terms. If I had to rely on Shamsa's word alone, I would have found differently, because she tried to deceive the court by denying that she had earlier borrowed Shs. 20,000/- from Hilal bin Ahmed, on the same

security, which sum she repaid in full. Her memory on other points was too good for her to have forgotten the loan made by Hilal bin Ahmed. She wanted the court to believe that she had never been in the position of having to borrow money. But notwithstanding her falsehood in this respect, I am quite satisfied that she was never a party to the transaction the subject of this case. She is such a forceful personality that there could have been no possibility of mistake or doubt in identifying her, either when the deed was executed, or when it was later registered. She would I am certain never have borrowed money on such unfavourable terms. The deed was executed as the result of a fraud engineered by her grandson Ali Mansoor, with the complicity of an unknown woman who personated Shamsa at her house, and in Mr. Patel's office, and in the office of the Registrar of Documents, and probably with the complicity of F. K. Velji the second defendant and of Ibrahim Ladha himself, who as a result of the transaction was recouping himself of a debt of Shs. 3,000/- discharged earlier by him to F. K. Velji. As Ladha said to Suleiman Bachoo, he was willing to run the risk "so long as Ali Mansoor is here." He was counting on Ali Mansoor to repay the so-called loan, and as Ali was forty-five years younger than Shamsa he should in the ordinary course of nature have survived her, in which case her estate would have been liable on an apparently genuine deed of mortgage. The suit in so far as it is based on the mortgage deed accordingly fails against Shamsa. As regards the alternative claim, based on an equitable mortgage, I find that at the time of the loan being made, the documents of title to Shamsa's property were deposited with Ibrahim Ladha. The various types of mortgage which are lawful in Zanzibar are defined in s. 58 of the Transfer of Property Decree (cap. 82). Equitable mortgages by deposit of title deeds are not included, nor are they referred to in s. 59 of the Decree, although in the corresponding section of the Indian Act (No. IV of 1882) the requirement of registration of a signed instrument is dispensed with in the case of equitable mortgages made in Calcutta, Madras, Bombay, Karachi and Rangoon. The Zanzibar Decree includes no such provision in relation to equitable mortgages made in Zanzibar town. Mr. Master for the plaintiffs has argued that the Zanzibar Decree is not exclusive and relies on Art. 24 of the Zanzibar Order in Council, 1924, which provides that the jurisdiction of the Zanzibar courts shall be exercised, *inter alia*

> "in conformity with the substance of the common law the doctrines of equity and the statutes of general application in force in England on July 7, 1897."

In this connexion reference must be made to the Equitable Mortgages Decree (Cap. 110) which provides that nothing in s. 59 of the Transfer of Property Decree shall be deemed to render invalid mortgages made in the town of Zanzibar by delivery to a banker of documents of title to immovable property with intent to create a security thereon Mr. Master describes this Decree (Cap. 110) as mere surplusage, which made legal what was already legal. I cannot agree with this view. The title of the Decree indicates that the legislature was dealing with the general subject of equitable mortgages, and it decided that the only form of equitable mortgage recognized in the Protectorate was to be by delivery of documents of title to immovable property to a banker, and not to any other person, in Zanzibar Township. The English common law and doctrines of equity only apply to the Protectorate subject to the Decrees of the local legislature. Had the local legislature intended that equitable mortgages made to persons other than bankers should be recognized as valid, it would have provided accordingly. The only form of equitable mortgage which validly exists in the Protectorate is therefore one made with a banker in Zanzibar Town, and I hold accordingly. The suit so far as it is based on an equitable mortgage therefore also fails against Shamsa the first defendant.

The third leg of the plaintiffs' claim against Shamsa is that she is bound by the acts of Ali Mansoor as her agent expressly or impliedly authorized by her to raise loans on her behalf. The evidence does not support this proposition. On the only other occasion when it has been proved that Shamsa borrowed

money, Ali Mansoor negotiated the loan but Shamsa received the money and signed the deed. The lender Hilal has deposed that he went to see her in person at her house and obtained her confirmation that she

wanted the money. Clearly Hilal at any rate did not consider that Ali Mansoor had the necessary authority to bind Shamsa. All that has been proved in this case is that Ali Mansoor was Shamsa's manager for the purpose of running her estates and selling the produce. There is nothing to show that at any time she held him out as her agent having power to negotiate loans on her behalf. According to Badr bin Mahomed, the seventh witness called by the plaintiffs:

> "It is quite common for Arab ladies to instruct a son or grandson or any other person whom they trust to manage their properties. Such a person is not authorized to sell or mortgage properties. If I were old and incapable and wished to sell a shamba, or mortgage it, I would instruct my son to look for a broker who would find a purchaser. Then I would deal with the formalities and collect the cash myself."

That extract from Badr's evidence represents exactly what happened when Shamsa borrowed money on mortgage from Hilal in 1952. Counsel for the plaintiffs has relied on the fact that the documents of title to Shamsa's properties were found in Ali Mansoor's possession after his death as indicating a general power on his part to deal with those properties, but I am satisfied with Shamsa's explanation that Ali took these documents from her without her knowledge or consent, and that she was forced after his death to bring a suit to recover them, in which suit she was successful. I find that at no time did Shamsa hold out Ali as her agent with power to borrow money on her behalf, and the suit in so far as it is based on this allegation of holding out also fails against Shamsa the first defendant.

I now turn to a consideration of the position of F. K. Velji the second defendant. The plaintiffs' claim against him is based on the allegation that he has been guilty of a breach of warranty as to the identity of Shamsa the mortgagor, the loan to her having been made at his request, and the deceased Ibrahim Ladha having relied on this warranty. F. K. Velji's defence that he did not request the loan to be made cannot avail him. The deed which he signed, after it had been read over to him, recites *inter alia*

> "And whereas the mortgagee has at the request of the mortgagor and the surety agreed to lend to her the mortgagor the sum of Shs. 16,000/-. . ."

To quote from Halsbury (3rd Edn.), Vol. 15, at p. 215, a person is bound by the recitals in a deed to which he is a party whenever they refer to specific facts and are certain, precise and unambiguous. F. K. Velji set his hand and seal to this deed, and he is not permitted to deny any matter which he has specifically asserted therein. He is estopped by deed from so doing, and the fact of his having made the request referred to in the preamble cannot be denied by him. Furthermore, he again signed the deed when it was presented for registration, at which formality the parties to the deed were identified – or purported to have been identified – to the Registrar. F. K. Velji is accordingly further estopped, in my opinion, from denying that the mortgagor was other than Shamsa binti Humud, the first defendant. In *Bank of England v. Cutler* (1), [1908] 2 K.B. 208 a stock-broker, honestly believing that his client was the person named as registered holder of some India Stock, sent the Bank of England a "ticket" requesting the transfer of the Stock. The client attended at the bank and forged the signature of the true owner of the Stock. The client was identified as being the true owner by the defendant, who honestly believed her to be the true owner. The Stock was duly transferred, and subsequently on discovery of the forgery the original stock-holder claimed to be reinstated in the Register, and was so reinstated at the Bank's expense. The Bank then sued the stockbroker/defendant in respect of its loss as upon a breach of warranty as to the identity of the transferor, and it was held that the Bank was entitled to succeed. The principles laid down in the *Bank of England* case (1), are in my opinion applicable to the case now under consideration, but the facts are distinguishable. In the *Bank of England* case (1), both the Bank and the stockbroker acted in good faith throughout, honestly believing that a certain person was the registered owner of the transferred stock, the stockbroker having been convinced

by that person and the Bank relying on the stockbroker's identification. In this case F. K. Velji had agreed to stand as conditional surety to Shamsa's mortgage, but when the time came to sign he insisted on a full indemnity in case he should eventually be found liable. In my view he did this because when it came to executing the deed of mortgage he either realized or had good reason to suspect that the person purporting to be Shamsa was not in fact Shamsa but some other person. Nevertheless F. K. Velji did sign both as surety and on registration of the deed and in so doing both requested that the loan be made and identified the mortgagor as being Shamsa. But before the plaintiffs can rely on a breach of warranty by F. K. Velji, they must satisfy me that the deceased Ibrahim Ladha acted on the warranty and advanced the money on the strength of the warranty. On this point I accept the evidence of Suleiman Bachoo. He, too, was suspicious that Shamsa was being impersonated by some other woman, and he communicated his suspicions to Ibrahim Ladha, and advised him to take steps to ensure that the right person would receive the money. Instead of doing this, Ibrahim Ladha preferred to use his own discretion and rely upon the presence of Ali Mansoor, Shamsa's grandson. Ladha said "It is not necessary (i.e. to take precautions) so long as Mansoor is here." In advancing the money, he was not relying on F. K. Velji's warranty as to Shamsa's identity, but substituting his own judgment and relying on Ali Mansoor to the exclusion. of F. K. Velji. He advanced the money with his eyes open as to the possibility of fraud and personation, relying on Ali Mansoor to see that the money was repaid in due course. In these circumstances I hold that Ibrahim Ladha's executors cannot succeed on a claim based on a breach of warranty on the part of F. K. Velji, although I am satisfied that there was a breach of warranty. There must be judgment for F. K. Velji the second defendant, and I order accordingly, although with regret having regard to the peculiar and unexplained part played by him in this transaction.

All the agreed issues are therefore answered in the negative.

The plaintiffs' claim against Shamsa binti Humud the first defendant is dismissed with costs, and the plaintiffs' claim against F. K. Velji the second defendant is dismissed, but without costs.

Judgment for the defendants.

Judgment for the defendants.

For the plaintiff:
KA Master
KA Master, Zanzibar

For the first defendant:
KS Talati
Wiggins & Stephens, Zanzibar

For the second defendant:
JS Balsara
Balsara & Co, Zanzibar

Panayotis Nicolaus Catravas v Khanubai Mohamed Ali Harji Bhanji

[1957] 1 EA 234 (HCT)

Division:	HM High Court for Tanganyika at Dar-Es-Salaam
Date of judgment:	14 February 1957
Case Number:	21/1956
Before:	Lowe J
Sourced by:	LawAfrica

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[1] Executors and Administrators – Action before application made for probate against person named in will as executor – Whether action lies.

Editor's Summary

The appellant sued the respondent as executrix of her deceased husband to recover a debt alleged to be due to the appellant from the deceased. In the plaint it was pleaded that "the defendant is the executrix" of the deceased and, after stating that the defendant had not applied for probate or administration in respect of the estate, it was subsequently pleaded "the plaintiff's claim from the defendant as executrix of the estate of the deceased . . .". The respondent filed a defence claiming that the plaint disclosed no cause of action against her as representing the estate of the deceased. At the hearing the Resident Magistrate after hearing arguments on the preliminary point taken in the defence found for the respondent.

On appeal it was contended for the respondent that the plaint did not sufficiently aver the representative capacity in which she was sued and that if it was intended to rely on alleged intermeddling by the respondent in the estate, the facts constituting intermeddling should have been pleaded.

Held–

(i) where a person is sued in a representative capacity the plaint must specifically so state.

(ii) when suing an executrix it is not necessary to plead specifically that she has taken out probate or has intermeddled provided it is alleged that she is sued as executrix.

(iii) it is a matter for proof whether an executrix who has not taken out probate has so intermeddled with the estate as to become liable as executrix de son tort.

Appeal allowed.

Cases referred to:

(1) *Mohamidu Mohideen Hadjiar v. Pitchey*, [1894] A.C. 437.

(2) *Hari Dutt Prasad and another v. Shib Kumar Jha* (1935), A.I.R. Pat. 449.

(3) *Chuni Lal Bose v. Osmond Beeby* (1903), 30 Cal. 1044.

Judgment

Lowe J: This appeal raises an issue of interest and of some importance to creditors of deceased estates

and to executors who have not taken out probate of the will of the deceased.

The appellant brought an action against the respondent to recover a debt alleged to have accrued due to the appellant by the deceased husband of the respondent. In his plaint the appellant, then the plaintiff, stated as follows:–

> "2. That the defendant is the executrix of the late Mohamedali Haji Bhanji (hereinafter called "the deceased") an Indian of Dar-es-Salaam who died on the 5th day of November, 1953.
>
> 3. That the defendant has not applied for probate or letters of administration in respect of the deceased's estate although she is entitled so to do."

Further reference in the plaint was made to the representative character of the respondent in para. 8 where the respondent is described as the executrix of the estate of the deceased.

In her written statement of defence the respondent stated:–

> "2. As regards para. 2 and para. 3 of the plaint, the defendant will submit

> that the plaint discloses no cause of action against her as representing the estate of the late Mohamedali Haji Bhanji deceased."

When the suit came on for hearing, counsel for the respondent – then, of course, the defendant – submitted, in accordance with para. 2 of the statement of defence, that as no cause of action was disclosed in the plaint it should be rejected by the court.

After hearing submissions on behalf of the two parties on this preliminary point, the learned resident magistrate found for the respondent and rejected the plaint. This appeal has been brought against the magistrate's ruling, and in effect the memorandum of appeal says that the learned resident magistrate erred in law and in fact in rejecting the plaint and not finding that the then defendant was properly sued as executrix of the deceased's estate and that he should have had evidence as to the position of the defendant in relation to that estate. The appellant claims also that the magistrate should have found in the alternative that the respondent was in possession of the estate of the deceased. I would say at once that I cannot see how the magistrate could have found in the absence of any averment or evidence to that effect and I do not propose to deal further with that portion of the memorandum of appeal.

Before this court both counsel relied to a great extent on *Mohamidu Mohideen Hadjiar v. Pitchey* (1), [1894] A.C. 437. Mr. Dodd for the appellant referred to the head note in that case, which is as follows:–

> "A creditor of a deceased debtor cannot sue a person named as executor in the will of the deceased unless he has either administered or obtained a grant of probate; and a sale in execution of a judgment obtained against such person does not bind the deceased's estate."

Mr. Dodd contended that in the case before the lower court he was entitled to prove that the respondent, although she had not taken out probate, had in fact intermeddled in the estate in such manner as to amount to an administration of the assets of the deceased, and for that reason she was the legal representative of the deceased or in other words an executrix of the type who was properly sued.

In the lower court counsel for the appellant made it clear that, whether or not he was entitled to do so, he did not seek an amendment of the plaint in this respect but relied on the law to show that he was entitled to proceed on the plaint as it stood. His main argument was to the effect that para. 2, para. 3 and para 8. of the plaint could only mean that his client was suing the respondent as the legal representative of the deceased and that those were the only material facts necessary for him to set out specifically in the plaint in order to enable him to call evidence to prove that fact. He also quoted from various textbooks to show the true definition of the words "legal representative", and he referred the court to the case of *Hari Dutt Prasad and another v. Shib Kumar Jha* (2), (1935) A.I.R. Pat. 449, where it was held that:–

> "For the purpose of deciding whether the plaint discloses any cause of action, evidence of the defendant is not necessary. Such question should be decided on the allegation of fact in the plaint and if necessary after examining the plaintiff."

I will refer to that case later. It was counsel's contention that the same position arose in the instant case in that had he been allowed to adduce the plaintiff's evidence he could have satisfied the court that the then defendant had so intermeddled in the deceased's estate that she had made herself liable in the action brought by his client against her as executrix.

I might mention that counsel for the appellant stated that the respondent was not only named in the will of the deceased as executrix, but was also the sole beneficiary. This was not denied by counsel for the respondent. It would certainly seem to be against natural justice that an executrix who is the sole beneficiary could, by neglecting or refusing to take out probate, allow the period of limitation to run to

the detriment of the creditors of the estate. However, that is a matter which is incidental in the instant case, which calls to be decided on the pleadings themselves.

Counsel for the respondent argued that the ruling that there was no cause of action disclosed in the plaint was in accordance with the law. He stressed, in effect, that

the appellant himself in his plaint had described the respondent in such manner as to preclude him from proceeding in the suit and referred the court to various authorities.

It seems clear, he said, that para. 2 and para. 3 of the plaint aver that the then defendant is an executrix who cannot, in accordance with the principle laid down in *Pitchey's* case (1), be sued for the debts of the deceased.

The position regarding a cause of action is set out very clearly and very correctly in the Code of Civil Procedure (Mulla) (12th Edn.), Vol. I, 120, where in a note to s. 20 it is stated as follows:–

> "Cause of action means every fact which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved to entitle the plaintiff to a decree. Everything which if not proved would give the defendant a right to an immediate judgment must be part of the cause of action. It is in other words a bundle of essential facts which it is necessary for the plaintiff to prove before he can succeed in the suit. It has no relation whatever to the defence which may be set up by the defendant, not does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as to the cause of action, or, in other words, to the media upon which the plaintiff asks the court to arrive at a conclusion in his favour."

Order 7, r. 1 of the Code of Civil Procedure states as follows:–

> "The plaint shall contain the following particulars:–
>
> . . . . . .
>
> (*e*) The facts constituting the cause of action and when it arose."

Rule 5 of the same order states:–

> "The plaint shall show that the defendant is or claims to be interested in the subject matter and that he is liable to be called upon to answer the plaintiff's demand."

It will be seen that these rules are mandatory. Those last words in r. 5, "liable to be called upon to answer the plaintiff's demand" are particularly apt in the instant case, as they are in complete agreement with the decision in the *Pitchey* case (1) that a creditor of a deceased's debtor cannot sue a person named as executor in the will of the deceased unless he has either administered or obtained a grant of probate.

Order 7, r. 11 makes it clear that a plaint must be rejected if it does not disclose a cause of action.

Order 7, r. 9 (2) is as follows:–

> "Where the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, such statements (referring to statements to be served on defendants in lieu of long plaints but which must conform to the plaints themselves) shall show in what capacity the plaintiff or defendant sues or is sued."

All of this makes it clear that the plaintiff in the instant case must, in his plaint, show that the defendant can be sued, and if he has failed to do so he has disclosed no cause of action.

Counsel for the respondent argued that the fact that the defendant in the suit which gave rise to this appeal is an executrix who has so intermeddled in the estate that she can be said to have administered, and so brought herself within that category of executors who can be sued for debts or liabilities of the estate, is clearly a material fact which must be pleaded. If it were not so, he said, the defendant would not know what she had to answer.

There is no doubt that the period of limitation continues to run after the death of a deceased and

before probate has been taken out by his executor and as was stated in the case of *Chuni Lal Bose v. Osmond Beeby* (3) (1903), 30 Cal. 1044, with reference to another case:–

> "The executor does not represent the deceased by virtue of the will until he

> has obtained probate. Who then represents the deceased who has left a will from his death until probate has been obtained? Surely someone must do so, or the law would not have provided that the statute of limitation should run between the death and the grant of probate, as it undoubtedly does."

I do not need to make any further reference to that dictum or its implications, because the position is clarified in the definition "legal representative" in section 2 (11) of the Code of Civil Procedure, as follows:–

> " 'Legal representative' means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased . . ."

In *Pitchey's* case (1) the judgment merely states that a creditor of a deceased debtor cannot sue a person named as executor in the will of the deceased unless he has either administered, that is, intermeddled with the estate, or proved the will. It says, in other words that no action can be taken against an executor who has not taken out probate or has not intermeddled with the estate but as soon as he does intermeddle in such a manner as to show an intention to administer he can be sued. In that case it was proved by evidence that the person alleged to have been the executor of the testator did not in fact intermeddle or administer, and an action founded on a contrary basis was held to be ineffectual to bind the testator's estate. There can be no dispute that the legal representative of a deceased person can be sued, and that if an action is commenced against any person in his representative character such representative character must be specifically stated in the plaint.

In the instant case, in para. 2 the respondent was stated to be the executrix of the deceased, and it was further stated that although she had not taken out probate she was entitled to do so. At that stage it would appear that the pleadings were insufficient, but at para. 8 the plaintiff went on to say:–

> "The plaintiff's claim from the defendant as executrix of the estate of the deceased . . ."

That seems to me to be a specific averment that the claim is being made against the defendant in her representative character. It follows that the plaintiff has shown an intention to prove such fact. If of course he failed to do so, or if it were shown at the outset that the defendant was not the executrix of the estate, then the plaintiff could go no further. It will be seen that the plaintiff did not allege that the defendant was the "executrix according to the tenor of the will" or that she was "the executrix named in the will" of the deceased, but that she was the executrix of the estate of the deceased, her representative character being clearly stated.

The defendant in her submission in para. 2 of the statement of defence alleged that the plaint disclosed no cause of action against her "as representing the estate" of the deceased. The learned magistrate seems to have accepted that submission and to have applied his mind to para. 2 and para. 3 of the plaint to the exclusion of para. 8, although he did mention that counsel for the plaintiff stated that the defendant was executrix of the estate. However, it does not seem to me that the defendant can aver that there is no cause of action against her as representing the estate, because that in fact is what the plaint itself specifically sets out.

I had some doubt regarding the Patna case (2), because the principle there enunciated is to the effect that in order to ascertain whether or not there is in fact a cause of action it might be necessary first to hear the evidence of the plaintiff. However, that does not lay down a general principle; it clearly refers to special cases. Mr. Dodd claims that this is just such a case. He says that the plaint states very clearly that the respondent represents the estate, that there is no doubt that she is sued in a representative character, and that his client has given her all the notice necessary to enable her to know the nature of the defence

she must set up. In Williams on Executors (12th Edn.), Vol. II, 1239, the learned author says:–

> "If the defendant intends to deny being executor or administrator, he must plead such denial specifically, otherwise he will admit his representative character.

> If this specific denial is traversed by the plaintiff, the burden of proof is on him to prove affirmatively that the defendant is executor or administrator. For the purpose of introducing formal and documentary evidence of the defendant being executor or administrator it is always prudent, and in some cases absolutely necessary, to give notice to the defendant to produce at the trial the probate of the will, or the letters of administration, but it is not always necessary, in order to let in secondary evidence, to prove that the probate or letters are in the defendant's possession; for if he has been duly appointed executor or administrator, they must necessarily be presumed to be in his possession . . . but it seems that if there are two executors and one proves the will in the name of both, even against the will of the other, that other cannot plead ne unques executor. Further, proof that the defendant has intermeddled with the property, so as to make himself executor de son tort, is sufficient proof of his being executor."

Surely it cannot be said that a plaintiff is entitled to bring evidence to prove that a defendant, sued as executor, has intermeddled and so is an executor de son tort who has, therefore, been properly sued, whereas another executor who has also intermeddled must have such fact pleaded before a suit can be brought against her. That does not seem to me to be at all logical. It must not be thought that the learned author has overlooked *Pitchey's* case (1) for throughout his work he has referred to it many times. In any event I cannot see any conflict between the principle laid down in that case and that enunciated by Williams. Furthermore, if learned counsel for the defence was correct with his submission, an executor who had in fact taken out probate could not be sued unless his creditor plaintiff specifically set out in the plaint the fact that the defendant was an executor who had taken out probate. I know of no law which requires that to be done. I think the position in the instant case is the same as that referred to by Williams where proof was permissible that the defendant had intermeddled with property so as to make himself executor de son tort, although, of course, in the instant case the executrix is not de son tort. The plaintiff to my mind has clearly said in his plaint that the defendant was the executrix of the estate of the deceased and the defendant was then placed in a position where she could, if she so wished, deny that fact and so put the plaintiff on his proof. Although I am satisfied that a cause of action is disclosed in the plaint it might, of course, be shown, when proof is admitted that the averment that the defendant is the executrix of the estate is ill-founded, in which case the plaintiff's right of action on that plaint would then end. Even if that were not so there is the fact that the defendant has merely submitted that she has not been sued in her representative character, whereas the plaint in fact shows that she has.

The defendant can, as I have said, admit the material fact or deny it as she wishes but if she does not deny it specifically she might be held to have admitted the fact. I will not, of course, express any opinion as to whether or not it could be held that the respondent has in her pleadings by implication, admitted any fact, as that is a matter which might have to be considered in future proceedings. Order 7, r. 5, has been complied with by the plaintiff, who has averred that the defendant is interested in the subject matter, and she can be called upon to answer the plaintiff's demand.

I think the pleadings are sufficiently precise, although the defendant named in the plaint should, in the intituling, have been described as the executrix of the estate of the deceased. However, that is a matter which, in my view, is cured by para. 8 taken with para. 2 and para. 3 of the plaint itself.

I think the learned resident magistrate misdirected himself in law in that he did not consider the effect of para. 8, and accepted *Pitchey's* case (1) as being an authority by which he was bound to reject the plaint even though the plaintiff had described the defendant as the executrix of the estate. It is not so. It is merely an authority that an executor cannot be sued until certain things have happened and it does not say that the executor cannot then be sued as such.

I would think, with respect, that had the judgment in *Pitchey's* case (1) been written in modern times

it would probably have read something to the effect that

> "no creditor of a deceased's estate can proceed with any suit brought by him against an executor who has not taken out probate or intermeddled with the estate".

In other words, the authority seems to me to be intended to mean that no such executor could be "successfully sued" in such circumstances. There seems to me to be no doubt that there is nothing in the law to prevent any person suing, that is commencing an action against, any executor. Whether the action would succeed in getting any further than that is another matter.

In the circumstances I allow this appeal, set aside the decree of the lower court, and allow costs to the appellant in this court and in the court below. The case is remitted to the lower court for hearing and determination.

Appeal allowed.

For the appellant:
HG Dodd
Dodd & Co, Dar-es-Salaam

For the respondent:
NRD Sayani
Satchu & Satchu, Dar-es-Salaam

Re Katengera Estate Ltd
[1957] 1 EA 239 (HCT)

Division:	HM High Court for Tanganyika at Dar-Es-Salaam
Date of judgment:	13 February 1957
Case Number:	97/1956
Before:	Lowe J
Sourced by:	LawAfrica

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[1] Company – Mortgage – Registration of particulars – Extension of time – Companies Ordinance, s. 79 (1) *and s.* 85 (*T.*).

Editor's Summary

The applicant applied to the court under s. 85 of the Companies Ordinance for an extension of time for the filing of the prescribed particulars of a mortgage and served a copy of the application upon the Registrar of Companies. An affidavit was filed in support of the application showing that registration had not been effected within the prescribed period owing to a misunderstanding and the court accepted the submission that there was genuine inadvertence in the failure to file particulars as required. The registrar,

however, pointed out to the court that certain alleged facts in the affidavit were not true, although he was not prepared to say that the deponent knew they were untrue. The registrar further submitted that since under the provisions of s. 79 (1) of the ordinance, rights might accrue to strangers between the time when registration should be effected and actual date of registration pursuant to an order made by the court extending the time, any such order should save the rights of other parties.

Held–

(i) in extending time under s. 85 the order made would provide that any extension granted should be "without prejudice to the rights of parties acquired prior to the time" of actual registration. *In re Joplin Brewery Co. Ltd.*, [1902] 1 Ch. 79 followed.

(ii) since in most instances the delay in presentation of documents for registration is due not merely to inadvertence, but to gross carelessness, the court would carefully examine future applications and would unless good cause is shown order costs against.

Application allowed.

Cases referred to in judgment:

(1) *In re Joplin Brewery Company Ltd*., [1902] 1 Ch. 79.

Judgment

Lowe J: This was an application under s. 85 of the Companies Ordinance whereby this court was asked to extend for a period of twenty-one days from the date of making the appropriate order, the time for delivery to the Registrar of Companies of the prescribed particulars of a mortgage. A copy of the application was served on the Registrar of Companies, and the registrar appeared in person.

For the applicant Mr. Thornton pointed out that registration had not been effected because of a misunderstanding as to certain facts which he traversed. On the submissions made by the applicant, the application would normally be granted as there appeared to be genuine inadvertence. However, Mr. Spry pointed out that some of the facts recited in the affidavit in support of the application were not true, although he was not prepared to say that the facts had been stated with a knowledge that they were untrue. He pointed out, very properly, that in such cases applicants are required to be much more careful in verifying facts in support of such applications. With this I am in entire agreement. Many such applications are received by this court, and I think it is fair to say that in most instances the delay in the presentation of the documents for registration has been due not only to inadvertence but to gross carelessness. For my part I consider that in future it will be necessary to look at such applications much more strictly and in the event of there being no reasonable excuse for the late presentation I will not hesitate to allow costs against the applicant. I did not do so in this case as there was some doubt as to whether or not the facts had been stated with a knowledge of their incorrectness.

Another matter of great importance was submitted by Mr. Spry. He pointed out that in many such applications it had apparently been the practice of this court to grant leave to present the document for registration within a period stated in the order. He referred the court to s. 79 sub-s. (1) of the Companies Ordinance, which is as follows:–

> "Subject to the provisions of this part of this ordinance, every charge created after the fixed date by a company registered in the Territory and being a charge to which this section applies shall, so far as any security on the company's property or undertaking is conferred thereby, be effected against the liquidator and any creditor of the company, unless the prescribed particulars of the charge, together with the instrument, if any, by which the charge is created, or evidence, or a copy thereof verified in the prescribed manner, are delivered to or received by the registrar for registration in the manner required by this ordinance within forty-two days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a charge becomes void under this section the money secured thereby shall immediately become payable."

It is clear from that sub-section that rights might accrue to certain parties between the date when the registration should be effected and the date when this Court permits the actual registration. If an order is made merely to the effect that registration can be effected within a specific period named, those parties might lose any rights they might otherwise have acquired. It is not reasonable, in my view, that this should be so.

Mr. Spry referred the court also to In *re Joplin Brewery Company Limited* (1), [1902] 1 Ch. 79, where it was held that a similar order extending the time for registration of debentures ought to contain the words:

> "but that this order be without prejudice to the rights of parties acquired prior to the time when such debentures shall be actually registered."

That safeguard seems to me to be not only wise but necessary and, with respect, I am in agreement that any order extending time for registration should include those words.

In the event I made an order in this case extending the time for registration and allowing seven days from the date of my order for that to be done, but the order remained

"without prejudice" following the words referred to in the *Joplin Brewery Company* case (1), and it is my intention to include such words in any future orders I make in similar circumstances unless good cause can be shown to the contrary.

Application allowed.

For the applicant*:*
RS Thornton
Fraser Murray Thornton & Co, Dar-es-Salaam
JF Spry (Registrar of Companies, Tanganyika) in person.

Re Tanganyika Produce Agency Limited
[1957] 1 EA 241 (HCT)

Division:	HM High Court for Tanganyika at Dar-Es-Salaam
Date of judgment:	11 March 1957
Case Number:	6/1957
Before:	Lowe J
Sourced by:	LawAfrica

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[1] Company – Winding up – Petition by creditor founded on debt disputed by company – Whether creditor entitled to petition – Companies Ordinance, s. 168 (*T.*).

Editor's Summary

The petitioner claimed to be a creditor of the company for the sum of Shs. 3,382/- and, having served on the company a demand under s. 168 of the Companies Ordinance requiring payment without obtaining satisfaction, he petitioned the court to wind up the company. In addition to the alleged debt, the petition claimed that there had been no meetings of directors, that one of the directors had benefited himself at the expense of the company and that no general meeting of the company had been held. The petition was opposed by the company and the chairman of the directors filed an affidavit disputing the alleged debt and the other allegations made by the petitioner, and averred that the petitioner was in fact indebted to the company.

Held – a disputed debt cannot be the subject matter of a creditor's petition for winding-up and if the debt is bona fide in dispute it is an abuse of the process of the court to try to enforce it by a petition to wind up.

[**Editorial Note:** It was decided by the Court of Appeal in England in *Re Welsh Brick Industries Ltd*., [1946] 2 All E.R. 197, that where a person, who had first issued a writ for the recovery of certain sums advanced by him to the company in respect of which the company had been granted unconditional leave

to defend, later petitioned for the winding-up of the company founding his petition on the sums claimed in his writ, it was competent for the judge in the winding-up court to go into the evidence which was before him to consider whether or not there was a bona fide dispute, and the judge was not precluded from finding as a fact that there was no bona fide dispute as to the amount claimed.]

Petition dismissed.

Cases referred to:

(1) *Re London and Paris Banking Corporation* (1875), L.R. 19 Eq. 444.

(2) *Re Anglo-Bavarian Steel Ball Company*, [1899] W.N. 80.

(3) *Re Imperial Guardian Life Assurance Company* (1869), L.R. 9 Eq. 447.

(4) *Re Patent Steam Engine Company* (1878), 8 Ch. D. 464.

Judgment

Lowe J: This is a petition for the winding-up of a company. The main grounds of complaint in the petition upon which the petitioner asks the court to exercise its discretion and order the winding-up, are that the company is indebted to the petitioner in the sum of Shs. 3,382/-; that demand has been made for that sum and that the company has for three weeks after demand neglected to pay the amount or secure or compound it; that there has never been a meeting of the directors whereas the Articles of Association provide that the company shall be managed by the board of directors; that one of the directors in a dealing with a motor van has benefited himself to the detriment of the company; that the petitioner has not yet had any share certificate issued to him in spite of demand for the same, and that no annual general meeting of the company has been held, although in this context the petitioner refers to a meeting of directors.

The Chairman of the board of directors of the company has filed an affidavit in opposition to the petition. He disputes that any money is owing by the company to the petitioner. He claims also that the petitioner is not a contributor within the meaning of the law; that the company while admitting that demand was made by the petitioner has answered that demand by denying liability, and that the petitioner owes money to the company. He also claims that the company is ready and willing to issue a share certificate to the petitioner in respect of the shares to which he is entitled upon payment by the petitioner of the amount owing by him to the company. There are further allegations in the affidavit to which I need not refer. In para. 8 of the affidavit the chairman states:

> "The other allegations in the petition are not admitted and are irrelevant for the purpose until the question whether the petitioner is entitled to present this petition has been established by the petitioner".

He then asks leave of the court to file a further affidavit to meet the other grounds set out in the petition if the court holds that the petitioner is entitled to present the petition. That method of attacking a petition for winding-up is not one which can have the approval of this court. When a petition is filed in the court a respondent puts himself at peril unless he answers at once all those grounds, set out in the petition, which he does not admit. If this were not so, the hearing of a petition for winding up of a company might go on interminably and in any event it is the petition and the answer to that petition which the court must consider.

For the petitioner Mr. Master has reiterated and explained certain relevant portions of the petition which is in two parts. The first portion, relating to the debt claimed by the petitioner, is of course a petition by a creditor, and the second portion, relating to the allegation of default by the company to hold the necessary statutory or other meetings or to conduct its business in accordance with its liability so to do, is made by the petitioner as a contributor. The petition was strenuously opposed by Mr. Davda who denied that his client company owed any money at all to the petitioner who, he said, still owed money to the company. He referred the court to s. 168 of the Companies Ordinance, Cap. 212, which defines a company's inability to pay its debts and argued that this section in its operation was not against the respondent company as the debt had been denied. Paragraph (*c*) of s. 168 is as follows:–

> "A company shall be deemed to be unable to pay its debts if it is proved to the satisfaction of the court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, a court shall take into account the contingent and prospective liabilities of the company."

Counsel went on to say that as the alleged debt was a "disputed debt" it could not form the subject matter

of a creditor's petition for winding-up and in this respect he referred the court to Palmer's Company Precedents (15th Edn.), part II, 38, where the learned author states:–

> "For it is now well settled that a petition for winding-up with a view to enforcing payment of a disputed debt is an abuse of the process of the court, and should be dismissed with costs."

The learned author goes on to refer to *Re London and Paris Banking Corporation* (1) (1875), L.R. 19 Eq. 444, in which case there was a bona fide dispute as to the debt and the company was not alleged to be insolvent; the court refused an order for winding-up, being of the opinion that the petition had not been presented bona fide, that is, not with a view to obtaining a winding-up order but with a view to extorting from the company a larger sum than they thought was fairly due, under pressure of a threat to present the winding-up petition. In *Re Anglo-Bavarian Steel Ball Company* (2), [1899] W.N. 80, it was held that:–

> "If it is shown that an alleged dispute is not a bona fide one the objection to the petition fails. Thus it is not uncommon for a company, after again and again begging for time for payment of a debt, to spring on the petitioner at the last moment the assertion that the debt is a disputed one. Such a defence is naturally open to great suspicion and meets with no favour from the court."

With that, with respect, I am in entire agreement and I agree also, with respect, with the finding in *Re Imperial Guardian Life Assurance Company* (3) (1869), L.R. 9 Eq. 447, that

> "A winding-up petition is not to be used as machinery to try a common law action".

Mr. Davda pointed out that in the instant case there was no question of the company asking for time to pay the alleged debt, nor could it be said that the debt was not disputed bona fide because at the first opportunity when demand had been made the allegation of liability had been denied by the company. He referred the court to Vol. 5, Halsbury's Laws of England (2nd Edn.), 550, at para. 888, where the learned author states:–

> "A winding-up order cannot be obtained by a person claiming unliquidated damages, his proper course being to change the claim for damages into a judgment and thus make himself a creditor; or by a judgment creditor who has attached a debt due from the company to his judgment debtor, his proper course being to obtain judgment in action and then petition."

Mr. Davda argued also that the petitioner had not shown that he was in fact a contributory and in so far as the petition was concerned there was certainly no *prima facie* case to support such a contention. He wished to argue that there was no evidence that the petitioner was in fact a shareholder with shares registered in his name. He was answered by Mr. Master with the fact that the petitioner had subscribed to the Articles of Association wherein he is shown to be a shareholder to the extent of two shares. However, Mr. Davda stressed that the petitioner was under a liability to pay for the shares to which he had subscribed but had not done so and for this reason could not be said to be a shareholder in law. He referred the court to *Re Patent Steam Engine Company* (4) (1878), 8 Ch. D. 464, in which it was held that a petition for the winding-up of a company may be presented by persons who have obtained a decree of the court ordering the company to allot them shares and to register them as shareholders although their names are not on the register at the time of the presentation of the petition. I do not think this case has much application in the instant case as it is not denied that the petitioner has in fact signed the Articles of Association subscribing to two shares in the company.

Mr. Master agreed in reply that he might not be on a very sound basis with regard to the petitioner's claim as a creditor but argued that his client could not be denied his rights in respect of what he described as the "second leg" of his petition. Although he argued that the respondent had not shown that there was a bona fide dispute I cannot accept that submission because there is a matter in issue between the parties which should be settled in a different action. There is also the allegation that although the petitioner subscribed to the Articles of Association he has not paid the amount owing by him for the shares. In any event the petitioner has not satisfied the court that it would be just and equitable for the company to be wound up in the circumstances of this case. I consider that had the petitioner come before this court as a

judgment

creditor who had made repeated and unsatisfied demands he might have succeeded but to have made one demand on what I am satisfied is a disputed debt, is insufficient. Any default by the company (which is in fact a private company) as to the holding of meetings is not in my view very serious although if the matter came before the court on a second occasion and no meeting had been held as required by law a very serious view would be taken of it. I am not satisfied that the company is in any way insolvent and unable to pay its debts nor, as I have said, can I find any other sufficient ground of complaint which satisfies me that it would be just and equitable to order that the company be wound up. The petition is dismissed with costs to the respondent company.

Petition dismissed.

For the petitioner:
KA Master & NRD Sayani
KA Master, Dar-es-Salaam

For the respondent company:
CJ Davda
CJ Davda, Dar-es-Salaam

For a contributory:
NP Patel
NP Patel, Dar-es-Salaam

The Municipal Council of Dar-es-Salaam v AB De P Almeida and three others

[1957] 1 EA 244 (HCT)

Division:	HM High Court for Tanganyika at Dar-Es-Salaam
Date of judgment:	4 March 1957
Case Number:	13, 14, 15 and 50/1957
Before:	Lowe J
Sourced by:	LawAfrica

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[1] Criminal law – Costs – Prosecution by local authority – Circumstances in which court may order costs against accused.

Editor's Summary

The Municipal Council of Dar-es-Salaam having secured convictions against each of the respondents in

four prosecutions in the resident magistrate's court for offences against municipal by-laws or township rules asked for an order for costs in each case against the accused which the magistrate refused. There was nothing entered on the record of each case to show that costs had been applied for or refused. Under s. 329 (5) of the Criminal Procedure Code it is provided that

> "Where an appeal lies from any finding sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed".

The Municipal Council did not appeal from the order refusing costs but applied to the High Court by way of revision in each case.

At the hearing all the applications for revision were consolidated and counsel was then heard on the merits. In the course of argument the attention of the court was drawn to certain points of law which the court, although it refused to entertain the applications for revision, considered were important and with which it decided to deal.

Section 122 of the Municipalities Ordinance provides that the Town Clerk or any person authorised by the council may prosecute in subordinate courts for all contraventions of the ordinance or of any bye-laws or regulations in force within a municipality and that the provisions of any law relating to prosecutions by private persons should apply to all such prosecutions. Section 173 of the Criminal Procedure Code defines a "public prosecutor" as any person prosecuting for and on behalf of the Crown or a public authority, and defines a "private prosecutor" as "any prosecutor other than a public prosecutor". Section 173 also provides that a judge or magistrate

may order any person convicted before him to pay in addition to any other penalty imposed such reasonable costs (limited as set out in the section) as the court deems fit. Counsel for the applicant referred to the common law principle that costs should not normally be given to and against the Crown except in special circumstances but submitted that there were indications in case law which he cited that this principle was not applicable to a local authority.

Held–

(i) section 329 (5) of the Criminal Procedure Code does not permit an election whether to appeal or apply for revision and since the Municipal Council should have appealed if dissatisfied with the magistrate's order as to costs, the court would not entertain the applications.

(ii) where a prosecution is brought by either a public or private prosecutor the proceedings are in fact brought on behalf of and in the name of the Crown, and the common law principle is applicable that no costs should be allowed unless exceptional circumstances are shown.

(iii) a private prosecution brought without justification, or obstruction of the prosecution by the accused resulting in considerable expense being incurred, are examples of the circumstances in which an order for costs might be made.

(iv) the power to order costs is discretionary, must be considered and exercised judicially on the merits and where an application for costs is made, this should be noted on the record together with the order made and the reasons therefor.

Order accordingly.

Cases referred to:

(1) *Nanalal Damodar Kanji v. Tanga Township Authority*, 1 T.L.R. (R.) 245.

(2) *Hunter and Greig v. The Revenue Authority, Kampala*, 5 E.A.C.A. 65.

(3) *Johnson v. R.*, [1904] A.C. 817.

(4) *Lejzor Teper v. R.*, [1952] 2 All E.R. 447; [1952] A.C. 480.

Judgment

Lowe J: At the request of counsel for the applicant I have consolidated all the applications for revision in these cases as the same question arises in each.

Each accused was charged with an offence against either a municipal by-law or a township rule and in each case the accused was convicted, but there is no record, on any of the case files, as to the question of costs. The prosecutions were conducted by an officer on behalf of the Municipal Council of Dar-es-Salaam and it is alleged in the applications for revision and the supporting affidavits that costs were asked for but were refused by the Resident Magistrate. Section 329 (5) of the Criminal Procedure Code is as follows:–

> "Where an appeal lies from any finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed."

In these cases there is the allegation that the magistrate made an order refusing costs. That order is one

which could have been appealed against but no appeal has been brought. Section 329 (5) does not operate to permit an election as to whether either party should appeal or apply for a revision. It is clear that the intention of the subsection is that where an appeal lies then, if a party so wishes, he may appeal but he has no right to be heard in revision and in fact this Court cannot entertain the applications. However, while dismissing the applications I think I should deal with the somewhat important side issues raised by counsel for the applicant and in doing so I must refer to the proceedings which are the foundation of the applications.

The authority for the appearance of an officer of the Council to conduct the prosecution is contained in s. 122 of the Municipalities Ordinance (Cap. 105). This section is as follows:–

> "The Town Clerk or any other person authorized thereto (*sic*) by the council may prosecute in subordinate courts for all contraventions of this ordinance or of any by-laws or regulations in force within any municipality, and the provisions of any law relating to prosecutions by private persons shall apply to all such prosecutions."

There is nothing on record to show that the prosecutor in these particular cases was in fact authorized by the Municipal Council of Dar-es-Salaam to conduct the prosecutions. In all such cases where a prosecution is in the nature of a private prosecution and an officer is specifically entitled to appear subject to him having obtained lawful authority, a note that he is so entitled or is permitted by the court to appear, should invariably be made on the record.

Section 87 (1) of the Criminal Procedure Code states:–

> "Any magistrate enquiring into or trying any case may permit the prosecution to be conducted by any person, but no person other than a public prosecutor or other officer generally or otherwise authorized by the Governor in this behalf shall be entitled to conduct the prosecution without such permission."

I have accepted that the prosecutor in these cases received the permission of the resident magistrate to conduct the prosecutions as that would appear to be implicit, but in any event the Municipalities Ordinance having been enacted by the Governor and not, as in modern form "by the Legislature of Tanganyika", the prosecutor no doubt was appearing as of right. It is of interest to note that the prosecutions are governed by the law relating to prosecutions by private persons by reason of section 122 of the Municipalities Ordinance, but in s. 173 of the Criminal Procedure Code "public prosecutor" means any person prosecuting for or on behalf of the Crown or for or on behalf of a public authority. There is therefore an apparent conflict between this definition and s. 122. "Private prosecutor" is also defined in s. 173 to mean any prosecutor other than a public prosecutor. It would be imagined that in such cases as the instant cases, they being "private prosecutions", the prosecutor himself would be considered to be a private prosecutor, but he is defined as a public prosecutor. It is not very consistent but perhaps in this instance he could be held to be a public prosecutor conducting private prosecutions. It is of no importance or relevance in these cases but I mention these matters merely for the reason that it would appear that some amendment is necessary to align the relevant portions of s. 87 and s. 173 of the Criminal Procedure Code and s. 122 of Cap. 105. It would, perhaps, be advantageous if an amendment is made to s. 122 to use such words as "or other officer generally or otherwise authorized by law" in view of cl. 4 of the Tanganyika (Legislative Council) (Amendment) Order in Council, 1955, (Government Notice No. 106 of 1955).

The applications in any event raised a difficulty in this case because as I have said there is no indication on the records that costs were ever applied for and there is certainly no order refusing costs. However, for the purposes of giving consideration to the side issues I have considered the question on the assumption that some such application was made and refused. Counsel for the applicant has asked the court for guidance as to when costs should be allowed in such cases and how they should be calculated. He referred to the common law principle that costs should not normally be given to or against the Crown except in exceptional circumstances. That principle is, of course, subject to the provisions of s. 173 of the Criminal Procedure Code and sub-s. (1) of that section is as follows:–

> "It shall be lawful for a judge of the High Court or any magistrate to order any person convicted before him of an offence to pay to the public or private prosecutor, as the case may be, such reasonable costs as to such judge or magistrate may seem fit, in addition to any other penalty imposed: Provided that such costs shall not exceed Shs. 1,000/- in the case of the High Court or Shs. 500/- in the case of a subordinate court."

The intention of the legislature therefore is clearly expressed but it has been an almost invariable rule of practice in this territory not to allow costs to or against the Crown

except in exceptional circumstances. When any prosecution is brought whether by a public or a private prosecutor the proceedings are in fact brought on behalf of and in the name of the Crown and as the case is then in effect prosecuted at the instance and on behalf of the Crown the common law principle should in practice be applied to s. 173 of the Criminal Procedure Code and unless exceptional circumstances can be shown no costs should be allowed.

Counsel for the applicant referred the court to *Nanalal Damodar Kanji v. Tanga Township Authority* (1), 1 T.L.R. (R.) 245, as an indication that this court should perhaps grant costs more readily when the attorney-general, by himself or by a public prosecutor, is not in fact the prosecutor. That case was the antithesis of the instant cases and the question which arose to be decided was whether or not an accused person whose conviction had been quashed on appeal was entitled to costs against the Tanga Township Authority for whom there appeared an officer authorized by law to prosecute the case. Although the learned Chief Justice, as he then was, made it clear that he considered that costs should not be given in that case for the reason that the attorney-general intervened and became a public prosecutor I do not think he intended in his judgment to go any further than that.

There is no doubt that reasonable costs can be allowed but the matter is in the discretion of the court.

In *Hunter and Greig v. The Revenue Authority, Kampala* (2), 5 E.A.C.A. 65, it was held that in an exceptional case where the public as well as the individual concerned had benefited by a decision of the Court of Appeal on a somewhat confused provision of law, in legislation which intimately concerns the Crown and the subject, the subject should not be put to the hardship of not being allowed costs if he succeeded in appeal and the case of *Johnson v. R.* (3), [1904] A.C. 817, was cited with approval. In that case it was decided that the Privy Council would adhere to the practice of the House of Lords and that the rule as to costs in cases between the Crown and a subject would be that the Crown neither pays nor receives costs unless the case is governed by some legal statute or there are exceptional cases justifying a departure from the ordinary rule. The principle enunciated in *Johnson's* case (3) was cited with approval in the case of *Lejzor Teper v. R.* (4), [1952] A.C. 480.

In such cases as those with which these applications are concerned it is difficult, if not impossible, for this court to generalize, because, as I have already stated, there is a discretion in the lower court in the matter of costs and I am of the opinion that every case must be considered on its merits and this court will not interfere where such a discretion has been exercised judicially and has not offended against any accepted principle. If, for instance, a court was satisfied that a private prosecution had been brought without justification it would no doubt not hesitate to award costs to the accused, and should it be found that the accused had obstructed the prosecution and caused considerable expense in the course of the case, the court might well agree to award costs against the accused. If a private prosecutor by his action in prosecuting an accused benefited the public at large it would be a hardship not to allow him costs. These examples are not intended to be either exhaustive or binding on the lower court but are cited merely for guidance.

All applications for costs should be noted on the record because they must be considered and decided judicially, consideration being given not only to the application and its merits but also to the merits of any opposition to such an application. When an order is made for the payment of costs by any party to criminal or quasi-criminal proceedings the court should always state its reasons for the order made. Nothing of this nature is before this court in the instant cases, nor has counsel for the applicant been able to point out to this court any exceptional circumstances which might have warranted the granting of costs. Costs when allowed are costs of the proceedings and nothing antecedent to the proceedings should

be taken into account by the court. It is reasonable, however, to include in an order for costs the expenses of witnesses who have been required to attend the court whether or not they are in fact called to give evidence. The trouble a Municipal Council might be put to in investigating a case

in order to commence proceedings is of no concern to the court and it is only from the time of lodging a complaint that any costs, which might in exceptional circumstances be allowed, begin to accrue. For instance fees paid to the court in such cases could be correctly included in an order for costs. In my view, in all cases of simple prosecutions on behalf of a public body, if costs are allowed they should be allowed in an inclusive sum determined by the court at the time of making the order for costs. In all normal cases they should not be left for taxation as the court would not then be fixing the sum which must be reasonable as provided in s. 173 of the Criminal Procedure Code. They must, in my view, be reasonable in the circumstances of the case and not in the circumstances of the prosecutor or the complainant and the same principle should apply as with the imposition of a fine; the ability of the party to pay should be considered by the court, this is particularly so when an impecunious African is the accused.

As to the amount of costs which appear to the court to be reasonably sufficient to compensate the prosecutor or, as the case may be, the accused, for the expenses properly incurred by him in carrying on the prosecution or the defence, and to compensate any witness for the prosecution or defence for the expense, trouble, or loss of time properly incurred in or incidental to his attendance and giving evidence (I have borrowed the words in 10 Halsbury (3rd Edn.), 547, at para. 107), the matter is entirely in the discretion of the magistrate, but he must act judicially and give the matter careful consideration before making any order. The words I have adopted from Halsbury are those used in s. 1 (2) of the Costs in Criminal Cases Act, 1952, of the United Kingdom and although legislative provision has been made in that act I think the words of the sub-section to which I have referred are apt and are a reasonable guide for the courts in this territory to consider when the making of an order for payment of costs is justified.

Had I not dismissed the applications for the reason that by s. 329 (5) of the Criminal Procedure Code this court cannot entertain them I would have done so because no exceptional circumstances existed which would have justified the granting of costs to the prosecution. The legislature has seen fit, in any event, to enact s. 121 of the Municipalities Ordinance pursuant to which the Council concerned receives one half of the fines recovered. This, no doubt, was to ensure to the Council some revenue for the maintenance of an organization to enforce municipal laws by prosecution for offences against those laws and that particular aspect cannot be considered as an exceptional circumstance in any case before a court. In a country which is in the development stage it is perhaps fully justified for a court not to apply the test as to exceptional circumstances quite so strongly when a local public body is the complainant as it would when the proceedings have actually been instituted by the Crown. However, in such a case I would go no further than to say that before costs are allowed when a council is the complainant there must be reasonably exceptional circumstances, and where the case had been brought in fact by the Crown there must be definitely exceptional circumstances.

The question of costs on these applications remains to be decided. Mr. Horn appeared for all respondents and there was nothing he wished to add to what Mr. Hamlyn for the applicant had said, the latter, as is always the case, having assisted the court by presenting all relevant facts and law as they applied to either side and in his usual lucid manner. I think in the circumstances if I allow one quarter of the costs on these applications to the respondents divided equally between them that will be a reasonable allowance. I order accordingly. For the purposes of taxation of costs the consolidated applications are to be treated as a single application for revision.

Order accordingly.

For the applicant:

OT Hamlyn
OT Hamlyn, Dar-es-Salaam

For the respondent:
L Horn
GN Houry & Co, Dar-es-Salaam

TH Patel v R Lawrenson and Anders Matzen

[1957] 1 EA 249 (HCT)

Division:	HM High Court for Tanganyika at Dar-Es-Salaam
Date of judgment:	30 January 1957
Case Number:	15/1956
Before:	Lowe J
Sourced by:	LawAfrica

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[1] Sale of land – Contract in writing – Consent of Land Officer required but not obtained – Purchaser failing to complete – Land Regulations, 1948, *Regulation* 3, (*T.*).

Editor's Summary

By a contract in writing dated February 1, 1955, the appellant agreed to purchase from the first respondent at the price of £400 a farm at Uwembe held under a right of occupancy. The contract provided *inter alia* that a deposit of £100 should be paid to the first respondent on signature of the contract and the balance on signature of the deed of transfer or on March 1, 1955, whichever event should first happen. The contract also stipulated that the sale should be subject to the consent of the land officer, Dar-es-Salaam. The consent of the land officer (exercised under powers delegated to him by the Governor) was necessary to comply with reg. 3 of the Land Regulations, 1948 (T.), which requires that a transfer of a right of occupancy shall not be operative without the approval of the Governor. The appellant paid the deposit to the first respondent and early in April, 1955, deposited the balance of the price with his own advocate. The consent of the Land Officer to the transaction was not obtained, but a transfer of the land was submitted to the first respondent but not signed by him; and on June 3, 1955, without giving notice to the appellant the first respondent sold the farm to the second respondent. To this transaction the land officer gave his consent. The appellant thereupon sued the first and second respondents in the District Court at Njombe for specific performance of the contract dated February 1, 1955, and claimed damages. The second respondent counterclaimed damages from the appellant. At the trial it was submitted for the first respondent that the appellant's suit must fail on the ground that the contract on which the action was founded was inoperative and unenforceable in view of reg. 3 of the Land Regulations. This submission was sustained, the action was dismissed and an order was made that the second defendant should be given possession with £300 damages and that the first respondent should repay the deposit of £100 on the ground that the consideration for this payment had failed. On appeal it was contended for the appellant that he was entitled at least to an order that the first respondent should

sign and deliver a transfer of the land so that the appellant could try on presentation of the transfer to the Land Officer to secure his consent.

Held–

(i) the contract between the appellant and the first respondent was inoperative and unenforceable as no approval had been given thereto by or on behalf of the Governor.

(ii) whether time was or was not of the essence of the contract was irrelevant since the contract was inoperative.

Observations of the court on the procedure of the land officer under reg. 3 of the Land Regulations, 1948.

Appeal dismissed.

Cases referred to:

(1) *Patterson and Versi v. Kanji,* E.A.C.A. Civil Appeal No. 83 of 1955 (unreported).

(2) *Barnhart v. Greenshields, Patterson and others,* 14 E.R. 204.

(3) *Agar v. Macklew* (1826), 4 L.J.O.S.Ch. 16.

Judgment

Lowe J: The appellant was the plaintiff in a suit brought by him against the two respondents in the District Court at Njombe. He based his action on a written agreement dated February 1, 1955, whereby the first respondent agreed to sell him a piece of land, held under a right of occupancy. The terms of the agreement are as follows:–

> "An agreement is made this 1st day of February, 1955, between Mr. R. Lawrenson of Impembe and Mr. T. H. Patel of Ndungu Sisal Estates by which it is agreed that:
>
> 1. Mr. Patel shall purchase from Mr. Lawrenson the lease of his farm at Uwembe, Land Office No. 14078 for the sum of £400 (four hundred pounds sterling).
> 2. Mr. Patel shall pay a deposit of £100 cash to Mr. Lawrenson on the signing of this agreement.
> 3. the balance of £300 shall be payable on the signing of the deed of transfer or on the 1st March, 1955, whichever is the sooner date.
> 4. This agreement is subject to the consent of the land officer, Dar-es-Salaam.
> 5. Mr. Patel on behalf of himself and Ndungu Sisal Estates hereby waives all claims against Mr. Lawrenson for payment for fertilizers or cultivations or for any other item whatsoever.
> 6. In the event of the land officer refusing his consent to this transfer the deposit of £100 shall be repayable."

The agreement is signed by both parties and bears stamp duty.

The proceedings disclose that the appellant had not paid the balance of purchase price to the first respondent and on June 3, 1955, the first respondent sold the land to the second respondent and that transaction was approved by the land officer under the powers delegated to him by the Governor. In his amended plaint the appellant claimed that the land officer had "given his consent" to the agreement but it is clear from the record that this was not so and counsel for the appellant admitted that no approval was obtained although he pointed out that the land officer intimated in writing that it was unlikely that he would refuse approval. However, there was, in fact, no approval. As soon as the evidence for the plaintiff was concluded Mr. Yates submitted that the agreement on which the action was based was inoperative by reason of reg. 3 of the Land Regulations, 1948, and could not be enforced.

This submission was upheld and the plaintiff's action was dismissed. The court decided in favour of the second respondent on a counter-claim. An order was made that he was to be given possession of the land and to get damages of £300 from the appellant but that, as the consideration for the agreement had failed, the first respondent was to repay to the appellant the deposit of £100. The agreement, as has been shown, provided for payment of the balance of the purchase price on the signing of the transfer or March 1, 1955, whichever was the sooner and it was found by the lower court that time was the essence of the contract and there was non-fulfilment by the appellant of this condition. From that judgment the appellant has now appealed.

The memorandum of appeal states as follows:–

> "1. That the learned Resident Magistrate erred in law in holding that the contract concluded between the appellant and the first respondent was unenforceable.
> 2. That the learned Resident Magistrate erred in law in holding that time was the essence of the said contract.

3. That the learned Resident Magistrate erred in law in not holding that the second respondent had actual and/or constructive or imputed notice of the contract between the appellant and the first respondent, and that his (second respondent) legal title to the said land was subject to the equitable rights of the appellant under the said agreement.

4. That the learned Resident Magistrate erred in his judgment in disregarding the fact that the appellant was not in a position to apply for or to obtain

the requisite consent of the land officer Dar-es-Salaam until the first respondent had executed the transfer to the appellant.

5. That the learned Resident Magistrate failed to take into account the fact that the land officer at Dar-es-Salaam had already expressed his views that it was very unlikely that he would refuse consent to the sale of the Uwemba Farm to the Ndungu Sisal Estates Ltd.

6. That the learned Resident Magistrate erred in law in NOT finding that the respondents and each of them must specifically perform the contract with the appellant.

The appellant prays that the judgments of the Resident Magistrate be set aside, the appeal be allowed with costs, and that judgment be entered for the appellant with costs for specific performance of the said contract by the respondents, and that the counter-claims be dismissed with costs."

After a brief resume of the facts, counsel for the appellant argued that the agreement, being in relation to a right of occupancy, might not be operative as a dealing with the land in question but should be held to be operative in other respects. Because of the correspondence which had taken place between the parties, and their conduct in that regard time, he said, was not of the essence of the contract, the appellant having deposited the balance of the purchase money with an advocate named by the first respondent a few days after March 31, to which date the first respondent had agreed. A transfer in pursuance of the agreement was prepared and submitted to the first respondent but not signed by him. Nor, said counsel, did he take any steps to obtain the Governor's approval as required by reg. 3. Without any notice to the appellant he sold the land to the second respondent and the Governor's approval was given to that transaction. Counsel asked that this court should order specific performance to the extent that the appellant was entitled to a transfer in pursuance of the agreement for submission to the land officer in an endeavour to obtain the necessary approval. The second respondent having purchased with notice of the agreement in writing and the appellant being himself in possession with the consent of the first respondent, counsel considered that he also might be divested of his rights or interest in the land. Failing all that, counsel asked that the matter be remitted to the court below for consideration of the matters raised and particularly that the magistrate be directed to award damages to the appellant. Damages were not specifically prayed by the appellant as plaintiff but said counsel, there was no need to do so as it was not necessary to ask for "such other relief" as it had been in the old form of plaint and the court had inherent jurisdiction to grant relief by way of damages on a claim for specific performance even though damages were not specifically pleaded. In fact, in his amended plaint the appellant clearly asked for specific performance only and para. 10 stated

"That in view of the money expended by the plaintiff for improvement of the farm in question following the execution of the agreement the remedy of damages would be inadequate."

Although in his prayer he asks for "damages and costs of the suit" he had indicated that he did not want the court to consider damages which he had already said would be inadequate. In the result he may perhaps have intended by his plaint to ask for both specific performance and damages but even if that is so he was basing his claims on the agreement which was, by reason of reg. 3, inoperative.

Counsel admitted that the case of *Patterson and Versi v. Kanji* (1), E.A.C.A. Civil Appeal No. 83 of 1955 (unreported), made it clear that, in so far as the land in question was concerned, his client had no rights in rem as, to that extent, the agreement was inoperative. As to his argument that time was not of the essence of the contract, counsel referred the court to s. 55 of the Indian Contract Act and in support of his contention that the second respondent could be dispossessed he cited *Barnhart v. Greenshields, Patterson and others* (2), 14 E.R. 204. For reasons which become apparent later, I do not think I need to deal with those authorities.

Mr. Yates for the first respondent and Mr. Walker for the second respondent relied on *Patterson and Versi v. Kanji* (1) and on reg. 3 of the Land Regulations, 1948, on which that decision was based. As to damages, Mr. Yates pointed out the appellant had in his plaint merely asked vaguely for damages as an alternative prayer and had not specified what damages he considered he had suffered. Furthermore, he was cross-examined as to damages and was still unable or unwilling to specify such damages. It is true, as counsel said, that the lower court could not assess fees payable under the relevant rules unless the damages were specified and it is also a fact that the court would not know whether or not it had jurisdiction to hear and determine a claim for damages unless and until the amount sought was specified or at least indicated. In any event, the appellant could have applied to have his plaint amended, had he wished, in order to state the damages claimed but he took no steps in that direction. Counsel argued that the appellant was not entitled to partial specific performance and in support of that contention he cited *Agar v. Macklew* (3) (1826), 4 L.J.O.S. Ch. 16. In that case it was held that

> "The court will not interfere in cases of specific performance unless it can give complete and not merely partial relief."

That is a very old case but I do not know of any more recent case which modifies that finding with which, with respect, I agree in its general terms. There may, however, be cases in which the court would order specific performance of a condition precedent in an agreement or other contract where it was shown to the court that the contract could not move towards a necessary function without performance by one party of that condition precedent. However, in such a case no doubt the order would be for complete and not partial specific performance of that condition precedent. It is not necessary for me in the instant case to decide the point. In *Patterson and Versi's* case (1), the learned president, in referring to a similar position to that which arises in this case, said:

> "In the present case the true position is that the plaintiff-respondent seeks to enforce at law a claim by a third party which he can only establish by relying upon a transaction declared by law to be inoperative for lack of approval. That, in my opinion, is exactly what he cannot do."

The appellant in the instant case is not trying to enforce a claim by or in fact against a third party, so far as the prayer for specific performance is concerned, but the words of the learned president

> "which he can only establish by relying upon a transaction declared by law to be inoperative for lack of approval"

apply with equal force to the instant case.

The relevant portion of reg. 3 of the Land Regulations is as follows:–

> "3. No transfer, mortgage, underlease or bequest of a right of occupancy or of any interest therein nor any dealing therewith in any way whatsoever shall be operative unless and until it is approved by the Governor."

I have considered whether or not there is any substance in the contention of counsel for the appellant that the intention of that regulation is to restrict any dealing with the land and that it does not make a contract inoperative in other respects. The regulation does not say that and its effect seems to me to be abundantly clear. The intimately relevant part says "no dealing therewith in any way whatsoever" shall be operative. It is the dealing, whether by agreement, transfer or otherwise which is inoperative without approval, not a portion of the dealing or agreement or whatever it is. Nor does the regulation say that any such dealing shall not be operative to pass merely the title to or any interest in any land held under a right of occupancy, unless it is approved. I am satisfied the whole agreement is inoperative because of a lack of

approval and that being so this court is precluded from enforcing any part of the agreement. It is wrong to suppose that any position in which the appellant finds himself could be remedied by an order for specific performance up to the stage of the

first respondent executing a transfer of the right of occupancy to see whether or not approval could now be obtained. That, in effect, would be for this court to defy the law by ordering another dealing, without approval, in pursuance of an agreement which itself is inoperative. So it is regarding the submission that time was not of the essence of the contract. It does not matter one way or the other because the agreement cannot operate to make time all important or of no import. In other words, the terms of the agreement are of no effect until the Governor has approved the agreement.

The second respondent has not transgressed in any way. He purchased the land while it was free to be purchased by him and he had no notice of nor was he hampered by any instrument which the law permitted to have any effect prior to it receiving approval. It may be that the appellant has an action in damages which he can bring against the first respondent, I express no view as to that, but he cannot in the instant case obtain relief by way of either specific performance or damages; the law prevents that. I can see no reason to disturb the judgment in favour of the second respondent on the counter-claim.

I am concerned to notice that in exhibit H in this case the District Commissioner, Njombe, wrote to the appellant's company apropos the proposed acquisition by the appellant of the land in question:

> "I am now advised that you should submit a formal deed of transfer for the consent of the land officer and for registration."

This letter was no doubt more or less a quotation from a communication which the District Commissioner himself had received from the Land Officer and it raises the implication that the land officer will give formal approval only to the document which in fact transfers the interest of the vendor in a right of occupancy. I have found it necessary, therefore, to look at the evidence in this case, particularly that of Mr. T. H. Lawrence, who must not be confused with the second respondent but who was a witness for the appellant, explaining certain matters which were contained in a land office file. After satisfying the court that no approval had been given by the land officer to the transaction between the appellant and the first respondent he referred to the copy of the relevant letter on the file from the original of which, apparently, exhibit H was prepared, and he read the last paragraph of the copy which is as follows:–

> "Taking all the above facts into consideration and providing the rent has been paid up to date and that no objections can be made to the form of transfer, it is unlikely that I should refuse my consent to a sale of the land to Ndungu Sisal Estate Limited.
>
> D. G. Thomas,
> *for Land Officer*."

The witness then went on to say:

> "So far as I know the actual consent is given when the stamp is put on the deed of transfer and signed by the land officer. He does not contract to consent until the deed of transfer is presented to him after execution. So far as I know that is the only way consent can be obtained."

If that is so, in my view the land officer would not be carrying out the intention of reg. 3 which clearly indicates that the Governor's approval can be obtained to "any dealing therewith in any way whatsoever". I think it of great importance that this should be understood because if what I consider to be the correct practice is carried out and intending purchasers of interests in rights of occupancy forward their agreements to the land officer for consent and satisfy him as to payment of rent up to date and all other relevant matters, and the land officer gives his approval to those he finds in order, much of the difficulty and indeed considerable expense which arises

at present over similar agreements which have been made but to which approval has not been given, would be saved. No doubt the land officer would at a later stage require the actual document which transfers the interest in the right of occupancy to be in proper form and acceptable to him, but there seems to me to be no reason whatsoever why he should not approve in the first instance the original dealing with the right of occupancy. A confirmatory approval could always be endorsed on the actual document which is registered and no doubt such a practice would be necessary. I realize that this raises an important issue because it is perhaps more than probable that a very considerable number of tenants of portions of various business premises hold them under some form of written contract which would no doubt be held to be dealings with rights of occupancy. The position of the landlords in view of the decision in *Patterson and Versi's case* (1) might be an unfortunate one, unless the contracts were approved by the land officer, and indeed the tenants themselves might be placed in an awkward position in consequence of there being no lawful approval of the dealing, with a right of occupancy, under which they enjoy their tenancies.

Patterson and Versi's case (1) makes it clear that the "title" to a right of occupancy is not only the document but is also the right which exists between the parties by virtue of any agreement they have entered into which has the effect of dealing with a right of occupancy. This raises the further question of a tenant occupying the whole or a portion of a building on land held under a right of occupancy, under an oral arrangement, as was the case in *Patterson and Versi's case* (1). It would appear that such an arrangement, by reason of reg. 3, unless approved by the land officer under his delegated powers, is inoperative to protect either party to the arrangement. That being so it can be imagined that a very considerable number of landlords and tenants in this territory might well find themselves in a most embarrassing position. No doubt many tenants do not know that they occupy part of a "right of occupancy".

I have dealt with this important albeit oblique aspect of the case for the reason that the implications it raises are such as should, in my opinion, be considered by the land officer who might think that some amendment to reg. 3 is necessary.

As will be clear from the earlier portions of this judgment I am satisfied that the appellant cannot succeed in this appeal which I dismiss with costs to the first and second respondents.

Appeal dismissed.

For the appellant:
B O'Donovan
Khetani & Winayak, Nairobi

For the first respondent:
HE Yates and *Mrs BA Bhojani*
Yates & Co, Mbeya and *Vellani & Co*, Dar-es-Salaam

For the second respondent:
HC Walker
Atkinsons, Dar-es-Salaam

Khatijabai Jiwa Hasham v Zanab d/o Chandu Nansi widow and executrix of Gulamhussein Harji, deceased

[1957] 1 EA 255 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	1 May 1957
Case Number:	21/1956
Before:	Briggs JA
Sourced by:	LawAfrica

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[1] Costs – Taxation – Instructions fee – Objection as to quantum – Eastern Africa Court of Appeal Rules 1954 *r.* 6 (2); *Schedule III, Scale A, Item* 6.

Editor's Summary

In this appeal the successful respondent filed a bill of costs in which he claimed Shs. 12,500/- as an instructions fee. The taxing officer allowed Shs. 3,000/- and the respondent objected to this on two grounds, first, that the amount allowed was so inadequate that the taxing officer could not have taken into account all the matters which, under Item 6 of Scale A to the Third Schedule of the Eastern African Court of Appeal Rules, 1954, he must consider; secondly, that a taxing officer should on the authority of *Sunnucks v. Smith,* [1950] 1 All E.R. 550 allow as an instructions fee the same amount as was allowed by the Supreme Court.

Held–

(i) where only one advocate is employed, an instructions fee may notionally be divided into two parts; one, covering that part of the "brief fee" which represents work done before the hearing by the advocate in his capacity as counsel; the other covering all "solicitor's" work not included in other items in the bill; that where the respondent is the successful party the "solicitor work" on an appeal is ordinarily almost nil; that for four hours hearing in court, except on a first day; an advocate receives Shs. 300/-, a rate of Shs. 75/- an hour; that there appears to be no reason why office work should, on a party and party basis, ever be made more remunerative than this and on that footing the fee allowed of Shs. 3,000/- would cover five days work on "getting up" with an ample margin for solicitors work, and that the work might well have been done in much less time than that and the fee allowed was if anything somewhat generous.

(ii) *Sunnucks v. Smith* (*supra*) applies only to brief fees to counsel and has no reference to the instructions fee to be allowed to the solicitor; while the "solicitor's work" on the appeal was almost negligible the "solicitor's work" in the Supreme Court must have been substantial; for this a figure of Shs. 7,000/- had been allowed in the Supreme Court which provided for this with, to say the least, extreme generosity, and to say that a similar amount should be allowed in the Court of Appeal is unreasonable; the taxing officers of the Court of Appeal are not only distinct from those of the Supreme Court of Kenya but they also work under an entirely different set of rules, and it is

most undesirable that they should in any way be fettered by anything done in another court; the taxing officer has a duty to the public to see that costs do not rise above a reasonable level and had the taxing officer in this case allowed Shs. 7,000/- and purported to do so, following *Sunnucks v. Smith*, the court would have said that he had acted on a wrong principle, while had he done so without giving reasons, the figure might well have been considered so high as to show that he must have acted on a wrong principle.

Respondent's objections disallowed.

Cases referred to in judgment:

(1) *Sunnucks v. Smith*, [1950] 1 All E.R. 550.

Judgment

Briggs JA: This was a reference to me under r. 6 (2) of the 1954 Rules of this court from a decision of the registrar in his capacity as taxing officer. He taxed the bill of costs of the successful respondent in this appeal at Shs. 4,520/-. The only item of the bill questioned before me was the fee for instructions. The respondent claimed Shs. 12,500/- and the registrar taxed off Shs. 9,500/- and allowed

Shs. 3,000. The respondent objected to this on two grounds. He said first that the amount allowed was, having regard to the nature of the proceedings, so inadequate as to indicate of itself that the registrar could not have taken into account all the factors which, under Item 6 of Scale A to the Third Schedule, he must consider. I accept that in a proper case this could be raised as a point of law which I should be entitled to consider, and would not merely involve *quantum*.

The appeal record extended to 864 folios, but three-quarters of this consisted of a shorthand note of the evidence. If the Judge's note alone had been included the record would have been of quite modest size. The hearing of the appeal lasted 2½ days. It involved consideration of the facts and of one novel and difficult point of law as well as some minor ones. The claim was for specific performance of an agreement to sell some land and a house for £5,000. It was allowed in the Supreme Court and the vendor appealed unsuccessfully.

An instruction fee under item 6 may notionally be divided into two parts where, as here, only one advocate is concerned. It covers that part of the "brief fee" which represents work done before the hearing by the advocate in his capacity as counsel. It also covers all "solicitor's" work not included in other items of the bill. But where the respondent is the successful party his "solicitor's work" on an appeal is ordinarily almost nil. It would in this case probably be limited to writing a very few letters, and I think the value of this work would probably be well under Shs. 100/-. I would remark that an appellant, who has the general conduct of the appeal and has to prepare the record, may be in a different position. In this case the substantial work to be considered was that of "getting up" the appeal, both on the law and the facts.

I was informed by counsel that there is in this country no recognized rate of remuneration per hour of work done by an advocate in his office, and I certainly do not intend to suggest one; but for four hours' hearing in court, except on a first day, the advocate receives Shs. 300/-, a rate of Shs. 75/- per hour. On a seven-hour day this would be Shs. 525. I see no reason why office work should, on a party and party basis, ever be made more remunerative than this. On that footing the instructions fee of Shs. 3,000/- would cover five days work on "getting up", with an ample margin for the "solicitor's work". I see no reason to suppose that the advocate in this case spent any longer time than that on the work necessary. Many experienced advocates would have done the work with perfect efficiency in much less time than five days. I could see no reason to think that the amount of Shs. 3,000/- allowed was in any way unusually or improperly low, much less that it was so low as to suggest some misdirection on the part of the registrar. In fact, I thought it was somewhat generous.

The second point, which was raised by the respondent before the registrar and before me, was that a taxing officer of this court ought as a general rule to allow as an instructions fee the same amount as was allowed by the Supreme Court in respect of the suit on which the appeal was brought. He relied on *Sunnucks v. Smith* (1), [1950] 1 All E.R. 550, and submitted that it should be followed here under rule 52, although he was unable to quote any decision to that effect. I over-ruled the submission for a number of reasons. First, I think the local law sufficiently covers this question and it is unnecessary to invoke r. 52. Secondly, the case deals only with brief fees to counsel. It has no reference to the instructions fee to be allowed to the solicitor, which depends always on work necessarily done. In this case, as I have said, the "solicitor's work" on the appeal was almost negligible; but the "solicitor's work" in preparing the case for hearing in the Supreme Court, in collecting evidence,' considering documents, instructing and conferring with experts and so on, must have been substantial, and perhaps heavy. The instructions fee allowed in the Supreme Court was Shs. 7,000/-, which appears to me to have provided for all this with, to

say the least, extreme generosity. To say that a similar figure must be allowed now because of an old rule of practice in England which relates only to brief fees seems to me quite unreasonable. The taxing officers of this court are not only distinct from those of the Supreme Court of Kenya; they work under an entirely different set of rules. I think it would be most undesirable that the discretion of an officer of this

court should in any way be fettered by anything done in another court. The taxing officer has a duty to the public to see that costs do not rise above a reasonable level. If he had allowed Shs. 7,000/-, and purported to do so following *Sunnucks v. Smith* (1), I should have said he had acted on a wrong principle. If he had done so without giving reasons, I might well have considered the figure so high as to show that he must have acted on a wrong principle. In any event, I should have considered the total amount of the bill wholly excessive and should, if asked, have reduced it under rule 24 of the taxation rules.

I disallowed the respondent's objection and gave costs, assessed at Shs. 100/-, to the appellant. I give leave to report this decision, which was given in chambers.

Respondent's objections disallowed.

For the applicant/respondent:
DN Khanna
DN & RN Khanna, Nairobi

For the respondent/appellant:
JK Winayak
Khetani & Winayak, Nairobi

The Attorney General v Ally Kleist Sykes
[1957] 1 EA 257 (HCT)

Division:	HM High Court for Tanganyika at Dar-Es-Salaam
Date of judgment:	12 March 1957
Case Number:	365/1956
Before:	Abernethy J
Sourced by:	LawAfrica

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[1] Criminal law – Trial – Finding of no case to answer – Whether court entitled to consider credibility of Crown witnesses when prosecution case closed – Criminal Procedure Code s. 205 (*T.*).

Editor's Summary

The respondent had been prosecuted on a charge of corruptly agreeing to accept a consideration as an inducement for showing favour. The magistrate after hearing the evidence for the prosecution found that the accused had no case to answer and dismissed the charge pursuant to s. 205 of the Criminal Procedure Code. On the application of the Attorney General a case was stated for the opinion of the High Court. Apart from a number of academic questions which the court declined to consider, the only material question raised by the case was whether, since the main witness for the prosecution was not shown to be

an accomplice, the magistrate was entitled at the close of the Crown case to make a preliminary assessment of the evidence and to find that the accused had no case to answer.

Held – if a magistrate considers that the material evidence for the prosecution is not worthy of credit, there can be no *prima facie* case against the accused and, therefore, the magistrate in the present case was quite entitled to find as he did.

Per curiam – whilst not strictly necessary, magistrates should give briefly their reasons for dismissing a charge under s. 205 of the Criminal Procedure Code.

Appeal dismissed.

Cases referred to in judgment:

(1) *Clark v. Edinburgh and District Tramways Co*., [1919] S.C. (H.L.) 35.

Judgment

Abernethy J: In this case the respondent was charged with corruptly agreeing to accept a consideration as an inducement for showing favour, the respondent at the time being employed as a labour assistant.

The salient facts of the case have been so briefly and ably stated by learned counsel for the Crown that I can do no better than quote him:

> "The case was that the complainant Mohamed was interested in obtaining for a relative a certain amount of compensation for an injury which he had received, and in the course of pursuing this matter at the Labour Office he met the accused who was employed there. At some stage of the dealings the Crown case was that the accused suggested to the complainant that a greater amount of compensation might be obtained by his efforts, and he suggested, according to the Crown case, that a certain amount of money should be given to him by the complainant. When the suggestion was made to the complainant, according to the Crown case, the complainant went to his advocate Trivedi, informed him of what had transpired, and went from there to the Police. After the details were recounted to the Police the complainant was given by the Police certain marked notes and instructed to carry out this apparent agreement with the accused. He went to the Labour Office and went into the office where the accused worked. Outside were posted various Police officers. Presumably the original idea was that they should observe what in fact transpired in the office. As it happened, nothing at all of any material weight was observed by them. The complainant, a short time after leaving the office, came out and gave a pre-arranged signal to the Police, who went into the office. On the desk which was used by the accused under a glass apparently were found, clearly visible, these marked notes. The account of what happened in the office itself rested solely on the evidence of the complainant."

After hearing all the evidence the learned trial magistrate found that the respondent had no case to answer.

The Attorney-General applied for a Case Stated, which was done, and a number of questions have been submitted for the opinion of this court. Most of these questions are of an academic nature, and it is no part of the duty of this court to answer academic questions. As learned counsel appearing for the Attorney-General said, the only real question that arises is whether, the main witness not being shown to be an accomplice, the magistrate was entitled on a preliminary assessment of credibility made at the conclusion of the Crown case to say that the respondent had no case to answer, and it is with that question only that I intend to deal.

Section 205 of the Criminal Procedure Code is quite plain:

> "If at the close of the evidence in support of the charge, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the charge and acquit the accused person."

The discretion lies entirely with the court. If a magistrate finds an accused has no case to answer, then he must acquit the accused. Even although witnesses for the Crown may give evidence that if true shows an accused has committed an offence, if such witnesses are palpably false or their evidence is incredible and the magistrate or Judge can place no reliance on them, why should he allow the case to go on? There can be no *prima facie* case against an accused which is supported by nothing but the testimony of a witness whose evidence is not worthy of credit. There may be cases in which the falsity or unreliability of the evidence of the prosecution witnesses is obvious, and there may, as Mr. Scollin has pointed out, be borderline cases where it is not so obvious that the witnesses are unworthy of credit, but even in the latter cases this court will hesitate to interfere with a finding of a magistrate unless he clearly went wrong. For

one thing, the magistrate, who has seen and heard the witness or witnesses, is in a very much better position to assess his or their truthfulness or integrity than this court and this preliminary assessment is of the utmost importance.

I would quote again from a case I have quoted before in this court. It is the case of *Clark v. Edinburgh and District Tramways Co*. (1), [1919] S.C. (H.L.) 35, in which Lord Shaw, afterwards Lord Dunedin, said:

> "Witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuances of their expressions and even the turn of an eyelid, left an impression upon the man who saw and heard them which could never be reproduced in the printed page. What in such circumstance thus psychologically put is the duty of an appellate court? In my opinion the duty of an appellate court in these circumstances is for each judge to put to himself, as I now do in this case, this question; 'Am I, who sit here without these advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case, in a position not having these privileges – to come to a clear conclusion that the judge who had them was plainly wrong?' If I cannot be satisfied in my own mind that the judge who had them was plainly wrong, then it appears to me to be my duty to defer to his judgment."

The prosecution in this case depended entirely on the evidence of one witness, and not only has the magistrate noted that from his observation of the demeanour of this witness he was unreliable, but a perusal of the evidence given by this witness shows that he frequently contradicted himself, and his evidence is inconsistent with the evidence of other Crown witnesses. In my opinion, therefore, the magistrate was quite entitled to find that the respondent had no case to answer.

Learned counsel for the Crown has suggested that when a magistrate finds that an accused has no case to answer he should give his reasons for so doing. Section 205 of the Criminal Procedure Code does not render this necessary, but I think it might be helpful if magistrates, when finding an accused has no case to answer, gave briefly their reasons for coming to that conclusion.

Appeal dismissed.

For the appellant:
JA Scollin (Crown Counsel, Tanganyika)
The Attorney-General, Tanganyika

For the respondent:
Al Noor Kassum
Al Noor Kassum, Dar-es-Salaam

Shamsudin s/o Issa Kassam Abji v R
[1957] 1 EA 260 (HCT)

Division:	HM High Court for Tanganyika at Dar-Es-Salaam
Date of judgment:	7 October 1957
Case Number:	224/1957
Before:	Abernethy J
Sourced by:	LawAfrica

[1] Criminal law – Evidence – Perjury – Whether necessary to prove the charge in the case wherein accused is alleged to have committed perjury.

Editor's Summary

The appellant was convicted by a magistrate of perjury, but at his trial neither the original of the charge in the case in which he was alleged to have committed perjury nor a certified copy thereof was produced and proved as evidence. Although Counsel for the appellant mentioned at least once early in the proceedings that a copy of the charge in the case in which the appellant was alleged to have perjured himself was missing, he took no formal objection to the failure properly to prove this charge until the case for the defence had been closed, whereupon the trial magistrate held that the objection was taken too late.

Held – the requisite evidence of the charge in the case in which it was alleged perjury was committed should have been given during the trial before the magistrate; where the evidence given of such a charge is inadmissible, it is not evidence at all.

Appeal allowed.

Cases referred to:

(1) *R. v. Carr*, 10 Cox C.C. 564.

(2) *R. v. Dillon*, 14 Cox C.C. 4.

(3) *Stirland v. Director of Public Prosecutions*, [1944] 2 All E.R. 13; [1944] A.C. 315.

Judgment

Abernethy J: The appellant in this case was found guilty of perjury and was sentenced to one year's imprisonment.

The appellant submitted a long Memorandum of Appeal but after hearing learned counsel for the appellant and the respondent on the first ground of appeal this court felt bound to allow the appeal on that ground and the other grounds of appeal were not argued. The reasons for the court's decision are now given.

The appellant's first ground of appeal is that the charge against the accused in the trial in which it is alleged the appellant committed perjury, was never proved, and that the learned trial magistrate erred in holding that the objection raised on behalf of the appellant, though it had not been proved by the prosecution, was too late.

It is clear from the record that no objection to the non-proving of this charge was made by learned counsel for the appellant until after the case for the defence had been closed although he did once at least mention the fact that a copy of the charge was missing early on in the proceedings.

Although there may be objections to counsel not objecting to improper production of something at a trial merely for the purpose of raising this on appeal, there is no obligation on counsel for the defence to object to the improper production of evidence by the prosecution and he is perfectly entitled, in his address to the court afterwards, to refer to that improper production. Moreover, there is an obligation on

the trial judge or magistrate to see that any evidence produced is properly produced.

Learned counsel for the appellant has referred to the case of *R. v. Carr* (1), 10 Cox C.C. 564, in which it was laid down that where perjury is alleged to have taken place on a judicial enquiry it must be proved what the charge was on the hearing of which the false evidence was given as otherwise it would be impossible to ascertain whether it was material to the issue. Archbold goes on to say that this must be proved by the best evidence. Learned counsel for the appellant also drew the attention of the

court to s. 74 (1) (iii), s. 77, s. 64, s. 65 (*e*) and s. 22 of the Indian Evidence Act which read as follows:–

> "Section 74. The following documents are public documents:–
>
> (1) documents forming the acts or records of the acts–
>
> (iii) of public officers, legislative, judicial and executive, whether of British India, or of any other part of Her Majesty's dominions, or of a foreign country;
>
> "Section 77. Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies.
>
> "Section 64. Documents must be proved by primary evidence except in the cases hereinafter mentioned.
>
> "Section 65 (*e*). When the original is a public document within the meaning of s. 74;
>
> "Section 22. Oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under the rules hereinafter contained, or unless the genuineness of a document produced is in question."

The Crown does not dispute the fact that neither the original charge in the case against Fatehali Gulamali Saleh nor a certified copy was produced at the trial of the appellant and learned counsel for the appellant has submitted that not only was the charge not proved but the so-called evidence of it was not evidence of it at all. He also drew the attention of the court to the second proviso of s. 165 of the Indian Evidence Act, which provides that judgments must be based upon facts declared by this Act to be relevant and duly proved. In his judgment the learned trial magistrate says:–

> "Archbold says that the charge on the hearing of which the alleged false evidence was given must be proved by the best evidence. It is suggested that this must mean the production of the charge against Saleh the accused in the case in which this accused gave evidence.
>
> "There was no objection taken by any of defence counsel when A. S. P. Sardari Lal gave evidence that he had prosecuted in Dodoma Cr. C. 613/56 in which Saleh was charged with 'a number of courts of stealing by public servant and falsifying accounts. Accused's evidence related to the first two counts in the case involving 3813/90' as stated in the charge in the present case. This in terms of *R. v. Carr* (1) appear to be a piece of evidence not proved in the proper manner and was admitted without objection but having passed unchallenged there can now be no challenge at this late stage in the proceedings.
>
> "Had objection been raised at the proper time and the production of the charge sheet in *Saleh's* case requested I should have been guided by the paragraph in the judgment of Edmonds, Ag. Judge in Criminal Appeal No. 272 of 1954 *Atanasi s/o Joseph v. R.* (Original Cr. C. 375/54 Dodoma). This is a perjury charge and discussing the question of what should be produced by the prosecution. He says that it is irregular for the whole proceedings of the trial in which it is alleged that the perjury was committed to be put in prosecution. 'No more should have been put in than the magistrate's note of the evidence given by the appellant at the former trial.' I have also considered as defence counsel wished, *Threlfall's* case in which it was held that a document consistent with the guilt or innocence of the accused may be treated as corroboration of the evidence against him in a charge of perjury."

from which it would appear that he was satisfied that the charge in the original case was sufficiently proved.

Learned counsel for the Crown argued that in *Carr's* case (1) there was not only the question of no charge being produced but that the witness did not know what the charge was. He suggested that the court should follow the dissenting judgment of Bramwell, B., in that case. Mr. Fifoot also referred to the case of *R. v. Dillon* (2), 14 Cox C.C. 4, which he had to admit was against him, and *Stirland v. Director of Public Prosecutions* (3), [1944] A.C. 315, in which it was held that

> "there is no universal rule that a conviction cannot be quashed on the ground of improper admission of evidence prejudicial to the prisoner unless his counsel apply for the trial to be begun again before another jury."

Learned counsel for the Crown also referred to a number of other cases on which I think it is unnecessary for me to comment, and argued that s. 218 of the Criminal Procedure Code requires the charge to be read over to the accused and the reading over of the charge was an overt act of the court since evidence of what was read over to the accused was given that was sufficient evidence of the charge. He further argued that the appellant was in no way prejudiced by the omission to prove the charge properly and that the evidence of the charge was not inadmissible but that only the mode of proof was wrong. He submitted that to allow the appeal on this ground of appeal was to allow it on a mere technicality. In all criminal cases the court must decide whether the prosecution has proved every ingredient necessary to sustain a conviction. If the court holds as proved something which has not been proved and is essential then obviously the conviction cannot stand. I have little hesitation in agreeing with learned counsel for the appellant that the decisions in *R. v. Carr* (1) and *R. v. Dillon* (2), which have never been upset, must be followed by this court. In both these cases the appeals were allowed simply because the informations or charges in the cases in which the appellant was alleged to have committed perjury was never produced. I had to agree with him that if the Evidence Act says that unless proved in a certain way evidence shall not be relevant (or admissible) then that evidence is no evidence at all and none of Mr. Fifoot's plausible arguments persuaded me that the decisions in the cases of *Carr* (1) and *Dillon* (2) were wrong or that it was not absolutely necessary for the charge to have been properly produced. The appeal was allowed on a technical ground but where the law lays down that certain rules as to proof must be observed and they are not observed then an Appellate Court is entitled to allow an appeal and frequently does allow appeals on what may be called purely technical grounds.

Appeal allowed

For the appellant:
KA Master
WJ Lockhart-Smith, Dar-es-Salaam

For the respondent:
PRN Fifoot (Crown Counsel, Tanganyika)
The Attorney General, Tanganyika

Jimmy Fannceca v ES Amrolia
[1957] 1 EA 263 (HCT)

Division: HM High Court for Tanganyika at Dar-Es-Salaam

Date of judgment: 23 May 1957

Case Number: 3/1957

Before: Mahon J

Sourced by: LawAfrica

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[1] Rent Restriction – Standard Rent – Date on which standard rent becomes applicable – Power of Rent control Board to fix date – Rent Restriction Ordinance (*Cap.* 301), *s.* 7 (1)(*d*)(*T.*).

[2] Rent Restriction – Decision of Rent Control Board – Whether failure to give reasons fatal – Rent Restriction Ordinance, (*Cap.* 301) (*T.*).

Editor's Summary

The respondent landlord applied to the Dar-es-Salaam Rent Restriction Board to have the standard rent of certain premises determined and also for an order for recovery of arrears of rent. The Board fixed the standard rent at Shs. 235/- per month as from January 1, 1956, and ordered the appellant to pay to the respondent arrears of rent amounting to Shs. 1,175/-.

The appellant appealed against this decision mainly on two grounds: firstly, that the board erred in fixing the standard rent as from January 1, 1956, and that it should have fixed such rent as from the date when the tenancy began, namely, November 1, 1953; and secondly, that the determination of the board was not supported by any reasons and the board had not exercised its discretion judicially.

Held–

(i) under the Rent Restriction Ordinance, a board is specifically empowered under s. 7 (1) (*d*) to fix a date not being earlier than the prescribed date from which a standard rent is to have effect in relation to any premises.

Observations of Goddard, L.J., in *Gover v. Field*, [1944] 1 All E.R. 151 at p. 157 distinguished.

(ii) while it may be desirable, particularly when an application is strongly contested, for a board to set out the reasons for its decision there are no statutory requirements as to the form which the decision of a board must take; and that as there was no reason to suppose that the board did not consider the relevant facts of the case, the fact that it did not give reasons for its decision could not be said to offend against natural justice.

Observations of Sir Barclay Nihill, P., in *Colonial Boot Company v. Dinshaw Byramjee & Sons*, 19 E.A.C.A. 125 at p. 128 applied.

Appeal dismissed.

Cases referred to:–

(1) *Gover v. Field*, [1944] 1 All E.R. 151; *sub nom. Field v. Gover*, [1944] 1 K.B. 200.

(2) *Desai, Chhaganlal and Parbat v. Sultan Ali*, 20 E.A.C.A. 1.

(3) *Colonial Boot Company v. Dinshaw Byramjee & Sons*, 19 E.A.C.A. 125.

Judgment

Mahon J: In January last the respondent, who is the landlord of the premises in question, applied to the Dar-es-Salaam Rent Restriction Board to have the standard rent of the premises determined and also for an order for recovery of arrears of rent. The board fixed the standard rent at Shs. 235/- per month as from January 1, 1956, and ordered the appellant to pay to the respondent arrears of rent amounting to Shs. 1,175/-. The appellant now appeals against this decision.

The first ground of appeal is that the board erred in fixing the standard rent of the premises at Shs. 235/- with effect from January 1, 1956, and that it should have fixed such rent with effect from the date on which the tenancy began, namely November 1, 1953. In support of this argument reliance has been placed on the observation of Goddard, L.J. in *Field v. Gover* (1), [1944] 1 K.B. 200, at p. 212, where he says:

> "The standard rate operates in rem as has more than once been held in this Court. The effect of that is that the standard rent attaches from the moment that the house is brought under control."

It is submitted, therefore, that the board should have fixed the standard rent with effect from November 1, 1953.

The answer to this argument is, I think, that under the Rent Restriction Ordinance, (Cap. 301), a board is specifically empowered under s. 7 (1) (*d*) to fix a date not being earlier than the prescribed date from which a standard rent is to have effect in relation to any premises. At the hearing Mr. Bhojani, who appeared for the appellant, agreed that the standard rent should be Shs. 235/- per month but suggested that it should be made effective as from January 22, 1955. He gave no reason for choosing this date but it is not unreasonable to suppose that in so doing he had in mind the provisions of s. 24 (3). I am satisfied that the board was empowered to fix the date from which the standard rent was to have effect.

The second ground of appeal is that the determination of the board is not supported by any reasons and that the discretion vested in the board has not been exercised judicially. In this connection it is said that the board's order was based on the opinion of the government valuer and that the reasons for the board's decision are unknown. It is clear from the record of proceedings that the valuer read his report and that it was accepted by Mr. Bhojani except as to the date from which the standard rent should become effective. The appellant cannot therefore complain now that the basis of the valuer's decision was unknown to him. He had an opportunity at the hearing to find out how the valuer arrived at his decision but did not take it. While it may well be desirable, particularly so when an application is strongly contested, for a board to set out the reasons for its decision, there are no statutory requirements so far as I am aware as to the form which the decision of a board must take. As was observed by the then President in *Desai, Chhaganlal and Parbat v. Sultan Ali* (2), 20 E.A.C.A. 1, at p. 4, it is correct to say as a broad proposition that an Appellate Court will not interfere with the exercise of discretion merely because it thinks that it might have decided differently. To exercise a discretion judicially there must at least be a consideration of all the relevant facts. In an earlier case, *Colonial Boot Company v. Dinshaw Byramjee and Sons*, (3) 19 E.A.C.A. 125 at p. 128, in dealing with the grounds of appeal which were classed generally under the heading "Informality" the then President said:

> "First it must be borne in mind that the procedure of the Central Rent Control Board at the material time was not, nor is now covered by any statutory rules although there is provision in the ordinance for their enactment. The only test this court can apply therefore, and which has been applied in past cases, is to see in each case whether the informality practised can be said to offend against natural justice. If in the opinion of this court it does not then we have refused and shall continue to refuse to upset a decision on this ground."

I have no reason to suppose that the board did not consider the relevant facts and it must be presumed that Mr. Bhojani's remarks were given due consideration. That being so, it cannot be said in my opinion that in the circumstances of this case the fact that the board did not give reasons for its decision offends against natural justice; indeed this has not been urged on behalf of the appellant.

The third ground of appeal has already been dealt with.

The fourth ground is that the board should not have passed a decree for the payment of any amount at all. The short answer to this is that the board did no such thing. What it did was to make an order for the recovery of arrears of rent as it was fully entitled to do under s. 7 (1) (*h*). That order, if not complied with, can be enforced as a decree under the provisions of s. 34 (1).

For the reasons given this appeal fails and is dismissed, with costs. Delivered in court at Dar-es-Salaam this 23rd day of May, 1957.

Appeal dismissed.

For the appellant:
AA Bhojani
Vellani & Co, Dar-es-Salaam

For the respondent:
KA Master
KA Master, Dar-es-Salaam

The Director Tanganyika National Parks v Ngutata s/o Lesila and Another
[1957] 1 EA 265 (HCT)

Division:	HM High Court for Tanganyika at Dar-Es-Salaam
Date of judgment:	27 September 1957
Case Number:	24/1957
Before:	Crawshaw J
Sourced by:	LawAfrica

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[1] Criminal Law – Killing an animal in National Park in self-defence – Whether an offence under the National Parks Ordinance (*Cap.* 253), *s.* 13 (1) (*b*) (*T.*).

Editor's Summary

A rhinoceros in the Serengeti National Park attacked a flock of sheep and killed three and wounded another. Two Africans, both of whom were lawful inhabitants of the Park, tried to prevent a further attack on the flock, whereupon the rhinoceros charged them and in self-defence they speared and killed it. They were prosecuted at the instance of the Director of the Tanganyika National Parks for killing an animal in the park without having a permit to do so. The magistrate who tried the case acquitted both accused, whereupon the director appealed to the High Court by way of case stated. The magistrate in stating the case submitted as a question of law for decision by the court whether persons born in the park have the right to defend their lives from attack in the park by wild animals, but the substantial point argued for the director was that s. 13 (1) (*b*) of the National Parks Ordinance creates an absolute offence.

Held – s. 13 (1) (*b*) does not create an absolute offence in all circumstances, and since the respondents were lawfully in the park, they were entitled to defend their lives.

Appeal dismissed.

Cases referred to:

(1) *R. v. Lesororuwa s/o Mbario*, Tanganyika High Court Criminal Revision No. 577 of 1954 (unreported).

(2) *The Gauntlet* (1871–73), L.R. 4 P.C. 184.

(3) *R. v. Dudley and Stephens* (1884), 14 Q.B.D. 273.

Judgment

Crawshaw J: This is an appeal by way of case stated by the Director of National Parks following an acquittal by the lower court of Ngutata s/o Lesila and Mario s/o Aluka who were charged with killing an animal within the Serengeti National Park without a permit, contrary to s. 13 (1) (*b*) of the National Parks Ordinance, Cap. 253.

The facts stated by the magistrate as being admitted or proved are as follows:

1. Both accused admit killing a rhinoceros.
2. The killing of the rhinoceros took place within the Serengeti National Park.
3. The precise date of the killing is uncertain but took place in the first half of December, 1956.
4. The rhinoceros was speared by accused in self-defence, it having charged them when they tried to drive it away from a flock of sheep and goats.
5. The rhinoceros killed three sheep and wounded another.
6. The sheep which were killed by the rhinoceros were lawfully within the Serengeti National Park, being the property of one Giliseri s/o Kipior a Masai who was born in the Serengeti National Park.
7. Both accused were lawful inhabitants of the Serengeti National Park. First accused was born in the Serengeti National Park and second accused had been a resident of the Serengeti National Park since before the date of commencement of the National Parks Ordinance.

The questions of law submitted for decision include the following:

> Persons born in a National Park or who entered a National Park before the date of commencement of the National Parks Ordinance have the right to defend their own lives or the lives of other people from attack by wild animals within a National Park.

The part of s. 13 relevant to the charge reads as follows:

> "(1) It shall not be lawful for any person except with the permission of the Trustees or an officer or servant of Trustees duly authorised by them to grant such permission–
>
> (*b*) Within a National Park, to kill, injure, capture or disturb any animal . . .;"

Mr. Swaffin, for the director, submits that this is an absolute offence. He has referred me to *R. v. Lesororuwa s/o Mbario* (1), Tanganyika High Court Criminal Revision No. 577 of 1954 (unreported), not, he says, because he agrees with the opinion of the learned judge therein, but to differentiate it from the instant case. The learned judge in that case had the advantage of hearing counsel for the Crown, and counsel agreed with the order he made. The circumstances there were that the accused killed an elephant which was attacking his cattle, and he was duly convicted of an offence under s. 13 (1) (*b*). The learned judge said as follows:

> "Section 17 of the National Parks Ordinance provides that the ordinance shall not affect the rights of persons in or over land acquired before the commencement of the ordinance or before the land became part of a National Park. These rights must, I think, include the right, if necessary, to use force to protect their crops and their herds while grazing on their land.
>
> "But if any person kills an animal destroying his crops or killing his cattle in a National Park it is up to him to show that he has the right to do so under s. 17 of the National Park Ordinance as well as prove that it was necessary for the protection of his crops or cattle to kill such animal.
>
> "In this case although from the evidence of accused, if believed, it was necessary for him to kill the elephant to save his cattle there is no suggestion that the elephant attacked the cattle while they were on the land of the accused."

The case of *Lesororuwa* (1) is distinguishable from the instant case in that in the instant case the killing was held to have been in defence of human life and, also, there is no evidence that either accused have acquired any particular piece of land, and therefore the provisions of s. 17 would not appear to apply. At the same time, the accused are both described by the magistrate as being "lawful inhabitants" of the Serengeti National Park, presumably by virtue of s. 11 (*c*) of the Ordinance. This being so, can it be said that they (or indeed any person whether lawfully in the park or not) had no right to defend themselves from the attack of a wild and dangerous animal, if necessary by killing of that animal? Penal statutes must be construed strictly, but, as James, L.J., said in *The Gauntlet* (2) (1871–73), L.R. 4 P.C. 184,

> ". . . the person charged has a right to say that the thing charged, though within the words is 'not' within the spirit of the enactment."

To come to the conclusion that s. 13 (1) (*b*) was intended to be so literally construed would, in my opinion, be quite unreasonable, and, indeed, contrary to natural justice. The purpose of the ordinance in this respect is clearly the general one of preserving animal life. But it seems to me that it is not inconsistent therewith that a person, anyway if lawfully within the park, should be able to defend himself against attack. The court, in the well-known case of *R. v. Dudley and Stephens* (3) (1884), 14 Q.B.D. 273, said "To preserve one's life is, generally speaking, a duty . . .' although not, as in that case, at the expense of another innocent person. Section 27 of the Fauna (Conservation) Ordinance, (Cap. 302), makes express provision for the killing of animals in defence of life or property, but adds a proviso that

the section shall not apply if the killing necessitates molestation or deliberate provocation of the animal. There

is no such provision in the National Parks Ordinance, but I am not saying what the position might be had the accused, for instance, deliberately provoked the rhinoceros with the intention of encouraging it to attack him so that he would then plead the necessity of killing it; such were not found to be the circumstances in this case. Section 13 (1) (*b*) does not, in fact, purport to be an absolute offence in all circumstances, for permission may be obtained to kill, permission which would surely be granted if the life of a person was in danger but which, for obvious reasons, could not normally be applied for. There is anyway, I think, an analogy with the finding (or obiter) in the *Lesororuwa case* (1) that a person having rights in or over land must be held also to have the right to protect his crops and cattle on that land, if necessary by killing the marauding animal. In the instant case the accused had a right of habitation, and the ordinance cannot, I think, have intended to take away the right of such a person to defend his life.

Mr. Swaffin has submitted that the case should any way be sent back to the magistrate under s. 338 of the Criminal Procedure Code on the ground that the magistrate did not give proper consideration to the evidence. This would not, however, in my opinion be justified. The magistrate accepted the evidence of the accused, which was given on oath, that they were attacked and acted in self-defence, though it seems that they put themselves to some extent in jeopardy by trying to drive it from some cattle. He did not accept as accurate the somewhat contrary evidence of the second prosecution witness, Nasereyu, and it is to be observed that the latter ran away and may well not have seen exactly what happened, as the magistrate suggests. The magistrate certainly appears wrongly to have applied s. 17, but the fact remains that he found the accused acted in self-defence and, as I have said, on that I think the acquittal of the accused was justified.

As to the questions of law submitted by the magistrate, those not set out above are not relevant to this case. The relevant part of that question which I have set out, I have already determined. It may be, of course, that the accused committed an offence under s. 13 (1) (*a*) of the ordinance and possibly in retaining possession (if it was believed that he did this) of the animal's horns, but these are not matters which I have had to consider.

Appeal dismissed.

For the appellant:
JP Swaffin
JP Swaffin, Arusha

The respondents did not appear and were not represented.

Re an Arbitration between Muljibhai Madhavani & Co Ltd and IH Lakhani & Co (EA) Ltd

[1957] 1 EA 268 (HCU)

Division: HM High Court for Uganda at Kampala

Date of judgment: 8 February 1957

Case Number: 64/1956

Before: Keatinge J

Sourced by: LawAfrica

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[1] Arbitration – Award – Objections – Procedure to be adopted when application made to court to set aside or remit award – Arbitration Rules, r. 7 *and* 16 (*U.*).

Editor's Summary

On August 28, 1956, notice was served upon a party to an arbitration of the filing of the award. Under r. 7 of the Arbitration Rules a party objecting to an award has eight weeks from service of the notice that the award has been filed within which to apply that the award may be remitted or set aside and to lodge his objections. On October 22, 1956, the precise date upon which the eight weeks expired, a notice of objections to the award and a supporting affidavit were filed, but a notice of motion to set aside the award was not filed until December 27, 1956. On the hearing of the motion, a preliminary point was taken for the respondent that the application was out of time. It was not disputed that the notice of motion was out of time, but it was submitted for the applicant that it had not been the practice hitherto to file any documents except the notice of objections and affidavit, and that the notice of motion was only filed as a result of a decision of the court in a similar case a few weeks before. It was also contended that in any event, the respondent had not been prejudiced and that justice should be done under the inherent powers of the court.

Held–

(i) the Arbitration Rules require, in case of an application to remit or set aside an award, the filing of three documents, a chamber summons, an affidavit and objections.

Per curiam – If it had been the practice hitherto to make such applications to the court without filing a formal application, this practice must cease forthwith.

(ii) since the respondent had not been prejudiced and there was nothing in the Arbitration Ordinance or the Rules limiting the inherent powers of the court the court would hear the application on its merits.

Order accordingly.

Cases referred to in judgment:

(1) *Jobbunputra Industries v. Anandji & Sons*, Uganda High Court Miscellaneous Cause No. 18 of 1956 (unreported).

Judgment

Keatinge J: The point has been taken by Mr. Baerlein for respondent that this application is out of time. The application in question, or, to be more accurate, notice of motion, is dated December 27, 1956, and the court is moved to set aside an award dated February 21, 1956, made in reference to arbitration "on the grounds set out in notice of objection and affidavit already filed herein." It is not disputed that the notice of objection and affidavit referred to were filed on October 22, 1956.

Under the provisions of r. 7 of the Arbitration Rules (Vol. VI of the Laws, p. 856) a party may object to an award within eight weeks after notice of the filing thereof. In this case notice was received on August 28, 1956, and the eight weeks expired on October 22, 1956. Thus the notice of objection and affidavit were filed in time but the formal notice was filed out of time. I may say here that I am surprised an application to file out of time was not made at the same time as the formal notice was filed.

Mr. Baerlein relies strongly on *Jobbunputra Industries v. Anandji & Sons* (1), Uganda High Court Miscellaneous Cause No. 18 of 1956 (unreported). In that matter only a notice of objection and affidavit were filed by the objector. After cross objections

had been filed a hearing notice was issued. At the hearing on December 7, 1956, the respondent submitted that the notice filed should be struck out as no application had been filed as required by r. 7. The court then ordered: "Proceedings filed to be struck out with costs."

Mr. Wilkinson for applicant says that it was only as a result of the above order that the formal notice of motion was filed in this case. He says that up till then the practice has been to file only a notice of objection and affidavit. Such a practice is not admitted by Mr. Baerlein and there is no evidence before me one way or the other. Mr. Wilkinson goes on to argue that this application can be distinguished from *Jobbunputra Industries v. Anandji & Sons* (1) in that an application has been filed even though it is out of time. He argues further that in any event the omission was a pure technicality, that the respondent has not been prejudiced and that justice should be done.

The material part of r. 7 of the Arbitration Rules reads:

> "Any party objecting to an award filed under s. 9 (2) of the Ordinance may, within eight weeks after notice of the filing thereof shall have been served upon the party so objecting, apply that the award may be remitted or set aside, as the case may be, and lodge his objections thereto, together with necessary copies and fees for serving the same upon the other parties interested."

In my opinion this rule contemplates two things, i.e. an application and objections. Any doubt about this would appear to be cleared up by r. 16 which is as follows:

> "All applications for the appointment or cancellation of the appointment of arbitrators or of an umpire, and all other applications under the Ordinance other than those directed by these Rules to be otherwise made shall be made by way of chamber summons supported by affidavit."

In my judgment the Rules require three documents to be filed, viz.: – (1) chamber summons, (2) affidavit and (3) objections.

I consider the document dated December 27, 1956, is a notice of motion as opposed to a chamber summons. There is a practice in this court, with which I personally do not agree, of treating motions and chamber summonses alike and all are heard in open court. This practice, in my opinion, is likely to lead to slackness. However, in the circumstances, I think it would be unfair to take exception to the notice of motion on the grounds that a chamber summons should have been filed.

It is not disputed that the notice of motion is in fact out of time and there is nothing in these Rules which specifically gives the court power to extend the time. Nor am I aware of any provision in the Arbitration Ordinance and Rules similar to s. 101 of the Civil Procedure Ordinance which provides that nothing in that Ordinance

> "shall be deemed to limit or otherwise affect the inherent power of the court to make such order as may be necessary for the ends of justice or to prevent abuse of the process of the court."

On the other hand there is no provision in the Arbitration Ordinance and Rules which limits the inherent powers of the court. In my opinion the court has power to make whatever orders may be necessary for the ends of justice. This aspect was not considered in *Jobbunputra Industries v. Anandji & Sons* (1), and, in any event, I am not bound to follow the order made therein.

Mr. Baerlein has not argued that respondent has in fact been prejudiced. It is to be observed that the notice of objection (filed within time) concludes with a prayer for similar relief as that contained in the notice of motion. Thus, on service, respondent knew what he had to answer just as well as he would have if a formal chamber summons had been served on him at the same time.

Mr. Wilkinson, who is an advocate of long experience in this court, has stated that up till now it has not been the practice to file a formal application in these matters. While there is no evidence before me in support of that statement it may well be correct. Assuming that it is correct I hasten to add that the Rules should be strictly complied with and this practice must cease forthwith.

Having regard to all the circumstances I have come to the conclusion that it is necessary for the ends of justice that this matter be heard on its merits, and it is ordered accordingly.

As regards costs, Mr. Baerlein had every right to raise this preliminary point. Applicant did not apply for leave to file out of time and the court has treated him with indulgence. Respondent will have the costs of February 5 and today in any event.

Order accordingly.

For the applicant:
PJ Wilkinson:
PJ Wilkinson, Kampala

For the respondent:
AA Baerlein
Baerlein & James, Jinja

VG Lakhani v RP Amin
[1957] 1 EA 270 (HCU)

Division:	HM High Court for Uganda at Jinja
Date of judgment:	17 June 1957
Case Number:	26/1957
Before:	McKisack CJ
Sourced by:	LawAfrica

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[1] Rent restriction – Statutory tenant – Claim for possession by landlord – Whether tenant still occupying part of premises – Rent Restriction Ordinance (*U.*).

Editor's Summary

The plaintiff landlord sued for possession of premises at Mbale on the ground that the defendant, a statutory tenant, was no longer in occupation thereof. The tenant admitted having sublet a portion of the premises but claimed to be still in occupation of two rooms. The plaintiff proved that other parties had occupied the rooms for some time past but the defendant explained that these parties were mere caretakers for him during his temporary absence at Jinja. It was established that the defendant had been resident and employed at Jinja since the beginning of 1955, that the parties occupying the rooms did not pay rent to the defendant, who had his own furniture in the rooms and he used these rooms for a few days each month when transacting business for his employers. The defendant's family also used the rooms when on holiday. The defendant claimed that having previously resided at Mbale he wished to return to

live there when his employment at Jinja was terminated. There was, however, no evidence that his employment was likely to end or that there was any offer of employment awaiting the defendant at Mbale.

Held – the evidence only established "a mere hope or chance" of the defendant's return to use the rooms as his home and there was insufficient evidence to prove the necessary "animus revertendi."

Judgment for the plaintiff.

Cases referred to:

(1) *Alimohamed Damji v. Punja Hirji Gudka*, 20 E.A.C.A. 78.

(2) *Beck v. Scholz* [1953] 1 Q.B. 570; [1953] 1 All E.R. 814.

Judgment

McKisack CJ: The plaintiff, who is the registered proprietor of a plot of land with a building thereon in Mbale, sues for possession of those premises on the ground that the defendant, who is the statutory tenant of the premises, is no longer in occupation thereof. The defendant agrees that he is a statutory tenant, but avers that he is still in occupation of part of the premises. It is not disputed that other

parts of the premises have been sublet by the defendant, but he claims that two rooms in the building remain in his own occupation.

Evidence was called for the plaintiff that the two rooms in question are now occupied by one Goganbhai, and that he had occupied them for the past eight months; before him, the occupier was one Kotecha.

The defendant's case is that his absence from Mbale is merely temporary, that Goganbhai, and, before him, Kotecha, have been occupying the rooms merely as caretakers and that those rooms are still the defendant's home. It was proved that the defendant lived in those rooms for some years up to December, 1954. He was then director of a limited company having its place of business in Mbale. And he continued to be a director of that company until it was liquidated in December, 1956. When he left Mbale at the end of 1954 he came to Jinja to take up employment with a hardware firm. In Jinja he, and his wife and seven children, live in two rooms which they have rented in that town. When he came to Jinja he installed Kotecha as caretaker living in those rooms, and after Kotecha's death Goganbhai occupied the rooms in the same capacity. Neither Kotecha nor Goganbhai pay rent to the defendant and they are in the position of licensees.

As evidence of the temporary nature of his absence from Mbale and that those two rooms are still his home, defendant points to the following facts. Firstly, he has left some furniture in them – a desk, table, bedstead, lamp, photographs, and some cooking utensils. Secondly, he visits Mbale two or three times a month for periods of two to four days each, but admits that the purpose of his visits is to attend to the business of his present employers. Thirdly, his wife and some of his children go there for holidays, and to see his wife's father, who lives in Mbale. When these visits are paid, Goganbhai vacates one of the two rooms and the defendant (or his wife and children) occupy it. The defendant also avers that, as he previously resided in Mbale for thirteen years, he would wish to live there again in the event of his present employment coming to an end. There was, however, no evidence that his present employment was likely, from any cause, to come to an end, or that he had any offer of employment awaiting him in Mbale.

On these facts I have to decide whether the defendant is entitled to the protection afforded to a statutory tenant by the Rent Restriction Ordinance (Cap. 115). It appears to be settled law that, as in the case of the English Acts, so, in the case of the Rent Restriction Ordinances in East Africa, a statutory tenant ceases to be protected if he ceases to occupy the premises in question although there is no express statutory provision to that effect (see, for example, *Alimohamed Damji v. Punja Hirji Gudka* (1), 20 E.A.C.A. 78). The circumstances of the present case are, in some respects, similar to those in *Beck v. Scholz* (2), [1953] 1 Q.B. 570, where the tenant had left furniture in the flat of which possession was claimed, and two persons were living there rent free as caretakers keeping the flat in good condition and available for occasional visits by the tenant and her husband who lived elsewhere in a house which they had purchased. The tenant slept there four or five times a year and the husband about once every two months. The county court judge refused an order for possession, holding that he was bound by authority to do so, but, on appeal, the case was remitted for the judge to determine whether the facts showed personal occupation of the flat by the tenant as a home, and it was held that it was not sufficient for this purpose merely to show that the tenant had left furniture and a caretaker and desired to retain possession because he found it convenient to resort to the premises.

In the present case the tenant pays more frequent visits to the premises of which possession is sought than did the tenant in the case I have just cited, but it is clear that they are undertaken for the purposes of

his employer’s business. And the visits of his wife are for the purposes of holidays, or of seeing her parent. These visits are not, I think, sufficient ground for saying that the defendant is occupying the premises as a home.

But it is also said by the defendant that he will go to live in Mbale if his present employment in Jinja comes to an end. Does this expectation, coupled with the other

facts with which I have dealt, establish the necessary animus revertendi? In Megarry's Rent Acts (8th Edn.), p. 190, it is said:

> "a mere hope or chance of returning as opposed to a firm intention would probably not be a sufficient animus revertendi."

As I have said, there is no evidence that the defendant intends to quit his present employment in Jinja, or that his employers intend to give him notice; nor is there evidence that he has other employment awaiting him in Mbale if he does leave Jinja. It may be that in the event of his present employment coming to an end he would go to seek other employment in Mbale, or would set up there in business on his own account, but I cannot regard that as more than a possibility, and I see no reason to suppose that, if the defendant were offered employment, or other business opportunity, in a place other than Mbale, he would not accept such offer.

On the facts of the case as a whole I have come to the conclusion that, although the case is something of a borderline one, there is only "a mere hope or chance" of the defendant returning to the Mbale premises as his home, and that he cannot be said to have a firm intention of doing so. There must accordingly be judgment for the plaintiff for possession of the premises with costs as prayed.

Judgment for the plaintiff.

For the plaintiff:
AA Baerlein
Baerlein & James, Jinja

For the defendant:
CC Patel
CC Patel, Kampala

JP Pandya v The Kampala Municipal Council
[1957] 1 EA 272 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	28 March 1957
Case Number:	38/1956
Before:	Keatinge J
Sourced by:	LawAfrica

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[1] Rates – Liability for rates – Whether statutory tenant liable – Definition of "owner" – Local Government (*Rating*) *Ordinance, s.* 3 (*U.*).

Editor's Summary

The appellant was a statutory tenant who had failed to make objections to the valuation court with the result that his name appeared in the valuation roll as liable to pay a rate based on the site value of Shs. 86,400/-. The appellant refused to pay the rates and the respondents sued him in the magistrate's court for the recovery thereof. The magistrate found that the appellant, a statutory tenant, came within the definition of "owner" in s. 3 of Local Government (Rating) Ordinance. The appellant appealed against the decision of the magistrate.

Held – a statutory tenant is not an "owner" within the definition thereof in s. 3 of the Local Government (Rating) Ordinance.

Appeal allowed.

Cases referred to:

(1) *Baker v. Turner*, [1950] 1 All E.R. 834; [1950] A.C. 401.

(2) *Keeves v. Dean*, [1924] 1 K.B. 685.

(3) *Marcroft Wagons Ltd. v. Smith*, [1951] 2 All E.R. 271; [1951] 2 K.B. 496.

(4) *Piper v. Muggleton*, [1956] 2 All E.R. 249.

Judgment

Keatinge J: The appellant was sued by the Kampala Municipal Council for site rates. The material facts are not in dispute and were set out by the learned magistrate as follows:

> "The defendant is one of four tenants of No. 1 Kampala Road. He has been a tenant since 1945; at first a yearly one, but since 1949 (when he was given a notice to quit) a statutory tenant. He failed to make objections to the valuation court in February, 1955, and his name appeared in the valuation roll as liable to pay a rate based on the site value of Shs. 86,400/-. He was sent a demand note for this amount at the end of April which he queried and he was later told that he fell within the Ordinance by virtue of the definition of "owner" in Local Government (Rating) Ordinance (Cap. 104 of the Laws), s. 3. Eventually in October he wrote, refusing to pay and claiming that he was under no legal obligation to do so."

The substantial issue in this appeal is whether the learned magistrate was right in finding that appellant, a statutory tenant, came within the definition of "owner."

The definition of "owner" in s. 3 as amended is:

> "'owner' means a proprietor whose interest in land has been registered under the Registration of Titles Ordinance, or any person who has a right to or concession over land for an indefinite period or which is renewable from time to time at the will of the occupier indefinitely, or for periods which together with the first period thereof amount in all to not less than seven years."

Appellant is not a proprietor whose interest in land has been registered under the Registration of Titles Ordinance. I think the crux of the matter is whether he is a person who has a right to or concession over land. As a statutory tenant appellant is purely the creature of statute. In *Baker v. Turner* (1), [1950] A.C. 401 at p. 436, and *Keeves v. Dean* (2), [1924] 1 K.B. 685 at p. 690, it was held that the right of a statutory tenant is merely a personal right to retain possession. He has no estate or interest in the premises such as a tenant has. And in *Marcroft Wagons Ltd. v. Smith* (3), [1951] 2 K.B. 496 at p. 501, he was held to have a statutory right of irremovability. A statutory tenant is not the owner of any interest in the property – *Piper v. Muggleton* (4), [1956] 2 All E.R. 249.

Of these authorities it would appear that a statutory tenant has no right to the land. But the definition uses the wording "a right to or concession over land." The Ordinance is silent as to the meaning of "concession." Generally speaking a statutory tenant cannot be removed from the premises and as long as that position prevails the landlord's use of the land may be restricted to some extent. Thus, it can perhaps be said that the statutory tenant has indirectly at least some control over the land. This argument may be attractive but I think it is not sound. If the building collapsed or was burnt down or otherwise destroyed the statutory tenant would have no rights whatever over the land on which the building had stood. While it has not been submitted that appellant has an "interest in land" as defined in s. 3 of the Local Government (Rating) Ordinance, I have considered the definition and in my view appellant does not come within its terms.

"Concession" is defined in Webster's New International Dictionary as a grant; especially a grant by Government or other authority over land, property, or a privilege or right to do something. The only rights or concessions which a statutory tenant may have are given to him under the provisions of the Rent Restriction Ordinance. While that Ordinance gives him a right to possession of premises, in my judgment it does not give him any right to or concession over any land. I consider the fact that a statutory tenant's occupation of premises may indirectly to some extent restrict the landlord's use of the land does not

amount to a concession to him over the land. Thus, with respect, I am unable to agree with the learned magistrate that a statutory tenant “has a right” to the property in the general sense of the word. I find that appellant does not come within the definition of owner as defined in the Local Government (Rating) Ordinance.

Accordingly, this appeal is allowed. The decree of the lower court will be set aside and appellant will have his costs here and in the court below.

Appeal allowed.

For the appellant:
CD Patel
Patel & Patel, Kampala

For the respondent:
JB Hira
JB Hira, Kampala

Re Pioneer Agencies Limited and the Advocates Remuneration and Taxation of Costs Rules

[1957] 1 EA 274 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	17 September 1957
Case Number:	30/1957
Before:	Lyon J
Sourced by:	LawAfrica

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[1] Costs – Taxation – Review of taxing officer's order – Whether court should interfere.

Editor's Summary

The taxing officer had taxing off Shs. 1,200/- from the instructions fee which appeared on plaintiffs' bill as Shs. 1,500/-. The applicant applied to the court to direct the taxing officer to re-assess the instructions fee for the plaintiffs' advocate on the grounds (*a*) that the advocate for the second defendants had agreed to Shs. 500/- as the plaintiffs' instructions fee, (*b*) that the taxing officer had acted on some mistaken principle or had not exercised his discretion judicially.

Held–

(i) the taxing officer was not bound in any way by any agreement made with the advocate for the second defendants.

(ii) the taxing officer did not act on any mistaken principle nor did he exercise his discretion without due care.

Application dismissed.

No cases referred to in judgment

Judgment

Lyon J: This is an application asking this court to direct the taxing officer to re-assess the instructions fee for plaintiffs' advocate in the suit. The relevant item 2 appeared on plaintiffs' bill as Shs. 1,500/-. The nature of the suit can be seen from the judgment of Keatinge, J., of April 26, 1957.

The taxing officer dealt with this item as follows:

> "On a perusal of the proceedings in this case and having regard to all the circumstances in the case, as also to the sum involved, I am satisfied that the fee claimed is excessive. I allow a sum of Shs. 300/- as sufficient instructions fee. Accordingly Shs. 1,200/- taxed off."

Plaintiffs' advocate, Mr. Ponda, filed an affidavit on July 6, 1957, to the full terms of which I refer. His main grounds for a review of this item are:

(*a*) that the advocate for second defendants had agreed to Shs. 500/- as Mr. Ponda's fee,

(*b*) that, although this is a question of quantum, a judge may interfere, where the taxing officer has acted on some mistaken principle or has not exercised his discretion judicially.

This is a question of quantum.

I have considered cases where review was directed – O. 65, r. 27 (41), White Book 1957, pp. 1563–4. I am unable to say that Mr. Ponda's first point in any way bound the taxing officer. The taxing officer did not act on any mistaken principle, nor did he exercise his discretion without due care. The taxing officer gave his reasons for allowing this item at Shs. 300/- only. In these circumstances I ought not to interfere. The taxing officer's order is confirmed and this application is dismissed with costs.

Application dismissed.

For the applicant:
VN Ponda
VN Ponda, Kampala

For the respondent:
ML Patel
Manubhai Patel & Son, Kampala

Muslim Sunni Jamat v Mafalda Barros
[1957] 1 EA 275 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	28 May 1957
Case Number:	3/1957
Before:	Sheridan J
Sourced by:	LawAfrica

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[1] Appeal – Period of limitation – Civil Procedure Code, s. 80 (1), (2), (*U.*).

Editor's Summary

The appellants appealed against the decision of the resident magistrate on a claim for possession of certain premises and the respondents took a preliminary objection to this appeal on the ground that it was out of time. Judgment had been delivered by the magistrate on January 10, 1956, and on February 8, 1956, the appellants applied to the magistrate's court for a copy of the proceedings. On February 21, 1956, a decree was issued which was defective since the costs had not been assessed. A formal decree was not drawn up until January 14, 1957. It was argued on behalf of the appellants that all the time between February 8, 1956, when they applied for a copy of the record and January 14, 1957, when the formal decree was extracted, should be excluded in computing the period of limitation as it did in fact take the court that length of time to provide and issue a formal decree.

Held – it was the duty of the appellants to extract a formal decree and they could not fall back on the act

of the resident magistrate in signing what purported to be a decree from which the item of costs had been omitted.

Appeal dismissed.

Cases referred to:

(1) *Alexander Morrison v. Mohamedraza Suleman Versi and Another*, 20 E.A.C.A. 26.

(2) *Francisco di Julio v. Stirling Astaldi* (*E.A.*) *Ltd*., 21 E.A.C.A. 142.

Judgment

Sheridan J: A preliminary objection has been taken to this appeal on the ground that it is out of time. Mr. Baerlein for the appellants disputes this and at the same time he makes it clear that under the proviso to s. 80 (1) of the Civil Procedure Code he is not asking for an extension of time.

The case originated in a claim by the appellants before the resident magistrate, Jinja, for possession of certain premises. Judgment was delivered on January 10, 1956. On February 8, 1956, the appellants applied to the court for a copy of the record. At that stage the appeal was in time as twenty-nine of the thirty days permitted for

appealing had elapsed. Also from that date time ceased to run until the court provided a copy of the decree and of the proceedings on which it was founded: s. 80 (2) of the Code. On February 21, 1956, a decree was issued. Unfortunately for the appellants it was a defective decree in that the costs had not been assessed. When the appeal came before me on a previous occasion I upheld a preliminary objection to the merits of the appeal being considered by my order dated August 1, 1956 (Civil Appeal No. 20 of 1956). On September 13, 1956, that is some forty-one days later, the appellants applied to the resident magistrate to tax the costs. Assessing the two periods together he would appear to be seventy days out of time. On January 14, 1957, a formal decree was drawn up. It is agreed that in accordance with the Civil Procedure Rules, O. 18, r. 7, it should bear the date of the judgment, January 10, 1956.

The argument for the appellants is that all the time between February 8, 1956, when they first applied for a copy of the record and January 14, 1957, when the formal decree was extracted should be excluded in computing the period of limitation as it did in fact take the court that length of time to provide a formal decree which could be that basis of an appeal. I find this a rather extraordinary proposition. It means that if a valid decree had been extracted on February 10, 1956, the appeal would be out of time but because the appellant mistakenly sought to appeal before the costs had been taxed and so a decree could not be drawn up, yet when he eventually realised his mistake and extracted a formal decree over a year later the appeal is competent. It was the duty of the appellant to extract a formal decree and he cannot fall back on the act of the resident magistrate in signing what purported to be a decree although the item of costs was omitted. See *Alexander Morrison v. Mohamedraza Suleman Versi and Another* (1), 20 E.A.C.A. 26. The position was different in *Francisco di Julio v. Stirling Astaldi* (*E.A.*) *Ltd*. (2), 21 E.A.C.A. 142, where the long delay in the extraction of the decree was due to pressure of work in the district court, a matter over which the appellant had no control. It was obligatory on counsel for the appellants to include in the decree the amount of the taxed costs and it was his lack of diligence in taking steps to have this done which prevents me from considering the merits of this appeal.

The appeal is dismissed with costs.

Appeal dismissed.

For the appellants:
AA Baerlein
Baerlein & James, Jinja

For the respondent:
JM Shah
Patel & Shah, Jinja

Re an Application by Mohamed Ahmed for an order of Prohibition
[1957] 1 EA 277 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	11 June 1957
Case Number:	66/1956

Before: McKisack CJ

Sourced by: LawAfrica

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[1] Prohibition – Demolition order made by district court – Whether evidence of condition of building given by "experts" admissible – Public Health Ordinance (*Cap.* 98), *s.* 68 (1) (*U.*).

Editor's Summary

In support of an application under s. 68 (1) of the Public Health Ordinance for a demolition order in respect of a building, two witnesses gave expert evidence without stating their qualifications and experience. The first of these was a district health inspector who stated that the foundations of the building concerned were unsound and that both the mud mortar walls and foundations had been attacked by termites. A superintendent of works employed by the Public Works Department supported this evidence and said that the building would sooner or later collapse. The district court of Teso made a demolition order accordingly, and the applicants, tenants of the building, applied for an order of prohibition, mainly on the grounds that neither of the two experts had stated his qualifications and experience, and that the magistrate had made no specific finding that the building constituted a nuisance within s. 59 of the Public Health Ordinance.

Held–

(i) the magistrate was entitled to assume that the district health inspector and the superintendent of works were not wholly without experience.

(ii) although the magistrate had not specifically referred to s. 59 of the Ordinance, his finding was clearly within para. (16) of that section.

(iii) the evidence was quite sufficient for a finding that the foundations ought to be replaced, and since obviously this could not be done without pulling down the building, the demolition order had been properly made.

Application dismissed.

Cases referred to in judgment:

(1) *Gatheru s/o Njagwara v. R.*, 21 E.A.C.A. 384.

Judgment

McKisack CJ: The applicants, who are tenants of a building at Kumi, applied for an order of prohibition in respect of an order made by the district court of Teso for the demolition of the building. The demolition order was made under s. 68 (1) of the Public Health Ordinance (Cap. 98), which is as follows:

> "68. (1) Where, in the opinion of the local or African authority, a nuisance exists with respect to premises which, in its opinion, are so dilapidated or so defectively constructed or so situated that repairs to or alterations of such premises are not likely to remove the nuisance, the local or African authority may apply to the court for a demolition order; and, on the court being satisfied that such nuisance exists, and that repairs to or alterations of the premises are not

likely to remove the nuisance, the court may order the owner thereof to commence to demolish the premises on or before a specified day, being at least one month from the date of issuing the order and to complete the demolition and to remove the materials which comprised the premises from the site before another specified day;

"Provided that, before any such demolition order is made, notice of the application for such order shall be served on the owner of the premises who may attend and give evidence at the hearing of the application by the court."

The demolition order is attacked on three grounds. There were two other grounds set out in the applicants' statement, but they were abandoned at the hearing. The first ground which was argued was that the evidence of a Mr. Johnstone and a Mr. Muddle as to the conditions of the building was not admissible because their qualifications and experience were not revealed to the court. Counsel for the applicants relied on *Gatheru s/o Njagwara v. R.* (1), 21 E.A.C.A. 384, in which it was held that a court must have the assistance of expert evidence when it has to form an opinion on the question whether a home-made gun is a lethal barrelled weapon, and that the competency of an expert witness should be shown before his evidence is admitted. The court in that case held that the question which the court had to decide in relation to the gun was "a point of science" within the meaning of s. 45 of the Indian Evidence Act (equivalent to s. 43 of the Evidence Ordinance of Uganda). In the instant case the questions which the District Court had to decide were, firstly, whether a nuisance existed and, secondly, whether repairs or alterations were likely to remove the nuisance. There appears to me to be a wide difference between the questions which arose in *Gatheru's* case (1) and those in the case with which I am dealing. The nuisance which the District Court found to exist was that the foundations of the building were unsound and the building was, on that account, liable to collapse. Evidence was given by Mr. Johnstone, who is a district health inspector, that he inspected the building, and the foundations in particular; he found the foundations to be so unsound that the walls could not be replaced without themselves becoming unsound; both foundations and walls were of mud mortar and had been attacked by termites. It will be seen that the evidence this witness gave was on a question that can hardly be termed abstruse, and was one that does not appear to me to require any high degree of training or knowledge before an opinion can be formed. It is true that the witness did not state his qualifications or experience, and it would be better if he had done so, but, in view of the nature of the question which the district court had to decide, I do not think his evidence can be regarded as having been improperly admitted. The other witness who gave evidence in support of the application for the demolition order is a superintendent of works in the Public Works Department, as appears from a statement made in the evidence of the district health inspector. This witness also failed to state his qualifications or experience, but his evidence was merely to the effect that there had been extensive ravages by termites and that the building would collapse sooner or later, according to the pace at which those ravages advanced, there being no means of checking their progress short of pulling up the entire foundations. I think the magistrate was entitled to assume that a superintendent of works would not be wholly without experience of buildings and building materials; nor was his evidence related to any complicated or technical question, and indeed counsel who appeared in the district court for the owner of the building does not appear to have cross-examined this witness at all.

In my opinion, therefore, *Gatheru's* case (1) is not relevant to the circumstances of the instant case, and there was sufficient evidence on which the magistrate could find that the foundations of the house were unsound and that the building was liable to collapse. Mr. D'Silva for the applicants further contended that the magistrate had not found that there existed a nuisance within the meaning of s. 59 of the Public Health Ordinance. That section sets out what are deemed to be nuisances liable to be dealt with under the part of the Ordinance containing provision for the making of demolition orders. It is true that the magistrate did not specifically refer to s. 59, and it would have been better had he done so, but his finding clearly comes within para. (16) of that section, by virtue of which any building which is so situated, constructed, housed or kept as to be unsafe is declared to be a nuisance.

The next ground on which the demolition order is attacked is that the magistrate

> "could not have been satisfied in law that the foundations could not be repaired and that demolition was the

only remedy."

The evidence of the district health inspector and the superintendent of works (which I have already summarised) was quite sufficient material upon which the magistrate

could find that the foundations of the building ought to be replaced. The magistrate observed:

> "you cannot replace in toto the foundations of a house without first pulling the house down."

This seems to me to be the statement of an obvious truth. The only evidence which was called in opposition to the application for the demolition order was that of the owner of the building. He said that he was a building contractor; that he had inspected the building and that, in his own opinion, the premises could be repaired and he was prepared to carry out those repairs. I think the magistrate was fully justified in finding that repairs were not likely to remove the nuisance, unless they were so extensive as in fact to amount to demolition followed by rebuilding.

For the foregoing reasons I consider the demolition order was properly made, and this application for an order of prohibition must be rejected. The order made on November 24, 1956, by Mr. Justice Bennett, whereby the demolition of the building in question was stayed pending the determination of the application for an order of prohibition, accordingly ceases to have effect. The demolition order required the owner of the building to begin demolition by November 26, 1956. I do not think that I have any power, upon the present application, to vary the date fixed by the magistrate, but, as s. 68 of the Public Health Ordinance requires that a court making a demolition order shall give the owner at least one month before he must commence the demolition, I presume that the local authority will be content if demolition is begun upon the expiry of one month from today.

The applicants must pay the respondent's costs.

Application dismissed.

For the applicants:
BE D'Silva
PJ Wilkinson, Kampala

For the respondent:
HSS Few (Crown Counsel, Uganda)
The Attorney-General, Uganda

George Buwanika and another v R
[1957] 1 EA 279 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	28 January 1957
Case Number:	458, 459/1956
Before:	Bennett J
Sourced by:	LawAfrica

[1] Street traffic – Omnibus carrying more passengers than permitted – Ignorance of owners – Whether knowledge an ingredient of offence – Traffic Ordinance, s. 90 (5) *and* (7) (*U.*).

Editor's Summary

The conductor of an omnibus and the appellant company as the owners were prosecuted in the district court of Masaka under s. 90 (5) of the Traffic Ordinance for carrying more passengers than the vehicle was licensed to carry. The evidence showed that when the omnibus left the depot at Masaka it was carrying the permitted maximum of forty-one passengers whereas when stopped by the police sixteen miles from Masaka it was carrying seventy-four adult passengers. There was no evidence to show that the owners or any officer of the company had authorised the conductor to carry more than the permitted number. The magistrate treated s. 90 (5) as imposing an absolute liability on the conductor and owners and convicted them. On appeal by the company it was contended that scienter or mens rea was an ingredient of the offence and that there was nothing in s. 90 to indicate that the liability of the owner for offences committed by the driver or conductor without the owner's knowledge or consent was absolute.

Held – s. 90 (5) of the Ordinance imposes an absolute prohibition and it was only necessary for the prosecution to prove that the omnibus carried more passengers than

the permitted number and that the company was the owner of the omnibus.

Appeal dismissed.

Judgment

Bennett J: The appellant company was convicted of an offence contrary to s. 90 (5) of the Traffic Ordinance and fined Shs. 500/ – .

The conductor of the omnibus in respect of which the offence is alleged to have been committed was also convicted and fined Shs. 200/-, but his appeal has been abandoned.

The facts were that an omnibus belonging to the appellant company which was licensed to carry forty-one passengers, when stopped by the police, was found to be carrying seventy-four adult passengers. There was evidence to the effect that when the bus left the depot at Masaka it was carrying only forty-one passengers; and the suggestion put forward by the prosecution was that the excess passengers had been picked up on the road between Masaka and the place where the bus was stopped by the police, which was some sixteen miles from Masaka.

There was no evidence to show that the company or its officers had authorised the conductor to carry more than forty-one passengers.

Section 90 (5) of the Traffic Ordinance reads as follows:

> "If any motor omnibus carries more persons, baggage or goods than it is licensed to carry, the conductor and the owner of such vehicle shall be liable on conviction to a fine not exceeding Shs. 1,000/-."

Sub-section (7) of s. 90 provides that:

> "For the purposes of sub-s. (5) of this section–
>
> (*a*) 'owner' shall include the owner and the agent of such owner."

Mr. Wilkinson, for the company, contends that having regard to the wording of sub-s. (5) and the definition of "owner" in sub-s. (7), the owner or agent is only responsible for the carrying of excess passengers if it can be shown that he knew or ought to have known that excess passengers were being carried.

He referred to the fact that in the definition of "owner" the expression "the agent of such owner" occurred, and argued that the words "the agent" must mean the agent responsible for the carrying of excess passengers, and ought not to be construed as including any agent. He contended that a company can only act by its servants or agents, and that the offence created by sub-s. (5) was an offence which could not be committed by a limited company. He submitted that there was nothing in the sub-s. to indicate that the legislature had intended to make a bus owner responsible for the acts of the driver or conductor committed without the owner's knowledge or consent.

He contended that since the learned magistrate treated the liability of the owner as being an absolute one, and did not direct his mind to the question as to who was responsible for the offence, the conviction was wrongly had.

In my judgment, s. 90 (5) of the Ordinance imposes an absolute prohibition against the carrying of excess passengers or goods and there is no obligation upon the prosecution to prove anything in the nature of scienter or mens rea.

In my opinion, the definition of "owner" in sub-s. (7) was intended for the purpose of extending the ordinary meaning of the word "owner" to include the agent of the owner. The definition was not designed for the purpose of restricting the meaning of the word "owner."

In the instant case all that the prosecution had to prove was that the omnibus carried more passengers than it was licensed to carry and that the appellant company was the owner of the omnibus. Both these two facts were proved to the satisfaction of the learned magistrate, and the magistrate's findings of fact have not been attacked.

The appeal is dismissed.

Appeal dismissed.

For the appellant:
PJ Wilkinson
PJ Wilkinson, Kampala

For the respondent:
AM McMullin (Crown Counsel, Uganda)
The Attorney-General, Uganda

R v Nyamitare s/o Kachumita
[1957] 1 EA 281 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	19 August 1957
Case Number:	206/1957
Before:	McKisack CJ
Sourced by:	LawAfrica

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[1] Criminal law – Indictment – Particulars of offence meaningless – Whether amendment permissible – Criminal Procedure Code, s. 259 (2) (*U.*).

Editor's Summary

In an indictment for murder, the particulars of offence were confined to the name of the accused followed by the place and date of the alleged offence. It was contended that those particulars were meaningless and so radically defective that the court was not entitled to allow an amendment to give them a meaning.

Held – the test is whether the amendment can be made without injustice having regard to the merits of the case; and since the amendment would not alter the substance of the offence charged and it was clear that the offence alleged against the accused was murder and nothing else, amendment of the particulars would be ordered.

Order accordingly.

No cases referred to in judgment

Judgment

McKisack CJ: The particulars of offence set out in this indictment are clearly defective, since there is no statement of any act or omission on the part of the accused, and this is certainly a most remarkable defect. There is merely the name of a person following the date and place of the "offence." But the statement of offence is "murder contrary to section 183 of the Penal Code." It is submitted for the defence that as this radical defect in the particulars renders them meaningless, the court cannot order an amendment which would supply a meaning. If it were not for the statement of offence (which is also, of course, a part of the indictment), I should be inclined to agree. But, since the word "murder" appears in the statement of offence, and since the particulars in an indictment for murder are not required to say more than that the accused, at a specified date and place, murdered the person in question, I think it proper for the court to order amendment by inserting the word "murdered." Section 259 (2) of the Criminal Procedure Code confers wide powers of amendment similar to those contained in the Indictments Act, 1915, s. 5. The test is whether the amendment can be made "without injustice," having regard to the merits of the case. The authorities cited in Archbold (33rd Edn.), at p. 54, show that an amendment may not properly be made where it alters the substance of the offence charged. But in the present case, having regard to the statement of offence, I do not think that the defence can have been left in any doubt that the act charged against the accused on the specified date, at the specified place, and in respect of the specified person, was murder and nothing else. I do not consider that there has been injustice to the accused, extraordinary though this omission has been. I must therefore decline to quash the indictment and I order its amendment by insertion of the word "murdered" in the particulars between the words "Province" and the word "Yowana."

Order accordingly.

For the Crown:
MJ Starforth (Crown Counsel, Uganda)
The Attorney-General, Uganda

For the accused:
MP Vyas

MP Vyas, Kampala

RB Sirdaw v the New Asiatic Insurance Co Ltd and another
[1957] 1 EA 282 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	18 September 1957
Case Number:	731/1956
Before:	McKisack CJ

Sourced by: LawAfrica

[1] Insurance – Policy containing arbitration clause for determining amount of damage – Whether insured obliged to obtain award before suing his insurers.

Editor's Summary

The plaintiff sued for Shs. 42,500/- damage by fire to a building he owned. The insurance was effected with the first defendant which had several months before the fire issued a policy in respect of the building. The second defendant was the insurance agent through whom the plaintiff arranged the business including payment of premium. After the fire there were discussions between the parties regarding the amount of the damage and the first defendant obtained an assessment of the damage. No agreement was reached and ultimately the first defendant repudiated any liability on the ground that the premium for the policy had not been paid. The plaintiff then sued the first defendant as insurer and, in the alternative, sued the second defendant who had been instructed to pay the premium to the first defendant. By the time the case came before the court for trial, the parties had agreed that (*a*) the first defendant should admit liability on the policy and that the action against the second defendant should be dismissed and (*b*) that the court should decide who should pay the costs of the second defendant, and also whether the first defendant was bound by an award already made by an arbitrator as to the amount of the damage and who should pay the costs of the argument in respect of the points upon which the decision of the court was sought.

The plaintiff claimed that under a condition in the policy it was incumbent on him to obtain an award as to damage before suing. This condition read

> "If any difference arises as to the amount of any loss or damage such difference shall independently of all other questions be referred to the decision of an arbitrator. . . ."

The first defendant contended that, in the circumstances of the case, the condition was inapplicable.

Held – it was necessary for the plaintiff to obtain the award as a condition precedent to his action, the award was binding and there would be judgment for the plaintiff for Shs. 42,500/- against the first defendant with costs including the costs of the arbitration and award.

Judgment for the plaintiff.

Cases referred to:

(1) *Woodall v. Pearl Assurance Company, Ltd.*, [1919] 1 K.B. 593.

(2) *Heyman v. Darwins Ltd.*, [1942] 1 All E.R. 337.

(3) *Jureidini v. The National British & Irish Millers Insurance Co., Ltd.*, [1915] A.C. 499.

Judgment

McKisack CJ: This action arises out of a fire which damaged a building belonging to the plaintiff and insured by the first defendant (to whom I shall refer as "the insurance company"). The second defendant is a firm of insurance agents. The insurance company issued a policy of fire insurance in respect of the

building on May 4, 1955. The fire which damaged the building occurred on August 13, 1955. The plaintiff had arranged payment of the premium for the insurance through the second defendant.

The insurance company repudiated liability, and the plaintiff sued the company to recover Shs. 42,500/-, the amount of the damage to the building. The second defendant was sued in the alternative, since the ground upon which the insurance company repudiated liability was that the premium for the policy had never been paid. In their written statements of defence both defendants denied all liability.

When the case came on for trial the issues had been narrowed by reason of agreement having been reached between the parties on certain points. These are set out in the document marked Exhibit 1 and are to the following effect:

1. The insurance company admits liability on the policy.
2. The case against the second defendant is to be dismissed.
3. The following questions are to be decided by the court:
   (*a*) The costs of the second defendant;
   (*b*) Whether the insurance company is bound by an award already made by an arbitrator as to the amount of the damage to the insured building;
   (*c*) Costs of, and incidental to, argument on the question contained in para. (*b*) above.
4. If the court holds that the arbitrator's award is binding on the insurance company, then judgment is to be entered for the plaintiff for the amount of the award with costs against the insurance company, including costs of the arbitration and award.
5. If the court does not so hold, then the amount of the damage is to be referred to arbitration in accordance with condition 18 of the insurance policy, and thereafter judgment to be entered for the plaintiff for the amount so awarded with costs (but excluding the costs of the previous arbitration).

In view of the agreement reached on the foregoing points, no evidence was called at the trial but correspondence between the parties (and their advocates) was put in (Exhibits 2 and 3). The insurance policy (Exhibit 4) and the arbitrator's award (Exhibit 5) were also put in.

I shall deal first with the question whether the insurance company is bound by the award of the arbitrator (Mr. I. S. Gill), who assessed the damage at Shs. 42,500/-, Mr. Nazareth for the plaintiff contends that by reason of condition 18 in the policy it was incumbent on the plaintiff to obtain an arbitrator's award as to the amount of the damage before he instituted proceedings. Mr. Phadke for the insurance company argued that condition 18 was inapplicable. That condition reads as follows:

18. If any difference arises as to the amount of any loss or damage such difference shall independently of all other questions be referred to the decision of an arbitrator, to be appointed in writing by the parties in difference, or if they cannot agree upon a single arbitrator to the decision of two disinterested persons as arbitrators, of whom one shall be appointed in writing by each of the parties within two calendar months after having been required so to do in writing by the other party. In case either party shall refuse or fail to appoint an arbitrator within two calendar months after receipt of notice in writing requiring an appointment, the other party shall be at liberty to appoint a sole arbitrator, and in case of disagreement between the arbitrators, the difference shall be referred to the decision of an umpire who shall have been appointed by them in writing before entering on the reference, and who shall sit with the arbitrators and preside at their meetings. The death of any party shall not revoke or affect the authority or powers of the arbitrator, arbitrators or umpire respectively; and in the event of the death of an arbitrator or umpire, another shall in each case be appointed in his stead by the party or arbitrators (as the case may be) by whom the arbitrator or umpire so dying was appointed. The costs of the reference and of the award shall be in the discretion of the arbitrator, arbitrators or umpire making the award. And it is hereby expressly stipulated and declared that it shall be a condition precedent to any

right of action or suit upon this policy that the award by such

> arbitrator, arbitrators or umpire of the amount of the loss or damage if disputed shall be first obtained.

It is common ground that, despite the repudiation of liability by the insurance company, the arbitration condition did not cease to have effect. This is in accordance with the decision in *Woodall v. Pearl Assurance Company Ltd*. (1), [1919] 1 K.B. 593. But I have to decide whether it was applicable in the circumstances existing at the time the plaintiff sought to put it into effect.

The wording of the first sentence of condition 18 is, it is to be noted, "If any difference arises as to the amount of any loss or damage . . ." The condition, therefore, is not so wide as that in the policy which was the subject of the decision in *Woodall v. Pearl Assurance Company Ltd.* (1) (which I have referred to above) or as that of the arbitration clause which was considered in *Heyman v. Darwins, Ltd.* (2), [1942] 1 All E.R. 337. In neither of the last-mentioned cases was the condition or clause limited to a dispute as to the amount of damage, but extended to any question touching the liability of the company (as in *Woodall's* case (1)) or to any dispute:

> "in respect of this agreement or any of the provisions herein contained or anything arising hereout"

(as in *Heyman's* case (2)). Condition 18 is worded in the same way as that in a fire policy which was considered in *Jureidini v. The National British and Irish Millers* (3), [1915] A.C. 499. Mr. Phadke for the insurance company placed great reliance on this case, which bore several points of resemblance to the one now before me. In that case there was a fire insurance policy in respect of goods which were damaged by fire, and the insurance company had repudiated liability on the ground that the plaintiff had himself set fire to the premises containing the goods and that the claim was a fraudulent one. A clause in the policy said that, if the claim was fraudulent or the damage was occasioned by any wilful act, then all benefit under the policy was to be forfeited. The policy also contained, as I have said, an arbitration clause which was to the same effect as the one I now have under consideration, and was thus restricted to disputes as to the amount of the loss or damage. In addition to the defence that the claim was fraudulent and that the fire was occasioned by the plaintiff himself, there was the further defence that the plaintiff had not complied with the arbitration clause. The trial judge entered judgment for the plaintiff, the jury having found that the plaintiff did not set fire to the premises in which the goods were and did not make a fraudulent claim. One of the grounds on which the insurance company appealed was that the judge was wrong in holding that the action was maintainable, having regard to the provisions of the arbitration clause. It was held by the House of Lords that the repudiation of the claim on a ground going to the root of the contract precluded the company from pleading the arbitration clause as a bar to an action to enforce the claim.

Mr. Phadke argued that the circumstances of the instant case were closely parallel to those of the *Jureidini* case (3). But I agree with Mr. Nazareth that there are two important distinctions between the two cases. Firstly, in the instant case we do not have the position that the insurance company is saying that the plaintiff cannot sue because he has not first obtained an arbitration award. And, secondly, the correspondence between the parties reveals that there had been discussion as to the amount of the damage and that agreement had not been arrived at.

It appears from the correspondence that the insurance company had taken steps to obtain an assessment of the damage. In a letter dated September 30, 1955, from plaintiff's advocates to the insurance company there occurs the following passage:

> "When the fire was reported to you, you appointed Mr. Howells of Radford, Howells & Partners, to assess the damage and our client agreed to accept his assessment.
>
> "Mr. Howells carried out the assessment a few days later, i.e. some five weeks ago. Shortly after he had done

so another valuation was made by a member of Messrs. Inglis, McGuiness & Wilkinson. Our client has no knowledge why this was done."

Then on October 4, 1955, the insurance company wrote to plaintiff's advocates as follows:

> "It is entirely up to the company and the assessor – in this case, Mr. Folkes – to appoint one or more persons for assessment. Mr. Folkes has already received another assessment report from Messrs. Inglis, McGuiness & Wilkinson and, I understand, he has had some discussions with your clients on first of October. The matter of valuation is still the subject of discussions between the assessor and your clients. The company, however, wants the recommendations of the surveyor and may or may not decide to admit liability on the ground of non receipt of consideration or any other ground."

In a letter dated October 14 from the insurance company to plaintiff's advocates criticism was made of an estimate obtained from an architect as being excessive, and the letter went on to say that an assessor

> "met the insured but after long discussions he was not willing to come to any sort of compromise in the matter."

A later passage in this letter says that a figure having been suggested by the assessor "your clients, however, refused this approach by Mr. Folkes" (the assessor). There are also other letters relating to discussions between the parties as to the amount of the damage which I need not quote, since I think it is already clear that there was, in the words of condition 18, "a difference as to the amount of the loss or damage." The earliest of these letters referring to the existence of a difference between the parties as to the amount of the damage is dated September 30, 1955, but at that date the company had already indicated to the plaintiff that they were repudiating the claim on the ground that the premium had not been paid; this was in the company's letter of September 16, 1955, in which they say

> "In view of the premium having not been received we cannot proceed with consideration of the claim, which please note."

It thus appears that, side by side with their repudiation of liability, the insurance company was enquiring into the amount of the damage and, through their agents, discussing it with the plaintiff. The correspondence sufficiently indicates that there was a difference of opinion between the parties as to the proper assessment of the damage. In this respect the circumstances appear to me to be quite different from those in *Jureidini's* case (3). In *Heyman's* case (2) Viscount Simon considered the decision in *Jureidini's* case (3) and pointed out that in the latter case their Lordships had not all rested their decisions on precisely the same ground; he concludes by saying that Lord Parmoor (who was one of the judges who delivered an opinion in that case)

> "says expressly that no difference had arisen as regards matters which could come for decision under the arbitration clause and that consequently the clause had no application. It is on this second ground that I think the majority of the House should be regarded as having decided the appeal."

In the instant case, as I have said, the position is quite different.

I find therefore that it was necessary for the plaintiff to obtain an arbitrator's award as a condition precedent in suing the insurance company. The plaintiff followed the procedure laid down in condition 18 and the insurance company, having declined to appoint an arbitrator within the stipulated time, a sole arbitrator was duly appointed by the plaintiff. His award is not attacked by the insurance company on the ground of misconduct or on any other ground. The company simply says that the plaintiff had no power to appoint any arbitrator because condition 18 was inapplicable. The question whether his award, which, as I have found, was duly delivered in accordance with condition 18, is binding upon the parties, does not, I think, present any difficulty, and, indeed, Mr. Phadke has not sought to show that the parties can go behind the award. Condition 18 is an agreement to submit a difference to arbitration, and the provisions of the Arbitration Ordinance (Cap. 21) apply. One of those provisions is that

> "the award to be made by the arbitrators or umpire shall be final and binding on the parties and the persons claiming under them respectively,"

unless a different intention is expressed (s. 4 and schedule, para. 8). No different intention is expressed in the policy, and I therefore find that the award is binding.

There will accordingly be judgment for the plaintiff for Shs. 42,500/- against the first defendant (the insurance company) with costs, including the costs of the arbitration and award.

Judgment for the plaintiff.

For the plaintiff:
JM Nazareth, QC and *SC Gautama*
Shah & Gautama, Nairobi

For the first defendant:
VV Phadke
Parekhji & Co, Kampala

For the second defendant:
AG Mehta
Patel & Mehta, Kampala

Mahendra Maganlal Pandya v R
[1957] 1 EA 286 (HCT)

Division:	HM High Court for Tanganyika at Dar – Es – Salaam
Date of judgment:	25 September 1957
Case Number:	285/1957
Before:	Mahon J
Sourced by:	LawAfrica

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[1] Criminal law – Plea – Recording of – Criminal Procedure Code, s. 203 (*T.*).

[2] Criminal law – Power to convict of kindred offence – Criminal Procedure Code, s. 186 (*T.*).

Editor's Summary

The appellant, together with two others, was charged in two counts with housebreaking and stealing. His answer to the first count was

> "I waited outside as lookout. I did not go inside. I waited while the other two went inside."

His answer to the second count was “I assisted in stealing these bangles and the money.” These answers were accepted and entered as pleas of guilty and thereafter the prosecutor presented the facts to the court and the appellant agreed that they were correct. The magistrate then observed that the facts did not reveal a technical housebreaking, that a charge of entering a dwelling house with intent to steal was more appropriate and went on to say

> “. . . under s. 186 C.P.C. I substitute a charge in count one so far as accused two and three are concerned of entering a dwelling house with intent to steal contrary to s. 295 Penal Code.”

The magistrate did not, in fact, substitute a fresh charge but proceeded to sentence the third accused, the appellant, to eight months imprisonment on each count, the sentences to run concurrently. The appellant appealed against his conviction and sentence, the substantial points argued at the appeal being: firstly, that the appellant’s answer to the charge contained in the first count did not amount to a plea of guilty and should not have been entered as such; secondly, that the magistrate erred in convicting on the first count of the charge by taking for granted a plea of guilty when he (the magistrate) later substituted a fresh offence under s. 295 of the Penal Code; thirdly, that the appellant had not pleaded to the offence under s. 295 which was substituted later; and fourthly, that the appellant’s answer to the second count did not amount to a plea of guilty.

Held–

(i) the appellant's answer to the charges were in the circumstances properly entered as pleas of guilty.

(ii) no offence under s. 295 had been substituted; the magistrate in fact convicted the appellant of this offence although he (the appellant) was not charged with it, and the magistrate was entitled to do so, having regard to the provisions of s. 186 of the Penal Code.

(iii) as no fresh charge under s. 295 was substituted there was no question of the appellant being required to plead again.

(iv) a plea of guilty to the second count was properly entered, there being nothing to suggest that the appellant did not fully understand the charge.

R. v. Yonasani Egalu and Others, 9 E.A.C.A. 65, distinguished.

Appeal dismissed.

Cases referred to in judgment:

(1) *R. v. Yonasani Egalu and Others*, 9 E.A.C.A. 65.

Judgment

Mahon J: The appellant, together with two others, was charged in two counts with housebreaking and stealing. His answer to the charge contained in the first count was:

> "I waited outside as lookout. I did not go inside. I waited while the other two went inside."

While his answer to the charge contained in the second count was: "I assisted in stealing these bangles and the money." These answers were accepted and entered as pleas of guilty. Thereafter the prosecutor presented the facts to the court and the appellant agreed that they were correct as did the second accused. The learned magistrate then made the following observation:

> "The facts do not reveal that there was a technical housebreaking since the accused did not enter through a space designed for a particular purpose. A charge of entering a dwelling house with intent to steal is more appropriate and under s. 186 C.P.C. I substitute a charge on count one so far as accused two and three are concerned of entering a dwelling house with intent to steal contrary to s. 295 Penal Code."

He then proceeded to sentence the appellant and the second accused to eight and four months' imprisonment respectively on each count, the sentences to run concurrently. The appellant now appeals against his conviction on each count and also against sentence.

Section 186 Criminal Procedure Code does not deal with the substitution of one charge for another. It reads thus:

> "When a person is charged with an offence under one of ss. 294 to 298 of the Penal Code and the court is of the opinion that he is not guilty of that offence but that he is guilty of any other offence under another of the said sections, he may be convicted of that other offence, although he was not charged with it."

What the learned magistrate meant to say, I think, was that he proposed, relying on this section, to convict on the first count of the offence of entering a dwelling house with intent to steal and that is what he actually did. There is nothing on the record to suggest that a fresh charge was substituted.

The first point in the memorandum of appeal is that the appellant's answer to the charge contained in the first count did not amount to a plea of guilty and should not have been entered as such. The appellant clearly admitted that he participated in the commission of this offence. He waited outside as a lookout while the other two went inside. He was, therefore, an aider or abettor and as such was properly charged with actually committing the offence: s. 22 Penal Code. His admission of his participation was in the circumstances properly entered as a plea of guilty.

The second ground of appeal is that the learned magistrate erred in convicting and sentencing the appellant on count one of the charge by taking for granted a plea of guilty when the learned magistrate substituted the offence under s. 295. As I have already indicated no offence was substituted. If s. 186 of the Criminal Procedure Code was applicable there was no necessity to ask the appellant to plead again. The court was empowered to convict of a kindred offence if it was of the opinion that the appellant was not guilty of the housebreaking charge. It is argued, however, that s. 186 only applies where evidence is taken. No authority was cited in support of this proposition and I know of none. Any doubt which I may have entertained on the matter is resolved by a consideration of the manner in which the court may form its opinion. It can certainly do so from evidence which is before it and I see no reason why it should not also do so from an accused person's plea of guilty considered with those facts presented by the prosecutor with which the accused person agrees. That seems to be what happened here. The appellant agreed in his plea that he participated in the housebreaking and the facts as presented and with which he agreed, left no doubt as to this. The magistrate, however, was of the opinion that there had not been a breaking but that there had been an entering with intent. He, therefore, convicted the appellant of this offence, although he was not charged with it and in my view he was entitled to do so, having regard to the provisions of s. 186.

As regards the third ground of appeal, I have already said that no charge was, in fact, drawn up under s. 295 Penal Code and that being so there was no question of the appellant pleading to such a charge.

To turn now to the second count and the points taken in the fourth and fifth paragraphs of the memorandum of appeal, the first point taken by learned counsel for the appellant, if I understand him correctly, is that the appellant's plea should have been recorded either by the word "guilty" or by the words "not guilty." I cannot agree with the first part of this submission because it would offend against the provisions of 203 (2) Criminal Procedure Code which requires that when an accused person admits the truth of a charge his admission shall be recorded as nearly as possible in the words used by him.

It is contended in regard to this count also that the appellant's answer to the charge did not amount to a plea of guilty and attention has been drawn to *R. v. Yonasani Egalu and Others* (1), 9 E.A.C.A. 65 at p. 67, where the following passage occurs in the judgment:

> "Finally we would observe that in view of the nature of the charge and the paucity of particulars given in the information we regard the pleas of the second, third and fourth appellants as being somewhat scantily recorded. In any case in which a conviction is likely to proceed on a plea of guilty (in other words when an admission by the accused is to be allowed to take the place of the otherwise necessary strict proof of the charge beyond reasonable doubt by the prosecution) it is most desirable not only that every constituent of the charge should be explained to the accused, but that he should be required to admit or deny every constituent and what he says should be recorded in a form which will satisfy an appeal court that he fully understood the charge and pleaded guilty to every element of it unequivocally. In the present instance no particulars at all were given in the information as to how the accused had made themselves accessories."

With respect I agree, but the facts in that case are very different from those in the instant case. In that case the information contained two counts for murder and being accessories after the fact and no particulars at all were given in the information as to how the accused made themselves accessories. In the instant case ample detail of the property said to have been stolen is set out in the particulars of offence and the appellant admitted that he assisted in stealing the bangles and money. That being so a plea of guilty was properly entered, there being nothing to suggest that the appellant did not fully understand the charge. I am satisfied that there was no irregularity in the procedure adopted but even if there was, no failure of justice ensued because the appellant having heard the facts as related by the prosecutor, which

facts

left no doubt whatever of his guilt, agreed that they were correct. Section 346 Criminal Procedure Code would therefore apply.

To turn now to the question of sentence, it is contended that there was no justification for awarding the appellant a more severe sentence than that meted out to the second accused. Before this court would be entitled to interfere, however, it would have to be shown that the sentence was manifestly excessive in view of the circumstances, or wrong in principle, and in my opinion it was neither. The magistrate gives reasons for differentiating between these two persons and no ground for interfering has been established.

For the reasons given the appeal is dismissed.

Appeal dismissed.

For the appellant:
MR Rattansey
Mahmud N Rattansey & Co, Dar-es-Salaam

For the respondent:
BAG Target (Crown Counsel, Tanganyika)
The Attorney-General, Tanganyika

Re Sejpal Limited
[1957] 1 EA 289 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	1 February 1957
Case Number:	49/1956
Before:	Lewis J
Sourced by:	LawAfrica

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[1] Company – Winding-up – Petition of holder of promissory notes – Whether petitioner a "creditor" within Companies Ordinance, s. 170 (*U.*).

Editor's Summary

Sejpal Ltd. in 1956 gave the petitioner eight promissory notes which the petitioner endorsed to a bank. The notes having been dishonoured on the due dates were returned to the petitioner who then petitioned for a winding-up and claimed to be a holder in due course and thus entitled to sue on the notes. Sejpal Ltd. opposed the petition on the ground that the petitioner was not a holder in due course.

Held – the question which the court had to decide was not whether the petitioner was a holder in due

course and entitled to sue on the notes but whether the petitioner was a "creditor" within s. 170 of the Companies Ordinance to whom the company was indebted in a sum presently due and who was thereof entitled to present a petition; that the petitioner was such a creditor and was entitled to an order for winding-up of the company.

Order accordingly.

Cases referred to:

(1) *Nika Singh & Sons v. Ganeshilal Lal Singh & Co*., 18 K.L.R. 3.

(2) *Daniel Meyer* (*Export*) *Ltd. v. Makolai Cycle Mart*, Uganda High Court Civil Appeal No. 81 of 1954 (unreported).

(3) *Re Paris Skating Rink Company* (1877), 5 Ch.D. 959.

(4) *Re Montgomery Moore Ship Collision Doors Syndicate* (1903), 72 L.J. Ch. 624.

(5) *Re Steel Wing Company Limited*, [1921] 1 Ch. 349.

(6) *Re Olathe Silver Mining Co*. (1884), 27 Ch.D. 278.

(7) *Re Masonic & General Life Assurance Company* (1885), 32 Ch.D. 373.

(8) *Moor v. Anglo-Italian Bank* (1879), 10 Ch.D. 681.

(9) *Re Borough of Portsmouth Tramways Company*, [1892] 2 Ch. 362.

Judgment

Lewis J: This is a petition by V. J. Sangani Ltd. for an order that Sejpal Ltd. be wound up by the court under the provisions of the Companies Ordinance. The petitioner was opposed by the company on the ground that the petitioner, not being the holder in due course of the notes, was not therefore entitled to sue thereon and so could not prove his debt.

The facts can be briefly stated. In 1956 Sejpal Ltd. made eight promissory notes in favour of the petitioner. These notes were endorsed to the National Bank of India Ltd., and dishonoured on the due dates. The notes were returned to the petitioner who now claims to be the holders in due course and so entitled to sue thereon in his own name.

It was argued by Mr. C. E. Patel on behalf of Sejpal Ltd. that, as the notes had not been endorsed back to the petitioner, he was not a holder in due course as defined in the Bills of Exchange Ordinance. I was referred to *Nika Singh & Sons v. Ganeshilal Lal Singh & Co.* (1), 18 K.L.R. 3, and *Daniel Meyer* (*Export*) *Ltd. v. Makolai Cycle* Mart (2), Uganda High Court Civil Appeal No. 81 of 1954 (unreported). In both these cases it was held that where promissory notes are endorsed payable to order mere possession resulting from delivery by the endorsee is not sufficient to enable the person to whom it was delivered to sue upon it in his own name. In other words, the position of the petitioner appears to be that of an equitable assignee, unable to sue in his own name.

Mr. Shah, who appeared for the petitioning creditor, argued that as he was in possession of the notes he was a holder in due course and so entitled to sue. Alternatively, he could still sue for goods sold and delivered. On this latter point Mr. C. E. Patel argued that the claims to sue on the contracts merged in the notes. The arguments addressed to me were doubtless of great interest on the question as to whether the petitioner had a title to sue on the notes. However, that is not the question before the court. The matter for decision is whether the petitioner is a person to whom the company is indebted in a sum of money presently due and so entitled to present a petition. The persons who can petition are mentioned in s. 170 of the Companies Ordinance, which re-enacts the provisions of s. 170 of the Companies Act, 1929. Under that Act it was held that the following could petition: – The assignee of a debt whether at law or in equity (*Re Paris Skating Rink Co*. (3) (1877), 5 Ch. D. 959; and Re *Montgomery Moore Ship Collision Doors Syndicate* (4) (1903), 72 L.J. Ch. 624); and assignee of part of a debt (*Re Steel Wing Co.* (5), [1921] 1 Ch. 349); the depositary by way of mortgagor of debentures to bearer, the interest on which was in arrear (*Re Olathe Silver Mining Co*. (6) (1884), 27 Ch. D. 278); the executor of a deceased life policy holder in respect of an admitted claim, a sum by the policy made payable out of the assets (*Re Masonic & General Life Assurance Co.* (7) (1885), 32 Ch.D. 373); and a secured creditor (*Moor v. Anglo-Italian Bank* (8) (1879), 10 Ch.D. 681), even after obtaining the appointment of a receiver in an action (*Re Borough of Portsmouth Tramways Co*. (7), [1892] 2 Ch. 362.

I think it is clear from the authorities which I have cited that the petitioner is a creditor entitled to present a petition and so, therefore, the order may go.

As to costs; as neither counsel addressed me on the only material and relevant point for consideration I make no order as to costs.

Order accordingly.

For the petitioner:

RK Shah
RK Shah, Kampala

For the company:
CE Patel
CE Patel, Kampala

Nanji Khodabhai v Sohan Singh and another
[1957] 1 EA 291 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	5 September 1957
Case Number:	307/1955
Before:	Keatinge J
Sourced by:	LawAfrica

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[1] Bill of exchange – Promissory note – Agreement to lend with promissory notes as collateral security – Whether giving of notes discharges liability under agreement.

[2] Bill of exchange – Promissory note – Cheque taken by bank in payment of notes dishonoured on clearance – Whether acceptance of cheque constitutes payment.

[3] Bill of exchange – Promissory note – Payment by cheque subsequently dishonoured – Endorser of notes notified of dishonour four days after due date of payment – Whether notice given within reasonable time – Bills of Exchange Ordinance, s. 49 (12) *and s.* 50 (1) (*U.*).

[4] Pleading – Promissory note – Waiver of notice to endorser of dishonour not pleaded – Whether necessary to plead.

Editor's Summary

On January 22, 1955, by an agreement in writing, the plaintiff, a money-lender, lent Shs. 10,000/- for ninety days to the first defendant, payment of which the second defendant guaranteed. As collateral security the first defendant drew in favour of the plaintiff two promissory notes of Shs. 5,000/- each, both of which the second defendant endorsed. On April 25, 1955, the date the notes were due, the first defendant drew a cheque upon Barclays Bank, Nairobi, for Shs. 10,000/- which was given to and taken by the Standard Bank of South Africa, Kampala, as payment of the notes. These facts were admitted by the parties. The judge also found that notice of dishonour was not given to the second defendant until April 29, 1955. The parties agreed that the issues were (*a*) whether both defendants were by giving the notes relieved of liability under the agreement, (*b*) whether acceptance by the Standard Bank of the cheque for Shs. 10,000/- amounted in law to payment of the notes and (*c*) if not, did both defendants receive notice of dishonour of the promissory notes within a reasonable time. The Bills of Exchange Ordinance, s. 49 (12) (*a*) provides that in the absence of special circumstances notice is not deemed to

have been given within a reasonable time unless

> "when the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill."

The plaintiff's case was that he had to await the fate of the cheque before, if at all, giving notice of dishonour and that the delay in giving notice of dishonour was excused by s. 50 (1) of the Ordinance as a circumstance

> "beyond the control of the party giving notice and not imputable to his default, misconduct or negligence."

It was also submitted that the second defendant had waived notice of dishonour. The second defendant objected that waiver of notice had not been pleaded.

Held–

(i) the notes having been given as collateral security only, the defendants were not relieved of liability under the agreement.

(ii) although the bank on April 25 treated the notes as paid and so stamped them, acceptance of the cheque was only payment if the cheque was duly honoured and so did not in this case, constitute payment.

(iii) since there were no special circumstances in this case, notice should have been given to the second defendant on April 26, 1955.

(iv) since the cheque was accepted by the bank as agent for the plaintiff without the knowledge and consent of the second defendant, and such acceptance had the effect of giving time to the first defendant, it was possible that the second defendant had been prejudiced.

(v) whilst there was some evidence as to waiver of notice, waiver should have been specifically pleaded so that the second defendant could cross-examine on that issue or call evidence thereon, and accordingly the court would not consider this point.

(vi) since the plaintiff had failed to give due notice of dishonour, the liability of the second defendant on both the notes and the antecedent agreement were discharged.

K. J. Raichura v. Uganda Chemists Limited, E.A.C.A. Civil Appeal No. 61 of 1956 (unreported), and *Goldfarb v. Bartlett*, [1920] 1 K.B. 639, followed.

Judgment for the plaintiff against the first defendant.

Cases referred to:

(1) *Drake v. Mitchell*, 102 E.R. 594.

(2) *Wegg Prosser v. Evans*, [1895] 1 Q.B. 108.

(3) *Jadva Karsan v. Harnam Singh Bhogal*, 20 E.A.C.A. 74.

(4) *Pearce v. Davis*, 174 E.R. 125.

(5) *Re Hone* (*a bankrupt*). *Ex parte The Trustee v. Kensington Borough Council*, [1950] 2 All E.R. 716.

(6) *Cordery v. Colville* (1863), 32 L.J. C.P. 210.

(7) *K. J. Raichura v. Uganda Chemists Limited*, E.A.C.A. Civil Appeal No. 61 of 1956 (unreported).

(8) *Goldfarb v. Bartlett & Kremer*, [1920] 1 K.B. 639.

Judgment

Keatinge J: The plaintiff in this case is a money-lender and on June 22, 1955, he gave a loan of Shs. 10,000/- to first defendant for a period of ninety days on the terms set out in an agreement marked A. The second defendant guaranteed repayment of the loan. On the same day by way of collateral security first defendant drew two pro-notes for Shs. 5,000/- each in favour of plaintiff and both pro-notes were endorsed by second defendant.

The following facts were agreed between the parties:

(1) Plaintiff did lend Shs. 10,000/- to first defendant.

(2) The terms of the loan were as set out in the agreement marked A attached to the plaint.

(3) Second defendant guaranteed repayment of the loan to plaintiff.

(4) First defendant gave two pro-notes in favour of plaintiff for 5,000/- each dated January 22, 1955 as collateral security for payment of the loan.

(5) Second defendant guaranteed payment of these pro-notes.

(6) On due dates (April 25, 1955) first defendant gave a cheque marked D drawn on Barclays Bank, Nairobi, for 10,000/- in favour of Standard Bank of South Africa Ltd., Kampala, for the purpose of payment of the pro-notes.

(7) The cheque was dishonoured on April 28, 1955.

Having heard the evidence for plaintiff – no evidence being called for either defendant – I also find the following two facts:

(8) Notice of dishonour was given to second defendant on April 29, 1955. (This is now conceded by Mr. Caldwell for second defendant.)

(9) No notice of dishonour was given to second defendant between April 25, 1955, and April 29, 1955.

The following issues were agreed:

(*a*) Did the giving of the pro-notes relieve first and second defendants from liability under the agreement marked A?

(*b*) Did acceptance of the cheque by the Standard Bank of South Africa Ltd. amount in law to payment of the pro-notes? and

(*c*) If not, did both defendants receive notice of dishonour of the pro-notes within a reasonable time?

As regards issue (*a*) it is agreed that plaintiff accepted the pro-notes as collateral security. In *Drake v. Mitchell* (1), 102 E.R. 594, Grose, J., said:

> "The note or bill not having been accepted as satisfaction for the debt, could only operate as a collateral security; and though judgment has been recovered on the bill, yet not having produced satisfaction in fact, the plaintiff may still resort to his original remedy on the covenant."

This case, *Drake v. Mitchell* (1) was followed in *Wegg Prosser v. Evans* (2), [1895] 1 Q.B. 108, and in *Jadva Karsan v. Harnam Singh Bhogal* (3), 20 E.A.C.A. 74. On these authorities I hold that the giving of the two pro-notes did not relieve first and second defendants of their liability under the agreement.

The next issue (*b*) is whether the acceptance of the cheque by the Standard Bank of South Africa Ltd. amounted in law to payment of the pro-notes. Plaintiff at the material time had an account with this bank and he had handed the two pro-notes to the bank for collection. The bank accepted the cheque on April 25, 1955, and credited plaintiff's account. The bank also stamped the pro-notes "paid." When the cheque was dishonoured on April 28, 1955, the bank debited plaintiff's account. I have no doubt the bank on April 25, 1955, treated the pro-notes as if they had been paid but for reasons which will appear later I think this makes no difference to the position in law.

"A cheque, unless dishonoured, is payment when it is cleared." Byles on Bills of Exchange (21st Edn.), p. 24. In *Pearce v. Davis* (4), 174 E.R. 125, it was held that the acceptance by a creditor of a cheque in his favour, drawn by his debtor, operates as payment, unless dishonoured. That case and others was considered in *Re Hone* (*a bankrupt*). *Ex parte The Trustee v. Kensington Borough Council* (5), [1950] 2 All E.R. 716. The relevant facts were that on October 4, 1949, H was served with a demand note for rates in respect of the six months from October 1, 1949, to March 31, 1950. On November 3, 1949, H signed a cheque for the appropriate amount payable to the rating authority, which received it on the same day and gave a receipt for the money. On November 4, 1949, at 11 a.m. the cheque was paid into the authority's bank. During the afternoon of November 4 H filed her petition in bankruptcy and at or about 3 p.m. a receiving order was made against her and she was adjudicated bankrupt. The cheque in question was honoured by H's bank on November 8, 1949. It was held, *inter alia*, that the rating authority was not paid until the money was collected on November 8, 1949. Harman, J., said in his judgment:

> "It is quite true the council could not have sued for the money, having accepted the cheque, until the cheque was dishonoured. Nevertheless, it was not till the council collected it that it was paid."

In that case the council treated the cheque as being paid on November 3, 1949, as the bank did in the present case, in that it (the council) issued a receipt that day. I find, therefore, that in this case, the acceptance of the cheque by the bank on April 25, 1955 did not in law amount to payment.

The last of the agreed issues (*c*) is: If not (not payment in law) did both defendants receive notice of dishonour of the pro-notes within a reasonable time. Mr. Phadke, for plaintiff, submitted and it was not disputed that in the circumstances of this case first defendant was not entitled to notice of dishonour.

As regards second defendant the pro-notes became due for payment on April 25, 1955. Having held that they were not paid on that day, it seems to me that second defendant was then entitled to notice of dishonour. In fact he was not so notified until April 29, 1955. By s. 49 (12) of the Bills of Exchange Ordinance (Cap. 217, Vol. V of the Laws, p. 3044) the notice may be given as soon as the bill is dishonoured, and must be given within a reasonable time thereafter. And, under the provisions of s. 49 (12) (*a*) in the absence of special circumstances, notice is not deemed to have been given within a reasonable time unless:

“where the person giving and the person to receive notice reside in the same

> place (as in this case), the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill."

Thus, in the absence of special circumstances second defendant should have been given notice of dishonour on April 26, 1955. In this case I can find no "special circumstances" within the meaning of s. 49 (12).

Mr. Phadke has argued that as plaintiff had to wait till the return of the cheque till he could give notice of dishonour the delay is excused under s. 50 (1) of the Bills of Exchange Ordinance. The material part of s. 50 (1) reads:

> "Delay in giving notice of dishonour is excused when the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct or negligence."

In this case, the delay was due to the plaintiff through his agent, the bank, accepting the cheque from first defendant. There is no evidence that the cheque was accepted with the knowledge or consent of second defendant. In my opinion the delay was in fact due to a circumstance within the control of plaintiff through his agent in that the bank was not obliged to accept the cheque and in my judgment s. 50 (1) does not apply.

Mr. Phadke has further argued that in any event second defendant was not entitled to notice of dishonour because he later waived it. There certainly is strong evidence of waiver. Mr. Caldwell has replied that waiver must be pleaded and that has not been done in this case.

In Byles (21st Edn.) it is stated at p. 282:

> "A subsequent promise, when used as a waiver of notice, must also be specially pleaded; but a subsequent promise to pay, when used as evidence of the fact of notice, need not."

Waiver was not pleaded in this case. It was not put in as an issue and when in arguing the question of which side should start, Mr. Caldwell said the only point on which evidence need be lead was whether notice of dishonour had been given within a reasonable time, Mr. Phadke made no comment. In fact Mr. Phadke did not raise the question of waiver until his final address. At the time the evidence of a subsequent promise to pay was being given, I consider Mr. Caldwell was entitled to regard it as being led as evidence of the fact of notice. However, I am mindful of the case of *Cordery v. Colville* (6) (1863), 32 L.J. C.P. 210, in which it was held that if there is no plea of waiver, the court will add such a plea. The following passage appears in the judgment of Byles, J.:

> "It is true that a prior dispensation or subsequent waiver of notice should be pleaded, but the Common Law Procedure Act enables and obliges the court to amend the record, wherever an amendment is necessary in order to decide the real question in controversy between the parties. The practical consequence is, that in almost every case proof of a promise to pay cures the want of notice of dishonour."

This point was very recently considered by the Court of Appeal for Eastern Africa in *K. J. Raichura v. Uganda Chemists Limited* (7), E.A.C.A. Civil Appeal No. 61 of 1956 (unreported), but I think it unlikely that the court had been referred to *Cordery v. Colville* (6). In delivering the judgment of the court Briggs, Ag. V.-P., said:

> "For the respondents it was submitted that failure to give notice of dishonour was excused by reason of waiver (s. 50 (2) (*b*)). I think that certain passages of the evidence might go at least some distance towards substantiating this. But waiver of notice was never pleaded, and having regard to the terms of O. VI, r. 5, r. 7 and r. 8 and O. VIII, r. 18, I think this issue could never have been relied on without filing a reply and expressly raising it. In fact it was never raised in the High Court, but only before us. I do not overlook the

point that in Uganda leave to file a reply is necessary, and that, although this point might have determined the whole result of the case, leave to raise it might in theory have been

> refused. So long as the rules require certain matters to be pleaded by way of reply, I think there should be an absolute right to reply if the party so desires. The rules in this respect require amendment."

With great respect I agree with the learned Acting Vice-President's comment as to the rules requiring amendment.

In this case the court was not asked for leave to file a reply nor did the plaintiff seek leave to amend his pleadings. Had waiver been pleaded or had it even been agreed as an issue it is possible that the cross-examination of the witnesses called might have taken a different line and also Mr. Caldwell might have called evidence to rebutt the allegation. After considerable thought I have come to the conclusion that, at any rate in the circumstances of this case, it would be unfair and unjust to allow plaintiff to raise a plea of waiver at this stage.

Although in my judgment the plaintiff's case against second defendant on the pronotes must fail the question of whether he can succeed on the agreement marked A remains.

In my opinion the effect of the acceptance of the cheque by plaintiff's agent was to give time to first defendant without any notice to second defendant. Thus it is possible that by this action plaintiff prejudiced the position of second defendant as against first defendant. In *K. J. Raichura v. Uganda Chemists Limited* (7) (*supra*) the Court of Appeal for Eastern Africa approved the rule in *Goldfarb v. Bartlett* (8), [1920] 1 K.B. 639. As I understand it the court agreed to the rule as stated by appellants' counsel which was in the following terms:

> "If a negotiable instrument is given in support of an antecedent obligation, and by reason of failure to give notice of dishonour, the liability on the negotiable instrument as such is discharged, the antecedent obligation is similarly discharged in the sense that there can be no claim on the original contract."

Thus, in this case I must find that not only is the liability of second defendant on the pro-notes discharged but that also there can be no claim against him on the agreement.

Accordingly the suit against second defendant is dismissed with costs. As regards first defendant, although a defence was filed no further steps were taken by way of defence and there can be no doubt as to his liability. Judgment as prayed will be entered against first defendant.

Judgment for the plaintiff against first defendant.

For the plaintiff:
VV Phadke
Parekhji & Co, Kampala

The first defendant did not appear and was not represented.

For the second defendant:
RA Caldwell
PJ Wilkinson, Kampala

R (*Ex parte* Vere Chamberlain Harvey-Brain) v Robert Confait

[1957] 1 EA 296 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	9 August 1957
Case Number:	95/1957
Before:	Sir Newnham Worley P, Briggs JA and Bacon JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Seychelles – Lyon, C.J

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[1] Costs – Order made against private prosecutor – Whether appeal therefrom competent – Criminal Procedure Code (*Cap*. 77), *s.* 151, *s.* 152, *s.* 153, s. 301 *and s.* 302 (*Sey.*) – *Courts Ordinance* (*Cap.* 75), *s.* 22 (*Sey.*).

[2] Costs – Order made against private prosecutor – Respondent (*accused*) *legally aided – Whether order for costs properly made – Criminal Procedure Code* (Cap. 77), *s.* 151 (*Sey.*) – *Legal Aid* (*Criminal Proceedings*) *Ordinance* (*Cap.* 89) (*Sey.*).

Editor's Summary

The appellant, as private prosecutor in a case of perjury in which the respondent (accused) who was legally aided was acquitted, was ordered by the Supreme Court to pay the sum of Rs. 250 as costs of the proceedings. The appellant appealed against the order. The two main questions argued on appeal were: firstly, whether there was a right of appeal against an order for costs under s. 151 of the Criminal Procedure Code; and secondly, whether the order for costs against the appellant was properly made in view of the fact that the respondent was legally aided.

Appeals in criminal matters to the Court of Appeal for Eastern Africa from the Seychelles are normally governed by s. 22 of the Courts Ordinance and s. 301 and s. 302 of the Criminal Procedure Code. However, s. 153 of the Criminal Procedure Code also creates a separate and special right of appeal in certain cases, namely, against an order awarding costs "under the last preceding section." The "last preceding section" in fact refers to s. 152, but the only reference to costs in that section is a provision that they shall not be given against the Crown, whereas s. 151 deals at length with costs.

Held –

(i) the legislation should not be presumed to have created a right of appeal against orders which could not be made. Therefore, the words "under the preceding section" in s. 153 would be ignored and the section would be treated as creating a right of appeal against orders made under s. 151.

(ii) the circumstances of the case made it impossible that the respondent or counsel on his behalf should have incurred any disbursements against which he (the respondent) could be indemnified. Therefore the order was wrongly made.

Per curiam – ". . . there is no power in law under s. 151 to order a private prosecutor to pay costs to the Crown or to any person other than the accused. It should be noted that the Crown, in paying the costs of an accused person's defence does not do so as his agent."

Appeal allowed.

No cases referred to in judgment

Judgment

Briggs JA: read the following judgment of the court: This was an appeal from an order of the Supreme Court of Seychelles, sitting in original jurisdiction, whereby the appellant, as private prosecutor in a case of perjury, was ordered to pay the sum of Rs. 250 as costs of the proceedings, on which the accused was acquitted.

The appeal was allowed and the order for payment set aside, for the following reasons.

Appeals in criminal matters from the Seychelles to this court are normally governed

by s. 22 of the Courts Ordinance (Cap. 75) and s. 301 and s. 302 of the Criminal Procedure Code (Cap. 77). Section 22 rather suggests that they can only be brought under those sections, but that is not the case. Section 153 of the Criminal Procedure Code creates a separate and special right of appeal in certain cases, namely, against an order awarding costs "under the last preceding section." These words give a little difficulty, since the only reference to costs in s. 152 is a provision that they shall not be given against the Crown. Section 151 on the other hand deals at length with costs. It would be clear, if one could deal only with general probabilities, that, when the legislature said "under the preceding section," it really meant s. 151 and not s. 152. We are informed from the bar that s. 152 or its equivalent was introduced into the old Criminal Procedure Code as an amendment between the old equivalents of s. 151 and s. 153, but s. 153 was through oversight not amended to refer correctly to s. 151. Since, however, the Code was re-enacted in 1952 and the previous alleged oversight as to the wording of s. 153 was not rectified, we thought we could not rely on this. The legislature should not be presumed to have created a right of appeal against orders which could not be made. It therefore seemed to us that this was one of the rare, but still recognised, class of cases where, since no rational meaning could be assigned to certain words in a statute, the statute should be read as if they were not there. Maxwell (10th Edn.), 236. We ignored the words "under the preceding section" and treated s. 153 as creating a right of appeal against orders made under s. 151. We therefore heard the appeal.

The alleged perjury was charged as having been committed by one Robert Confait while giving evidence in his own defence on a serious criminal charge. The general effect of the evidence was that the appellant had instigated and abetted his offence. It seems that the Attorney-General having declined to prosecute Confait for perjury, the appellant as a "private prosecutor" applied for and obtained the issue of a summons in the magistrate's court at Victoria. Thereafter the proceedings were transferred into the Supreme Court, and on the appellant's information and application a further summons was issued on February 22, 1957. By February 25 it had been set down for hearing on April 18. The appellant is a master-mariner and soon after February 25 he sailed on a voyage to Chagos, intending to be back before April 18. On April 18 the appellant had not returned and there was no news of him or his ship. At Confait's request counsel was assigned to defend him as a poor person and the trial was postponed to April 25. Before that date the appellant managed to convey to the court a message that he was detained by bad weather and did not expect to reach Victoria until May 7. The court recorded a plea of not guilty and postponed the case to May 13. By that date the appellant had still not returned. He finally arrived on May 21, and we accepted that the delay was due entirely to bad weather and damage done to his ship.

On May 13 no other prosecutor appeared and the court acquitted and discharged Confait. It also made the order for costs appealed from. It is not quite clear whether the learned Chief Justice intended to order that the Rs. 250 should be paid to Confait or to the Crown. He referred to the fact that Confait was being represented under the provisions for legal aid and said "There is no reason why Government should be called upon to pay any costs." We thought that on either basis the order must have been wrongly made. Under the Legal Aid (Criminal Proceedings) Ordinance (Cap. 89) the only fees payable to counsel would be those payable by Government. It would, indeed, have been professional misconduct to accept any fee from Confait. The circumstances made it impossible that Confait or counsel on his behalf should have incurred any disbursements. Confait had therefore incurred no costs against which he could be indemnified. On the other hand there is no power in law under s. 151 to order a private prosecutor to pay costs to the Crown, or to any person other than the accused. It should be noted that the Crown, in paying the costs of an accused person's defence, does not do so as his agent.

A further and more difficult question was raised on the appeal, under the proviso to s. 151 (2) that

"no such order shall be made if the judge . . . shall consider that the private prosecutor had reasonable grounds for making his complaint."

It was contended for the appellant that in the circumstances of this case the proviso precluded the making of any order against the appellant, at least at that date. It was not necessary to decide this issue and we express no opinion on it.

Appeal allowed.

For the Crown:
C Brookes (Crown Counsel, Kenya)
The Attorney-General, Kenya

The appellant and respondent did not appear and were not represented.

For the respondent:
Mrs. MC Collet Victoria

Laurenti Busolo s/o Makumba v R
[1957] 1 EA 298 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	14 August 1957
Case Number:	96/1957
Before:	Sir Newnham Worley P, Briggs and Bacon JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Rodwell, Ag. J

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[1] Criminal law – Procedure – Trial with assessors – Discharge of one assessor during hearing on ground of personal interest – Trial a nullity – Criminal Procedure Code s. 3 (3) *and s.* 294 (1) (*K.*).

Editor's Summary

The appellant was convicted of murder by the Supreme Court of Kenya and he now appealed against his conviction. During the trial it came to the notice of the court that one of the assessors had taken part in a search instituted by the police for articles which might become real evidence at the trial and was present when a spear shaft and a panga were found. The assessor concerned was thereupon discharged and the trial proceeded with the other two assessors. In so doing, the trial judge relied on the provisions of s. 294 (1) of the Criminal Procedure Code. In England s. 15 of the Criminal Justice Act, 1925, is in wider terms than s. 294 (1) and for the Crown it was contended, in support of the conviction, that it would be wide

enough to cover this case and that it should be applied to an assessor by analogy under the provisions of s. 3 (3) of the Criminal Procedure Code.

Held – the words of s. 294 (1) refer only to the physical absence (or perhaps to the physical condition) of the assessor and cannot be extended to cases where the assessor, though physically present and able to act, is disqualified from acting as assessor by reason of special circumstances such as personal interest in the case and the trial was therefore a nullity.

Appeal allowed, conviction and sentence set aside and a re-trial ordered.

Cases referred to:

(1) *Joseph Kabui v. R.*, 21 E.A.C.A. 260.

(2) *Cherere Gikuli v. R.*, 21 E.A.C.A. 304.

August 14. The following judgment was read by direction of the court.

Judgment

The appellant was convicted of murder by the Supreme Court of Kenya. We allowed his appeal and set aside the conviction and sentence, being of opinion that his trial was a nullity for the following reasons. We accordingly ordered that he be tried before another judge and that he be remanded in custody pending such trial.

One of the assessors had taken part in a search instituted by the police for articles which might become real evidence at the trial, and was present when a spear shaft and panga were found. This came to the knowledge of the court in the course of evidence by a witness who identified the articles, which subsequently became exhibits. The court thereupon discharged that assessor and continued the trial with the other two. In so doing, the learned judge relied on the provisions of s. 294 (1) of the Criminal Procedure Code. We considered that the words of that sub-section refer only to the physical absence (or perhaps to the physical condition) of the assessor and cannot be extended to cases where the assessor, though physically present and able to act, is disqualified from acting as assessor by reason of special circumstances such as personal interest in the case. The decisions of this court in *Joseph Kabui v. R.* (1), 21 E.A.C.A. 260, and *Cherere Gikuli v. R.* (2), 21 E.A.C.A. 304, appear to support this view. In England s. 15 of the Criminal Justice Act, 1925, is in wider terms than s. 294 (1). It was submitted that it would be wide enough to cover this case, and that it should be applied to an assessor by analogy under the provisions of s. 3 (3) of the Criminal Procedure Code. We disagreed with the second part of this submission, since s. 294 appears to be, and to be intended to be, exhaustive on the powers of the court in these circumstances. We therefore express no opinion as to the first part of the submission.

Appeal allowed, conviction and sentence set aside and a re-trial ordered.

The appellant in person.

For the appellant:
DB Kohli, Kisumu

For the respondent:
C Brookes (Crown Counsel, Kenya)
The Attorney-General, Kenya

Purshottam Kurji v OPA Laboratories Limited
[1957] 1 EA 299 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	4 November 1957
Case Number:	87/1956
Before:	McKisack CJ

Sourced by: LawAfrica

[1] Costs – Action in High Court – Judgment for Shs. 1,885/- *– Whether sufficient reason for awarding costs on High Court scale – Civil Procedure Ordinance, s.* 11 (7) (*U.*).

Editor's Summary

The applicant having obtained judgment in the High Court for the sum of Shs. 1,885/- with costs applied to the court under s. 11 of Civil Procedure Ordinance to determine whether the costs should be allowed on the High Court scale or the subordinate court scale. The amount which the applicant had claimed in his plaint was Shs. 3,991/84 which exceeded the jurisdiction of a subordinate court. The action was upon a building contract and the sum claimed was made up of four items relating to work done and materials supplied. The applicant succeeded on two of these items, totalling Shs. 1,885/- and failed on the other two items. The judgment contained no direction that costs should be on the High Court scale. The applicant contended that the case was complex and therefore a proper case of an order under s. 11 (7) of the Ordinance.

Held – there was no sufficient reason for allowing the costs on the High Court scale.

Application dismissed.

Cases referred to:

(1) *Globe Cinema v. Norman Godinho*, 6 U.L.R. 133.

(2) *Lovejoy v. Cole*, [1894] 2 Q.B. 861.

(3) *Finch v. Telegraph Construction and Maintenance Co., Ltd.*, [1949] 1 All E.R. 452; [1949] 65 T.L.R. 153.

Judgment

McKisack CJ: This is an application, by a plaintiff who obtained judgment in the High Court for the sum of Shs. 1,885/- with costs, to determine whether the costs should be allowed on the High Court scale or the subordinate court scale. The amount which the plaintiff had claimed in his plaint was Shs. 3,991/84. The sum claimed therefore exceeded the jurisdiction of a subordinate court. The action was upon a building contract, and the sum claimed was made up of four items relating to work done and materials supplied. The plaintiff succeeded on two of these items, totalling Shs. 1,885/-, and failed on the other two items. The judgment (which was written by myself and delivered by another judge) contained no direction that costs should be on the High Court scale.

This application is brought under s. 11 of the Civil Procedure Ordinance (Cap. 6), the relevant provisions of which are as follows:

> "11 (1). Suits and proceedings of a civil nature shall be instituted in the High Court save that in any case wherein the subject matter in dispute is capable of being estimated at a money value and that value does not exceed Shs. 2,000 the suit or proceedings shall be instituted in a subordinate court.
>
> "(7). Notwithstanding the other provisions of this section, any suit may be instituted in the High Court which could have been commenced in a subordinate court and then in every such case, if the plaintiff shall recover a sum less than Shs. 400, he shall not be entitled to any costs, and if he shall recover a sum of Shs. 400 or upwards, but not exceeding the pecuniary limit of the subordinate court's jurisdiction, he shall not be entitled to any more costs than he would have been entitled to if the action had been brought in the subordinate court, unless in any such action a judge of the High Court certifies that there was reason for bringing the action in that court, or unless the judge thereof in chambers shall by order allow costs on the High Court scale."

Mr. Baerlein for the plaintiff argues that this is a proper case for an order to be made under the provisions of the concluding words in sub-s. (7). He does not contend that the plaintiff is *entitled* to costs on the High Court scale, but that the discretion conferred by sub-s. (7) upon a judge in chambers can, and should, be exercised in his favour. He concedes that, in determining whether this is a suit "which could have been commenced in a subordinate court," the test is the amount recovered and not the amount claimed. This is in accordance with the decision in *Globe Cinema v. Norman Godinho* (1), 6 U.L.R. 133, and with *Lovejoy v. Cole* (2), [1894] 2 Q.B. 861, in which a similar decision was reached in relation to County Court jurisdiction. Consequently, the suit to which this application relates is one which could have been commenced in a subordinate court.

Mr. Baerlein argues that there were reasonable grounds for claiming the amount set out in the writ and, for that reason, it is proper to allow the High Court scale. He also says that the case was one of some

complexity. Mr. Keeble for the defendant does not dispute the complexity, but says that the mere fact that the amount claimed exceeded Shs. 2,000/- is not sufficient.

Sub-s. (7) of s. 11 of the Uganda Civil Procedure Ordinance bears a resemblance to the provisions of sub-s. (1) and sub-s. (3) of s. 47 of the County Courts Act, 1934. That section of the English Act provided for a limitation as to costs similar to that contained in s. 11 (7) of our Ordinance (but with different pecuniary limits) and further provided that the High Court or a judge thereof could make an order allowing costs on the High Court scale if satisfied–

> "(*a*) that there was sufficient reason for bringing the action in the High Court; or
>
> (*b*) that the defendant or one of the defendants objected to the transfer of the action to a county court."

On the question of what is "sufficient reason" for the purposes of making such an order, the Annual Practice, 1957, in the commentary on that section, cites only one authority, *Finch v. Telegraph Construction and Maintenance Company, Limited* (3), [1949] 65 T.L.R. 153. The relevant passage in the judgment of Devlin, J., is as follows:

> "With regard to the costs, in my view the plaintiff's expectation that he would recover damages to an amount exceeding £50, which was negatived by the medical evidence, was not a "sufficient reason" within the meaning of s. 47 (3) of the County Courts Act, 1934, for bringing the action in the High Court, and the plaintiff is, therefore, only entitled to costs on the county court scale."

Sub-s. (1) of s. 47 of the County Courts Act, 1934, was amended in 1955, not only by the alteration of the pecuniary limits and in certain other respects not material to the question I have to decide, but also by the introduction of a proviso that

> "this section shall not affect any question as to costs if it appears to the High Court or a judge thereof . . . that there was reasonable ground for supposing the amount recoverable in respect of the plaintiff's claim to be in excess of the amount recoverable in an action commenced in the county court."

No proviso of this nature has been introduced into our Ordinance. Section 11 (7) of our Ordinance contains no pointer as to how the discretion conferred by the concluding words of the sub-section should be exercised, and, in the absence of any such guide, I do not think that the discretion should be construed as being so wide as to be exerciseable merely on the ground that the plaintiff had reasonable ground for thinking he would recover a sum in excess of Shs. 2,000/-. In the suit out of which this application arises, I do not think that there was no justification for the items included in the plaintiff's claim on which he failed, but I took the view that the evidence did not support them. The situation is thus somewhat similar to that in *Finch v. Telegraph Construction and Maintenance Co., Ltd.* (3), to which I have already referred.

As to the ground that the case was one of some complexity, I am unable to regard it as one of such a degree of complexity that, had the amount claimed not exceeded Shs. 2,000/-, it would nevertheless have been proper to institute the suit in the High Court.

In my view, therefore, there is no sufficient reason for allowing the High Court scale, and this application must be dismissed with costs.

Application dismissed.

For the applicant:
AA Baerlein

For the respondent:
OJ Keeble

For the plaintiff:
Baerlein & James, Jinja

For the defendant:
Hunter & Greig, Kampala

Venonah Margaret Bray v Raymond Jack Bray
[1957] 1 EA 302 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	18 February 1957
Case Number:	1/1957
Before:	Bennett J
Sourced by:	LawAfrica

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[1] Practice – Leave to appeal out of time – Mistake of legal adviser – Discretion of court to extend time – Rule 3, *Uganda* (*Non-Domiciled Parties*) *Divorce Rules,* 1953.

Editor's Summary

The applicant applied for leave to appeal out of time against the dismissal of her petition for dissolution of marriage. The grounds upon which this application was made were that the applicant's advocates had misinterpreted r. 3 of the Uganda (Non-Domiciled Parties) Rules, 1953, and had appealed to the Court of Appeal for Eastern Africa when they should have appealed to a bench of two judges of the High Court.

Held – in all the circumstances the discretion of the court ought to be exercised in favour of the applicant and accordingly leave to appeal would be given.

Application allowed.

Cases referred to in judgment:

(1) *Gatti v. Shoosmith*, [1939] 3 All E.R. 916.

Judgment

Bennett J: This is an application for leave to appeal against the dismissal of a wife's petition for dissolution of marriage by Lewis, J., on November 26, 1956.

Rule 3 of the Uganda (Non-Domiciled Parties) Divorce Rules, 1953, Legal Notice No. 294 of 1953, provides that "an appeal shall lie within thirty days or such time as the court may order." Thirty days having elapsed since the date of the decree, leave of the court is now sought to lodge an appeal.

It is conceded by Mr. Gray, for the respondent, that r. 3 gives the court discretion to extend the period within which an appeal must be lodged, but Mr. Gray contends that the court ought not to exercise its discretion in the applicant's favour.

The facts are as follows. Within ten days of the dismissal of the petition, the applicant's advocates gave notice of appeal to the respondent's advocates, but that notice related to an intended appeal to the Court of Appeal for Eastern Africa. When the appeal came on for hearing the Court of Appeal held that it

had no jurisdiction to entertain the appeal.

The grounds upon which this application is made are that the applicant's advocates misinterpreted r. 3 of Legal Notice No. 294 of 1953, and appealed to the Court of Appeal for Eastern Africa when they should have appealed to a bench of two judges of the High Court nominated and approved under r. 2 of Legal Notice No. 294 of 1953.

Mr. Gray, in opposing the application, contended that the High Court had no jurisdiction to entertain the appeal for the reason that r. 3 provides that an appeal lies only against a decree or order which would be appealable if it had been made in proceedings under the Divorce Ordinance (Cap. 112). He argued that since cruelty alone is not a ground for divorce under the Divorce Ordinance it follows that a decree dismissing a petition brought on the grounds of cruelty only is not appealable.

It seems to me that this argument rests upon a confusion between a decree and the grounds on which a decree is made. The decree against which it is sought to appeal is a decree dismissing a petition for dissolution of marriage, and such a decree is appealable by virtue of s. 39 of the Divorce Ordinance.

The fact that a petition on the grounds of cruelty only could not be brought under the Divorce Ordinance seems to me to be neither here nor there.

Mr. Gray has also contended, on the assumption that there is a right of appeal, that the court ought not to exercise its discretion in the applicant's favour since the inadvertence of a party's advocate is not a proper ground for allowing an appeal out of time. He has referred me to an unreported judgment of Lewis, J., in Uganda High Court Civil Case No. 628 of 1954, in which leave to appeal out of time was refused.

There are a great many English and East African authorities on the question as to the circumstances in which it is proper for a court to grant leave to appeal out of time when the failure to appeal within time arises from some mistake or inadvertence on the part of the would-be appellant's legal advisers.

Formerly the trend of authority in England appears to have been against granting leave to appeal in such circumstances. In recent years, however, the trend of authority has been in the opposite direction.

I think the modern rule is stated in the judgment of Sir Wilfred Greene, M.R., in *Gatti v. Shoosmith* (1), [1939] 3 All E.R. 916, as follows:

> "What I venture to think is the proper rule which this 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 that 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, the discretion should be exercised."

In that case the Court of Appeal exercised its discretion in the appellant's favour, the failure to appeal within time having arisen owing to the misunderstanding of the effect of a rule by the managing clerk of the appellant's solicitors.

Whichever way I exercise my discretion in this case, hardship will be caused to the unsuccessful party.

The respondent has been aware of the applicant's intention to appeal since December 6, 1956, when a notice of appeal to the Court of Appeal for Eastern Africa was served upon his advocates. If leave to appeal is granted I do not consider that the respondent will lose any advantage that he might have had had an appeal to this court been lodged within the proper time. The petition was filed as recently as September 25, 1956. There is no reason to suppose that the hearing of the appeal will be long delayed.

In all the circumstances it appears to me that the case is one where the discretion of the court ought to be exercised in the applicant's favour.

Accordingly leave to appeal is granted to the applicant. The memorandum of appeal is to be filed within seven days of the date of this order. Costs of this application will abide the result of the appeal.

Application allowed.

For the applicant:
RA Caldwell
PJ Wilkinson, Kampala

For the respondent:
G Gray
Hunter & Greig, Kampala

Gangabai Harji v Bhoja Keshav
[1957] 1 EA 304 (HCT)

Division:	HM High Court for Tanganyika at Dar-Es-Salaam
Date of judgment:	15 May 1957
Case Number:	8/1957
Before:	Biron AgJ
Sourced by:	LawAfrica

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[1] Rent restriction – Jurisdiction of High and Subordinate Courts and Rent Restriction Board – Rent Restriction Ordinance, 1951, *s.* 32 (3) (*T.*).

Editor's Summary

The plaintiff as landlord claimed possession of certain premises which the defendant was holding over in occupation after his contractual tenancy had been terminated. The issue between the parties was whether the premises were residential premises within the meaning of the Rent Restriction Ordinance, 1951, and accordingly subject to the provisions thereof, or whether they were business premises and therefore exempted from such provisions by virtue of Government Notice No. 62 cited as the Rent Restriction (Exemption) (No. 2) Order, 1955.

The preliminary point taken by the defendant was that the High Court had no jurisdiction to deal with the suit but that the proper forum was the Rent Restriction Board. The plaintiff conceded that the board had jurisdiction to deal with the case but asserted that the High Court also had concurrent jurisdiction and should, therefore, exercise such jurisdiction.

Held –

(i) the legislature intended that all questions which could be determined by a Rent Restriction Board should be referred to such board and deliberately ousted the jurisdiction of the courts on such questions.

(ii) the court was not satisfied that it could entertain these proceedings and accordingly ordered the suit to be transferred to the Dar-es-Salaam Rent Restriction Board.

Per curiam – ". . . even if I were to hold that this court has jurisdiction to entertain this present suit, I would still consider a Rent Restriction Board to be a more suitable forum for this particular issue, which to my mind is peculiarly within the province of such a board. Accordingly, even if I felt I had jurisdiction to deal with this case I would still consider it incumbent on me to transfer it to the local Rent Restriction Board."

[Editorial Note:

(1) The relevant Ordinance in force is the Rent Restriction Ordinance, 1951, as amended by the Rent Restriction (Amendment) Ordinance, 1954, and the relevant section of the Ordinance is s. 32 which appears in the 1950–54 Edition of the Laws of Tanganyika as s. 33.

(2) The other preliminary point raised by the defendant was that the subordinate court was more fitted to hear the case than the High Court. Though the learned trial judge discussed this question in some detail, he refrained from deciding it in view of his ruling on the first preliminary point.]

Order that the suit be transferred to the Dar-es-Salaam Rent Restriction Board.

Cases referred to:

(1) *Fernandes v. Joseph & Son*, 8 E.A.L.R. 99.

(2) *Kuwathkhan v. Ahmed Adam*, Tanganyika High Court Civil Appeal No. 1 of 1949 (unreported).

Judgment

Biron AgJ: The plaintiff, as landlord, is claiming from the defendant, as tenant, possession of his premises comprising house No. 74, Msimbazi Street, Dar-es-Salaam.

Two preliminary points have been raised by learned leading counsel for the defendant; the first challenges the court's jurisdiction to deal with the suit and the second, which is alternative to the first, is an assertion that the proper court to deal with the suit is the subordinate court and not the High Court.

It is common ground that the premises, the subject of the suit, are what is popularly known as mixed premises, combining business and residential premises. For the plaintiff it is contended that the premises are business premises and the defendant contends that they are residential premises. By Government Notice No. 62 published on February 25, 1955, and cited as the Rent Restriction (Exemption) (No. 2) Order, 1955, made under s. 1 (2) (*c*) of the Rent Restriction Ordinance, 1951, as amended by the Rent Restriction (Amendment) Ordinance, 1954, all business premises in the territory are exempted from the provisions of the Ordinance as from January 1, 1957. It is common ground that the contractual tenancy between the two parties has been terminated by a proper notice to quit and that the defendant is holding over in occupation of the premises. The defendant's submission is that he is entitled to do so as a statutory tenant under the Rent Restriction Ordinance, 1951, as it is contended on his behalf that the premises are residential premises.

It is agreed by learned counsel for both parties that the main, if not the only issue, between the parties is whether the premises in question are a dwelling house or whether they are business premises as defined in the Rent Restriction Ordinance above cited. Learned counsel further agree that this issue is to be determined in accordance with the definition in s. 2 (2) of the Ordinance which reads:

> "For the purposes of this Ordinance, premises shall be deemed to be used as a dwelling house when such premises, although used by the tenant partly for business, trade or professional purposes or for the public service, are used by him mainly as a dwelling house; and conversely premises shall be deemed to be used for business, trade or professional purposes or for the public service when such premises, although used by the tenant partly as a dwelling house, are used by him mainly for business, trade or professional purposes or for the public service."

Learned leading counsel for the defendant submits on the first point for decision that this court has no jurisdiction to entertain the suit but that the proper forum is the Rent Restriction Board. Section 32 of the Ordinance (re-numbered as s. 33 in the 1950–54 edition of the Laws) reads as follows:

> "(1) The court shall have jurisdiction to deal with any offence under this Ordinance and with any proceedings for recovery of possession or arrears of rent or permission to levy distress affecting premises to which this Ordinance applies for the bringing of which in the court leave has been granted by a board in accordance with para. (s) of sub-s. (1) of s. 7 of this Ordinance, notwithstanding that by reason of the amount of penalty, claim or otherwise the case would not but for this provision be within the jurisdiction of the court. The court may order that any costs incurred by a party be taxed on the scale applicable to proceedings before a board.
>
> "(2) If a person takes proceedings under this Ordinance in the High Court which he could have taken in the court, the High Court may entertain the proceedings and shall have the same powers as the court under this Ordinance but such person shall, if successful, only be entitled to recover costs on the subordinate court scale, or the scale applicable to proceedings before a board, as the High Court may order.
>
> "(3) The High Court and the court shall conform to this Ordinance in any proceedings arising under this Ordinance between landlords and tenants, and in the case of any proceedings affecting premises to which this Ordinance applies, the High Court or the court unless satisfied that under this section it may entertain such proceedings, shall transfer the same to a board having jurisdiction under para. (s) of sub-s. (1) of s. 7 and the board may either dispose of such proceedings or grant the necessary leave to bring such proceedings in the High Court or the court."

It is submitted by learned counsel for the defendant that sub-s. (3) of the above-quoted section ousts the jurisdiction of this court in this present suit.

By s. 6 (1) (*a*) of the Ordinance (s. 7 in the 1950–54 edition) a Rent Restriction Board is expressly empowered *inter alia*

> "to determine whether or not any premises whatsoever are premises to which this Ordinance applies."

Learned leading counsel for the defendant, when asked by the court, conceded that the Rent Restriction Board has jurisdiction to deal with this case but he submits that the High Court has concurrent jurisdiction and asks that this court should accordingly entertain this suit.

Section 32 (3) of the Ordinance (s. 33 (3) in the 1950–54 edition) on which the defendant relies, is not unequivocal and free from ambiguity. The relevant part of the sub-section reads:

> "The High Court and the court shall conform to this Ordinance in any proceedings arising under this Ordinance between landlords and tenants, and in the case of any proceedings affecting premises to which this Ordinance applies, the High Court or the court unless satisfied that under this section it may entertain such proceedings shall transfer the same to a board having jurisdiction."

In this particular case it cannot be said that the premises, the subject of this suit, are "premises to which this Ordinance applies" because this is the very question which is to be determined before the court.

To my mind it is obvious that the legislature intended by this section that all questions which could be determined by a Rent Restriction Board should be referred to such board, and deliberately ousted the jurisdiction of the courts on such questions. I consider that so to construe the section and give such effect to the intention of the legislature does not unduly, if at all, strain the language of the section. Further, the first part of the section reads:

> "The High Court and the court shall conform to this Ordinance in any proceedings arising under this Ordinance between landlords and tenants,"

and it will not be disputed that these instant proceedings arise between the parties under this Ordinance. The sub-section further reads:

> "The High Court or the court unless satisfied that under this section it may entertain such proceedings shall transfer the same to a board having jurisdiction."

That is, before the court can entertain such proceedings it must be satisfied that it may entertain such proceedings. As already remarked, the language of the section is not unequivocal but I am certainly not satisfied that the court may entertain such proceedings.

As already recorded, learned counsel for the plaintiff has conceded that the board has jurisdiction to deal with this present case but asserts that this court has concurrent jurisdiction and should exercise such jurisdiction. The reason he advances for such submission is that if the case were heard by the Rent Restriction Board and the board held that the premises were business premises, the plaintiff would still have to bring an action in this court for possession. Such argument would be both attractive and compelling, as it is irrefutable that if a suit can be disposed of by one tribunal a party should not be compelled to have recourse to two, were not the obverse side equally true. For, if this court held that the premises were a dwelling house the plaintiff would then have to bring an action for possession before the Rent Restriction Board.

The legislature has seen fit to create and set up a special domestic tribunal to deal with particular cases and disputes between landlords and tenants, and by the composition of such tribunal has ensured that it should be competent and qualified to deal with such questions. Therefore, even if I were to hold that this court has jurisdiction to entertain this present suit, I would still consider a Rent Restriction

Board to be the more suitable forum for this particular issue, which to my mind is peculiarly within the province of such a board. Accordingly, even if I felt I had jurisdiction to deal with this case I would still consider it incumbent on me to transfer it to the local Rent Restriction Board.

The second preliminary point raised was to the effect that this case would more fittingly be heard by the subordinate court than this court. Learned counsel for the defendant advances as a reason for such preference that the parties would thus have an additional tribunal to which to appeal and thus, to borrow a popular expression, to have two bites at the cherry. It is questionable whether such a reason is really so persuasive.

The issue on this second point is the value of the suit for the purposes of jurisdiction. For the plaintiff it is contended that the value of the suit is Shs. 25,000/-, which is, as asserted by the plaintiff, the value of the premises and therefore beyond the jurisdiction of the subordinate court. For the defendant it is contended that the value of this suit is not to be determined by the value of the subject matter of the suit, which is not the title to the premises but the possession or occupation of such premises. Learned counsel for the plaintiff cited in aid the Kenya case of *Fernandes v. Joseph & Son* (1), 8 E.A.L.R. 99, where, in a case for possession, it was held that the value of the premises constituted the value of the suit for the purpose of jurisdiction. However, this case was expressly distinguished in the Tanganyika case of *Kuwathkhan v. Ahmed Adam* (2), Tanganyika High Court Civil Appeal No. 1 of 1949 (unreported), by Sir George Graham Paul, the then Chief Justice. He held that in a suit for possession the value of the suit was not determined by the value of the premises. He distinguished between the Kenya case and the case before him as follows:

> "The jurisdiction of the court below is laid down in the schedule to the Subordinate Courts Ordinance (No. 15 of 1941) which is in the following terms:
>
> > " 'In suits and proceedings of a civil nature, in which the subject matter in dispute is capable of being estimated at a money value, the ordinary jurisdiction of the district courts specified in the first column hereunder shall be limited to suits and proceedings in which the subject matter does not exceed the amount or value specified respectively in the second column hereunder.' "

The learned Chief Justice went on to say that as so valued the subject matter in the dispute was well within the jurisdiction of the lower court. With regard to the Kenya case he said:

> "That was a decision upon the Kenya Ordinance (No. 13 of 1907), s. 18, which was in the following terms:
>
> > " 'The subordinate courts constituted by this Ordinance shall exercise the following jurisdiction civil matters that is to say:
> >
> > > " 'Courts of first class. Full jurisdiction over all persons in all matters in which the value of the subject in dispute does not exceed seven hundred and fifty rupees.'
>
> "The Appeal Court held that in the suit instituted for recovery of possession of a house the value of 'the subject in dispute' was the value of the house and not the value of a tenant right.
>
> "The section in *Fernandes*' case was however in an important respect different from the section now before me as the court in *Fernandes*' case was given 'full jurisdiction over all persons *in all matters*' where the '*subject in dispute* does not exceed seven hundred and fifty rupees.' That is to say in the section construed in *Fernandes*' case it was the value of the 'subject in dispute' and not of the 'matters' in dispute which determined jurisdiction. Here it is the 'subject *matter* in dispute' which has to be valued. The house in the present case may be said to be the *subject* in dispute in this suit but it is certainly not the *subject matter* in dispute in this suit. This case is in my view distinguishable from *Fernandes'* case.' "

The subject matter of this suit is likewise the possession of the premises and not the premises. It would not be impossible to assess the value of such subject matter. To my mind, the best way to arrive at such a valuation would be to have assessed the value of the premises if sold on the open market with vacant possession and the

value if sold subject to the occupation of a sitting statutory tenant. The difference between these two values would constitute the value of the matter in dispute.

Even if this suit were within the jurisdiction of the subordinate court this court would not thereby be precluded from entertaining the case and it has not been so suggested by learned counsel for the defendant, but he contends that it would be more appropriate for such suit to be tried by the subordinate court for the reason above recorded. However, in view of my ruling on the first preliminary point I think it would be otiose for me to decide this particular nice question.

In the circumstances, for the reasons I have already recorded, I order that this suit be transferred to the Dar-es-Salaam Rent Restriction Board.

With regard to costs, learned counsel for the defendant claims full costs to date in any event. Such claim is vigorously contested by learned counsel for the plaintiff. Had I dismissed this plaint the defendant would have been entitled to his full costs but I have not dismissed the plaint but transferred it to the Rent Restriction Board. I therefore give the defendant his full costs of the hearing and appearances in this court and the difference between the costs incurred in bringing this action in this court and if such suit had been brought before the Rent Restriction Board in the first instance, in any event; the remaining costs to be costs in the cause.

Order that the suit be transferred to the Dar-es-Salaam Rent Restriction Board.

For the plaintiff:
NRD Sayani
Sayani & Co, Dar-es-Salaam

For the defendant:
MN Rattansey
Mahmud N Rattansey & Co, Dar-es-Salaam

Sita d/o Zatio and two others v R
[1957] 1 EA 308 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	30 July 1957
Case Number:	100/1957
Before:	Sir Newnham Worley P, Sir Ronald Sinclair V-P and Bacon JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Tanganyika – Abernethy, J.

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[1] Criminal law – Murder – "Lion-man" killing – Whether appellant properly convicted as principal

offender – Penal Code, s. 22 (*T.*).

Editor's Summary

The appellants had been convicted by the High Court of a "lion-man" murder and they now appealed. The first two appellants had hired a "lion-man" from the third appellant to do the killing and the point was whether since the Penal Code of Tanganyika does not recognise the category of offenders known as accessories before the fact, the third appellant was rightly convicted of the murder. This depended upon the question whether the third appellant knew or believed that the "lion-man" was to be used for the purpose of killing somebody when he hired the "lion-man."

Held – (affirming the decision of the High Court) the rule stated by the court in *R. v. Munduli s/o Chui and Others*, 15 E.A.C.A. 47, as to the evidence required to implicate the keeper of a "lion-man" was applicable and the third appellant's conviction was fully justified.

Appeal dismissed.

Cases referred to:

(1) *R. v. Duloo s/o Gidakunga and Others*, 14 E.A.C.A. 132.

(2) *R. v. Munduli s/o Chui and Others*, 15 E.A.C.A. 47.

(3) *Nyumi v. R.*, E.A.C.A. Criminal Appeal No. 50 of 1948 (unreported).

(4) *Somerset's* (*Earl*) *Case* (1616), 2 State Tr. 745, H.L.

[**Note**: The third appellant subsequently petitioned the Judicial Committee of the Privy Council for leave to appeal in forma pauperis and his petition was dismissed.]

July 30. The following judgment was read by direction of the court.

Judgment

These three appellants were convicted by the High Court of Tanganyika, sitting at Dodoma, of the murder of a five-year-old girl. The Crown case, accepted by the trial judge and the assessors, was that this was a "lion-man" killing, a type of crime described in the judgment of this court in *R. v. Duloo s/o Gidakunga and Others* (1), 14 E.A.C.A. 132. There are many horrifying features in the instant case, as in the one cited, not the least of these being the inadequacy of the apparent motive.

The facts accepted by the trial court were that the first and second appellants (who are elderly women) had a grudge against one Gomo (a son of the second appellant) because he insulted her second husband by throwing his bows and arrows out of the house. The two women resolved to hire a "lion-man" to kill Gomo and asked an old man, Kitundu, to procure them one. Kitundu passed on the task to one Selemani who, after some difficulty, "hired" a "lion-man" from the third appellant for Shs. 100/-, money provided by the first appellant. He took the "lion-man" back to the house of the second appellant. About this time the second appellant's husband died and the responsibility for providing for the first two appellants fell on Gomo. The women therefore decided that he should not be killed but, in order to inflict grief and hurt upon him, his five-year-old niece (the deceased) should be killed by the "lion-man." Accordingly, on a day in December last year, when the girl's mother was alone with her children in the shamba, the deceased was seized by the "lion-man" and carried off into the bush. Later a few remnants of bones and viscera were found, with a few beads and keys which the child had been wearing when taken. After the murder, the women handed back the "lion-man" to Selemani who took it into the bush and there released it.

These are the bare facts of this well-nigh incredible story. The "lion-man" (as in the similar series of murders which took place in the same area about ten years ago) appears to be a human being who has been brought up as a beast to kill on the orders of those in charge of him and to kill with bestial ferocity. While employed in its inhuman task the creature disguises itself in the skin of a lion, or partly in lion skins and partly in baboon skins.

As regards the first and second appellants their complicity in the murder was fully established by their own inculpatory evidence given at the preliminary inquiry. They were also implicated by the evidence of their two accomplices, Kitundu and Selemani. At the trial they sought unsuccessfully to persuade the court that their evidence at the preliminary inquiry was untrue. They were convicted on very clear evidence and we have dismissed their appeals.

We reserved the appeal of the third appellant for further consideration but, at the resumed hearing, dismissed it and confirmed the conviction. We now give our reasons.

The question which we reserved for consideration was whether the third appellant was rightly convicted of the murder as a principal offender. We were assisted in this by the judgment of this court in *R. v. Munduli s/o Chui and Others* (2), 15 E.A.C.A. 47, which was also a "lion-man" murder. For our present purposes it is sufficient to cite the following passage in which this court declared the degree of complicity of the keeper of the "lion-man":

"Lastly we come to the case of the first appellant. On the evidence of the two women, Akana and Mlima (P.W. 4 and P.W. 5), Mundulu was the 'lion-man' keeper who allowed the second appellant and others to take her away from his house to the scene of the killing after receiving a payment of Shs. 30/-.

"It is a common feature of these fantastic and disgusting cases that the 'lion-man' who is the actual killer in every case, appears to be kept under control by a keeper who is sometimes a man and sometimes a woman, but who is invariably

> paid a sum of money before releasing the 'lion-man' for the work in hand. This court has come to the conclusion after anxious consideration of every circumstance in these unprecedented cases that where there is evidence from which the inference is inescapable that a keeper released a 'lion-man' for money received and handed him over to another with the knowledge that the hirer intended that the 'lion-man' should proceed to a spot and there kill a person, such keeper is a principal offender to the crime of murder under either or both s. 22 (*b*) or s. 22 (*d*) of the Tanganyika Penal Code. The evidence, however, must be clear and unmistakable and if derived from an accomplice be corroborated on some material particulars."

In that particular instance the keeper's appeal was allowed as there was no corroboration of the accomplice evidence which alone implicated him. The rule was, however, applied in a number of similar cases which occurred at about the same time: e.g. *Nyumi v. R* (3), E.A.C.A. Criminal Appeal No. 50 of 1948 (unreported).

The Penal Code of Tanganyika does not recognise an accessory before the fact' which would be the position in England of a keeper who hired out a "lion-man', knowing that murder was intended.

> "Those who by hire, command, counsel or conspiracy, or by showing an express liking, approbation or assent to another's felonious design of committing a felony, abet and encourage him to commit it, but are so far absent when he actually commits it that he could not be encouraged by the hopes of any immediate help or assistance from them are accessories before the fact":

Russell on Crime (9th Edn.), 1481, citing 2 Hawk c. 29, s. 16. It is not necessary that there should be an direct communication between an accessory before the fact and the principal offender: see the case of the *Earl of Somerset* (4) ((1616), 2 State Tf. 745, H.L.) at p. 1484 of Russell op. cit. In Tanganyika, such an accessory is indictable as a principal offender under s. 22 of the Penal Code.

In the instant case, the evidence implicating the third appellant was that of Selemani (who was an accomplice and who himself stands charged with conspiracy to murder) and of Aluu, the appellant's wife by customary marriage. On the question of the state of the appellant's knowledge the learned trial judge said:

> "The evidence of Selemani and Aluu nevertheless leave no reasonable doubt in my mind that accused No. 3 kept a 'lion-man' and that he hired it to Selemani as Selemani said. But did accused No. 3 when he hired the 'lion-man' know or believe that it was to be used for the purpose of killing somebody? Selemani has stated in his evidence that he never told accused No. 3 that he wanted the 'lion' to kill Gomo and there is not sufficient evidence to show that 'lion-men' are kept only for the purpose of killing human beings. In fact Aluu said this one killed young goats. But on his first visit to accused No. 3 Selemani told accused No. 3 that 'they had something for the "lion-man" to do' and either then or on his second visit 'that the "lion" would relieve us of our difficulties.' According to Selemani when accused No. 3 handed over the 'lion-man' accused said 'take the "lion" and after you have settled your difficulties with it return it to me' and Selemani was under the impression that accused No. 3 knew that the lion was wanted to kill someone. On deciding whether accused No. 3 knew or did not know for what purpose the 'lion-man' was wanted I am greatly influenced by the opinions of the assessors. Not only are they local men who know Kisandawe and Kinyaturu and are able to say what the words used by Selemani to Muna would convey to a person of Muna's tribe and intelligence but they are in a better position than I am to know what a 'lion-man' is likely to be used for. I accept their opinions that Muna, accused No. 3, knew that the 'lion-man' was to be used to kill someone. Their opinions confirm my own and I am satisfied beyond reasonable doubt on this point."

We think that this conclusion was fully justified.

Before coming to this conclusion the learned judge found corroboration of Selemani's evidence in Aluu's testimony, which he summarises in the following passage:

> "Aluu, the wife of accused No. 3, who is not an accomplice and who appeared to me to be quite an honest witness, testified that her husband kept a 'lion-man' which used to come and sleep at their house, that the 'lion-man' was an African who ate 'ugali,' the food eaten by people of her tribe, that the 'lion-man' had conversations with accused No. 3 and that the 'lion-man' never came to their house in the daytime. She also said that the skin worn by the 'lion-man' was a lion's skin and that sometimes he slept in it and sometimes without it and although she did not see Selemani actually taking the 'lion-man' away she heard Selemani and the third accused bargaining over the price of the hire or sale and after that the 'lion-man' never came back to their house."

The learned judge accepted her evidence and the assessors must have done so also. The only criticism we can make of the judgment on this aspect of the case is that the judge does not seem to have taken into account, before accepting Aluu's evidence, her admission in cross-examination that she hated her husband, the third appellant, an admission which might suggest a motive for her testifying falsely. She was not further cross-examined or re-examined on this, but it seems possible from the context in which the admission was made that her hatred was attributable to his keeping the "lion-man." Her evidence that he did so was to some extent supported by the discovery of lion hairs and baboon hairs in the place she pointed out to the police in the appellant's hut as the place where the "lion-man" kept his skin when not wearing it. One other aspect of her evidence which is not referred to in the judgment is the fact that, when first questioned by the police in her husband's presence, she supported his denial of keeping a "lion-man." This, however, was probably attributable to the appellant's presence and she has been consistent in her subsequent testimony. This woman's evidence was important as affording the only corroboration of Selemani's evidence implicating the appellant and we think that the matters we have referred to were of sufficient weight to warrant their being referred to and considered in the judgment. It is evident, however, that the witness's story, which was circumstantial and apparently truthful, impressed the court. We think that the matters referred to are susceptible of reasonable explanation and did not detract from her credibility.

On her evidence and Selemani's the conviction of the third appellant was fully justified.

Appeal dismissed.

The appellants did not appear and were not represented.

For the first and second appellants:
JN Pandya, Dodoma

For the third appellant:
Dara F Keeka, Dodoma

For the respondent:
JG Samuels (Crown Counsel, Tanganyika)
The Attorney-General, Tanganyika

Yolamu Kaluba v Kerementi Kajaya

[1957] 1 EA 312 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	17 June 1957
Case Number:	20/1957
Before:	McKisack CJ
Sourced by:	LawAfrica

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[1] Practice – Transfer of suit – Whether suit should be transferred to a native court – Civil Procedure Ordinance, s. 18 (1) (*U.*) *– Buganda Courts Ordinance, s.* 7 (*U.*).

Editor's Summary

In a High Court action between two Africans neither the plaintiff nor the defendant wished to transfer the suit to a native court. However, in view of the fact that the High Court has under s. 18 (1) of Civil Procedure Ordinance, power to make an order for transfer of a suit, of its own motion, the court agreed to consider the circumstances as well as the general principles upon which the power should be exercised. It was submitted that mere fact that a case is within the competence of a native court is not a sufficient ground for ordering a transfer and since it is normally open to plaintiff to choose his own forum there should be a more compelling reason than mere balance of convenience for depriving plaintiff of his option. Whilst the Buganda Courts Ordinance, s. 7. contains a mandatory provision for transfer the Native Court Ordinance has no such provision.

Held –

(i) outside Buganda the High Court has a discretion under Civil Procedure Ordinance, s. 18 (1) to transfer a suit to a native court.

(ii) this discretion should not be exercised without some reason stronger than the mere balance of convenience and since neither of the parties desired a transfer and there were no other grounds the court would not order a transfer of the suit to a native court.

Order accordingly.

Cases referred to in judgment:

(1) *Re Norton's Settlement*, [1908] 1 Ch. 471.

Judgment

Lewis J: read the following judgment of **McKisack CJ:** When this case (in which both parties are Africans) came on for hearing, Mr. Bhatt for the defendant asked to be allowed to address me on the question whether the case was one suitable for transfer to a native court. Neither he nor counsel for the plaintiff (Mr. C. C. Patel) wished for such transfer, but, in view of the power conferred on the High Court to make an order of transfer of its own motion, Mr. Bhatt wished me to hear his views on the general principles governing such matters.

Section 18 (1) of the Civil Procedure Ordinance (Cap. 6) provides that

> "on the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage–
>
> "(*a*) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any subordinate or native court competent to try or dispose of the same; . . ."

The Ordinance does not specify the grounds upon which a transfer may be ordered and it would, therefore, appear to be entirely a matter for the discretion of the court. Mr. Bhatt submits that the High Court should not make such order of its own motion unless there are strong grounds for doing so, and that the mere fact that the case is one within the competence of a native court is not sufficient. Where a native court has jurisdiction concurrent with that of the High Court in relation to a case, Mr. Bhatt says that it is open to the plaintiff to choose in which court to institute the case, and in the absence of a compelling reason for a transfer the plaintiff should not be deprived of his option.

Section 18 (1) of the Civil Procedure Ordinance is in terms very similar to that of s. 24 of the Indian Civil Procedure Code, save that, where the Uganda section refers to "any subordinate or native court," the Indian section refers to "any court subordinate to it" (i.e. subordinate to the High Court). In Mulla's Commentary on the Indian Code (10th Edn.), at p. 131, the notes on s. 24 include the following–

> "GROUNDS OF TRANSFER. – As stated in the notes on s. 22 the plaintiff as arbiter litis or dominus litis has the right to choose his own forum or rather any forum the law allows him. This right is subject to control under s. 22, s. 23, s. 24. The burden lies on the applicant to make out a strong case for a transfer. A mere balance of convenience in favour of proceedings in another court is not a sufficient ground, though it is a relevant consideration. As a general rule the court should not interfere unless the expenses and difficulties of the trial would be so great as to lead to injustice or the suit has been filed in a particular court for the purpose of working injustice. What the court has to consider is whether the applicant has made out a case to justify it in closing the doors of the court in which the suit is brought to the plaintiff and leaving him to seek his remedy in another jurisdiction."

A footnote to the above note refers to *Re Norton's Settlement* (1), [1908] 1 Ch. 471, as one of the authorities for the proposition stated in the note. That case raised the question whether an action brought in England should be stayed where the action could also have been brought in another country (India). In the particular circumstances of that case it was decided that the action should be stayed because its institution in England had not been for a bona fide purpose but in order to obtain an undue advantage over the defendant. But the case is a pointer to the principles governing the question which I have been asked to decide, and Vaughan Williams, L.J., in the course of his judgment said that

> "in order to justify a stay it is, as a rule, necessary that something more should exist than a mere balance of convenience in favour of proceedings in some other country."

The authorities which I have cited support Mr. Bhatt's contention that, where there is a choice of forum the High Court should not of its own motion interfere with the plaintiff's choice without some reason stronger than that of mere balance of convenience.

It is relevant to point to certain statutory provisions which have a bearing on this question. The Buganda Courts Ordinance (Cap. 77) has, in s. 7, a mandatory provision (subject to a proviso which is not material to the question before me) that

> "where any proceedings of a civil or criminal nature which a court [i.e. a Buganda court] has jurisdiction to try are commenced in a subordinate court or the High Court, they shall be transferred for hearing to a court [i.e. a Buganda court] having jurisdiction."

The Native Courts Ordinance (Cap. 76), on the other hand, has no such mandatory provision. It therefore appears that the question of a transfer from the High Court to a native court outside Buganda is in the discretion of the High Court but is governed by the principle which I have mentioned above. It is also to be noted that the African Courts Ordinance, 1957 (which is not yet in force) has the following provision in s. 10 (4):

> "any proceeding in respect of which the High Court or a subordinate court and an African court (other than a proceeding referred to in sub-s. (3) of this section) have concurrent jurisdiction shall be tried by the court in which the proceeding is commenced . . ."

This provision would appear to cut down the discretion conferred by s. 18 of the Civil Procedure Ordinance, and, in cases where the African Courts Ordinance applies, the High Court will have no power to order a transfer to an African court; on the

other hand so long as the present Buganda Courts Ordinance continues in force, the High Court will (subject to certain exceptions) be compelled to transfer a case to a Buganda court if that court has jurisdiction to deal with it.

In the present case neither party, as I have said, wishes a transfer to a native court, and the pleadings do not disclose any ground for interfering with the plaintiff's choice of court. I therefore do not propose – at any rate at this stage of the proceedings – to make any order of transfer.

Order accordingly.

For the plaintiff:
CC Patel
CC Patel, Jinja

For the defendant:
JH Bhatt
JH Bhatt, Jinja

Ratilal Gordhanbhai Patel v Lalji Makanji
[1957] 1 EA 314 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	15 August 1957
Case Number:	70/1956
Before:	Sir Newnham Worley P, Sir Ronald Sinclair V-P and Lowe J
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Tanganyika – Crawshaw, J.

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[1] Practice – Standard of proof – Allegations of fraud to be strictly proved – No direction by trial judge as to burden or standard of proof.

[2] Practice – Appeal – Conflicting evidence – Demeanour of witnesses – Duty of judge to test demeanour of witness against whole evidence – Power of Appellate Court to draw own inferences.

Editor's Summary

The appellant gave a guarantee on which he was sued by the respondent. Judgment was given against him *ex parte*. He then instituted proceedings in the High Court against the respondent for orders *inter alia* that the guarantee agreement be rescinded in respect of his liability as guarantor, that the *ex parte* decree against him be set aside and that a sum of Shs. 18,322/68 received by the respondent in attachment proceedings in that case be refunded to him.

The appellant's case at the trial was that he was induced to sign the agreement as guarantor by the fraud of the respondent in falsely representing to him that the guarantee would not be acted upon or enforced against him and that its only purpose was to bring moral pressure to bear upon the principal debtor. The appellant alleged that at the time the agreement between the debtor, the respondent and himself was drawn up and executed, the respondent said to him: "I will not ruin your children. If you sign, Dahyabhai (the debtor) will pay my money. I don't want any money from you" or words to that effect. The appellant further alleged that the respondent had at all material times no intention of fulfilling this promise. The respondent denied these allegations in his defence. The trial judge, however, while accepting generally the evidence of the appellant and his witnesses and rejecting that of the respondent and his witness, found that the representations alleged were in fact made by the respondent but that they were "no more than a mere expression of intention, without however sacrificing his legal right, an intention on which the guarantor was not entitled to rely." He accordingly dismissed the suit in toto on the grounds that the allegations of inducement and fraud had not been substantiated. The appellant appealed against this decision and contended that the trial judge's findings of fact

were wrong and that he (the judge) had also misdirected himself on the law generally. On the other hand, the respondent also argued that the judge's findings of fact could not be supported having regard to the evidence and the probabilities of the case and that the appellant's suit ought to have been dismissed for failure of adequate proof.

Held –

(i) the trial judge's estimate of the credibility of the appellant's witnesses was wrong; there were many other circumstances, apart from manner and demeanour, which showed the unreliability of the appellant and his witnesses.

(ii) the trial judge had not anywhere in the judgment expressly directed himself on the burden of proof or on the standard of proof required. "There is no specific indication that the learned judge had this [referring to the standard of proof] in mind: there are some indications which suggest he had not."

(iii) the appellant's suit should have been dismissed for failure of adequate proof.

[Decision of Crawshaw, J., affirmed on different grounds.]

Appeal dismissed.

Cases referred to:

(1) *Jorden v. Money* (1854), 23 L.J. Ch. 865.

(2) *Davies v. London and Provincial Insurance Co., Ltd*. (1878), 8 Ch. D. 469.

(3) *Bold v. Hutchinson*, 104 R.R. 201.

(4) *Yuill v. Yuill*, [1945] 1 All E.R. 183.

(5) *The Glannibanta* (1876), 1 P.D. 283.

(6) *Coghlan v. Cumberland*, [1898] 1 Ch. 704.

(7) *D. R. Pandya v. R.*, [1957] E.A. 336 (C.A.).

August 15. The following judgment was read by direction of the court.

Judgment

This was an appeal from a decree of the High Court of Tanganyika which dismissed with costs the appellant-plaintiff's suit. At the conclusion of the argument we dismissed the appeal with costs, but stated that we upheld the decree for reasons other than those given by the learned trial judge in his judgment. We now state our reasons.

In his plaint the appellant asked for orders: (*a*) that an agreement made between him, one D. V. Patel, and the respondent should be rescinded in respect of the appellant's liability as guarantor thereunder; (*b*) that an *ex parte* decree passed in High Court Civil Case No. 11 of 1954 should be set aside as against him; (*c*) that the sum of Shs. 18,322/68 received by the respondent in attachment proceedings in that case be refunded by the respondent to the appellant; (*d*) for the reimbursement of certain small sums paid as court charges by the appellant; (*e*) general damages Shs. 20,000/-.

The issues in this case arose in the following manner. The appellant in April, 1953, was doing business at Dodoma in partnership with D. V. Patel. The latter owed the respondent Shs. 50,000/- and was further heavily indebted elsewhere. He had, however, a credit in the partnership of Shs. 83,000/-. We shall for convenience refer to him as the debtor. On April 13, 1953, the respondent went from Nairobi to Dodoma, accompanied by one V. B. Patel and one N. V. Patel (who died before the trial) to discuss with the debtor the matter of his debt. The appellant was brought into the discussions and the agreement above referred to was drawn up and executed by the debtor, the appellant and the respondent. The operative terms of this agreement were:

(*a*) the debtor acknowledged the debt of Shs. 50,000/-.

(*b*) he undertook to pay it off by monthly instalments of Shs. 2,000/- beginning on July 1, 1953, and thereafter punctually on the first day of each month.

(*c*) the appellant guaranteed to pay in the event of any default by the debtor.

The appellant's case, as pleaded, was that he was induced to sign the agreement as guarantor by the fraud of the respondent in falsely representing to him that the guarantee would not be acted upon or enforced against him and that its only purpose

was to bring moral pressure to bear upon the debtor. The plaint alleged that on this occasion the respondent said

> "I will not ruin your children. If you sign, Dahyabhai [the debtor] will pay my money. I don't want any money from you"

or words to that effect; further, it was alleged that the respondent had at all material times no intention of fulfilling this promise. These allegations were denied in the defence.

The debtor failed to pay any instalment and in February, 1954, in High Court Civil Suit No. 11 of 1954 the respondent sued him and the appellant for Shs. 16,000/- being the amount of the instalments then due and unpaid. The debtor did not defend the suit but the appellant instructed Mr. Dastur who applied for and obtained leave to defend. Before any defence was filed the appellant withdrew his instructions and, when the case was called on August 24, 1954, Mr. Dastur was granted leave to withdraw. Judgment was entered against the debtor and the appellant *ex parte*. This is the judgment which the appellant sought to have set aside, on the ground, as pleaded, that he was induced to withdraw his instructions to defend by the false representation of the respondent that he would enforce the judgment against the debtor only.

About January 15, 1955, the respondent executed this judgment by attaching the shop goods of the appellant (who was at that date in India) and the appellant's manager paid sums totalling Shs. 18,459/68 to raise the attachment. These are the monies which were claimed in the plaint, the grounds for claiming a refund being that, before going to India in October, 1954, the appellant had obtained from the respondent a reiteration of his promise that he would not execute the decree against the appellant. The defence denied that any such representation was made on either of these two occasions.

The appellant returned to Dodoma from India in March, 1955, but the plaint in this suit was not filed until November 5 of that year. In the meantime the respondent had in October, 1954, filed a second suit for instalments due and unpaid: No. 87 of 1954. No defence was entered and judgment *ex parte* was entered on June 5, 1956. A third suit, No. 46 of 1955, is stayed pending the termination of these proceedings.

The appellant's suit was heard in May and June, 1956, and a reserved judgment, dismissing the suit in toto, was delivered on August 23 of that year. The findings and conclusions in the judgment can be summarised as follows: The learned judge, accepting generally the evidence of the appellant and his witnesses and rejecting that of the respondent and his witness, found that the representations alleged were in fact made by the respondent but that they were:

> "no more than a mere expression of intention, without however sacrificing his legal right, an intention on which the guarantor was not entitled to rely."

The judge accordingly found that the allegations of inducement and fraud had not been substantiated. We feel bound to say, however, that the findings are not free from obscurity and inconsistency: for instance, the learned judge also states:

> "there was never any question of the creditor accepting the instalments unless they were guaranteed and the guarantor must have known this at the time."

Later, he says:

> "To my mind the creditor could not possibly have meant that he would attach absolutely no legal value to the guarantee, and what he said did not, I think, certainly on what the guarantor testifies that he said go as far as

that":

and also:

> "As I have said, he (the guarantor) made the mistake as I see it of trusting the creditor when he said he would not proceed against him."

In this court, Mr. Dodd based his appeal on the trial judge's findings of fact and addressed to us a long and careful argument on the law contending that the court below had misdirected itself on the law generally and on the effect of the cases cited

in the judgment: *Jorden v. Money* (1) (1854), 23 L.J. Ch. 865; *Davies v. London and Provincial Insurance Co., Ltd.* (2) (1878), 8 Ch. D. 469; and *Bold v. Hutchinson* (3), 104 R.R. 201. On the other side, Mr. Nazareth dealt only with one or two minor points of law and devoted his long and careful argument to demonstrating that the learned trial judge's findings of fact could not be supported having regard to the evidence and the probabilities of the case, and that the plaintiff-appellant's suit should have been dismissed for failure of adequate proof. As we were of opinion that this contention succeeded it is unnecessary to consider Mr. Dodd's submissions on the law.

The function and duty of an appellate court which is asked to review the findings of fact of a trial court are clear. They were fully and authoritatively stated in the oft-cited judgment of Lord Greene, M.R., in *Yuill v. Yuill* (4), [1945] 1 All E.R. 183 at p. 188, p. 190. They were also clearly set out in two earlier decisions of the Court of Appeal: *The Glannibanta* (5) (1876), 1 P.D. 283 at p. 287, and *Coghlan v. Cumberland* (6), [1898] 1 Ch. 704: the relevant passages from these two cases are cited and applied in *D. R. Pandya v. R.* (7), [1957] E.A. 336 (C.A.), an appeal heard at this same sittings of the court and so far unreported. It is with these principles in mind that we approach our review of the learned trial judge's findings of fact.

Oral evidence was given by the appellant and he called two witnesses. One was Mr. J. N. Pandya, an advocate of the High Court who acted for the debtor throughout and who claimed to have been present when the first misrepresentations were made on April 13, 1953, and, also, when the respondent reiterated his assurances in September, 1954, before the appellant went to India. The other witness was one Pitamber, who claimed to have been present on the latter occasion. The appellant alone testified to the alleged misrepresentation in April, 1954, whereby he was induced to withdraw his defence to suit No. 11 of 1954. He said that this was made over the telephone. The respondent gave evidence and called V. B. Patel who had accompanied him to Dodoma on April 13, 1953. There were also twenty-three documentary exhibits, most of which were letters passing between the advocates of the parties and of the debtor.

There is one preliminary observation which we must make on the learned judge's treatment of this evidence: he does not anywhere in the judgment expressly direct himself on the burden of proof or on the standard of proof required. Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required. There is no specific indication that the learned judge had this in mind: there are some indications which suggest he had not. For instance, he says

> "I regarded Mr. Pandya as an entirely honest witness (which means that in part anyway I was unable to believe the creditor and his witness) and although he may after this long interval of time have forgotten or become confused as to some details of the events, I am satisfied that in substance his evidence is correct."

Again, on the all-important question as to the actual words and extent of the alleged original false representation, the appellant and Mr. Pandya differed substantially, and on this the learned judge says

> "I prefer the guarantor's account of what the creditor said to that of Mr. Pandya as, the guarantor being the more concerned at the time and subsequently, the actual words would be likely to be the more vividly impressed on his mind."

The judge's acceptance of the evidence for the plaintiff appears to be based mainly on impression and demeanour. We have quoted his appreciation of Mr. Pandya's credibility. Of the appellant he says

> "The guarantor's trust in the creditor may seem almost incredible, but from the way he gave his evidence as well as from the consistency of his behaviour I do believe him."

He does not refer to Pitamber: nor, indeed, does he indicate why he disbelieved the

respondent and his witness who were certainly telling the more consistent and credible story. When the whole of the evidence is considered it is an inevitable conclusion that the learned judge unfortunately failed to test the accuracy of his impressions by the documentary evidence, by the "glaring improbability" of the appellant's case and by the contradictions in the evidence.

We will take first the documentary evidence. This includes a number of letters written by Mr. Pandya to the respondent or to others and relating to the debtor's affairs between September, 1953, and September, 1954. Only one of these is referred to in the judgment and even that is not in the appellant's favour. It was Pandya who drew up the agreement on April 13, 1953, and it was finally on his assurance that the appellant signed as guarantor. The substance of his evidence on this point was as follows:

> "The defendant told the plaintiff that if he signed an agreement in which he would become a nominal guarantor he would not take any action against him. The words of the defendant were: 'If you sign it I will not look after you as a guarantor: I will not file any action against you on this guarantee . . . I am not going to ruin your wife and children'."

Also,

> "When Ratilal (appellant) asked me if he should sign it I said 'You have heard him give you promises. I do not think he will betray the trust he has put on his promises'."

It is, of itself, sufficiently remarkable that a practising advocate should admit that he persuaded the appellant to put his hand to a document ex facie creating an obligation on the appellant but intended, as between the appellant and the respondent, to have no legal effect. But Mr. Pandya's letters show conclusively that he never put forward this interpretation of the agreement until he came into the witness box. In a letter dated September 12, 1953, to the respondent, he wrote:

> "I know you stand in a different position in that you have a written guarantee from Ratilal. You can have that weapon as a reserve in your armoury, but as I remember, you assured Ratilal that you would not embarrass him, so if you would also not precipitate action and fall in line with Van Eeghan, Native Creamery and some other big creditors all will be regularly paid."

On January 12, 1954, he wrote to the respondent's advocate:

> "I know Laljibhai has Ratilal to catch hold of but Ratilal in turn would jump upon Dayabhai. These are stark facts and I have now only to request you to do all you can to avoid the catastrophe."

On March 28, 1954, he wrote again, with reference to the appellant's intention to defend suit No. 11 of 1954:

> "Even though Ratilal is the guarantor this money has ultimately to come from the principal debtor . . . Ratilal's defence is never going to stand. . . ."

Finally, on July 20, 1954, he again wrote to the respondent's advocate:

> "I think I wrote to you about Ratilal's view in the matter. He seems to be labouring under a wrong impression that he can escape liability under the guarantee in question. I explained to him everything and I understood him to say that he would see that Laljibhai is paid at least Shs. 1,000/- a month."

The only explanation which Mr. Pandya could offer for these letters was that he was trying to appease his client's creditors and that if he had said that the guarantee was useless the respondent would have "pounced" on his client at once. Comment seems superfluous: if his explanation is accepted, he is shown to have written lying letters in the exercise of his professional duties. Whether it is accepted or rejected his credibility is destroyed. There were other inconsistencies and contradictions in his evidence to which we do not propose to refer. If his evidence is rejected, as we think it should have been, the main

corroboration of the appellant’s case goes with it.

We turn now to the appellant's own evidence, the outstanding feature of which is its glaring improbability. It was unfortunate that at the most crucial points his testimony was given in response to blatantly leading questions and that his advocate, Mr. Dastur, took over the interpretation. This was apparently done because the translation by the court interpreter was unsatisfactory at that stage: nevertheless the remainder of this witness's evidence seems to have been satisfactorily interpreted. But whatever the reason for this unusual procedure, the appellant's evidence as to what was said by the respondent on April 13 differed considerably from Mr. Pandya's account, as the trial judge noted. The substance of the appellant's evidence on this point as recorded in the judge's notes is:

> "I signed Ex. A when Pandya said that if I signed he did not think I would have to pay as D. V. Patel would pay. The defendant said 'I am not going to kill your children,' by which I took him to mean he would not demand money from me."

According to the shorthand transcript he also said:

> "I did not believe him at first but when Mr. Pandya said that, after requesting (? being requested) four or five times, I should sign. If he (the respondent) was going to court, I (i.e. Pandya) was prepared to swear."

There were, of course, good reasons for the appellant signing the guarantee. Apart from any desire to assist the debtor, the appellant may well have thought that unless the respondent could be induced to hold his hand, the sudden withdrawal of Shs. 50,000/- or more from the partnership would be embarrassing. He is a business man of mature age and experience and it would be surprising enough if he were taken in by the assurance that his guarantee was required merely to bring moral pressure to bear on the debtor. The learned judge thought he might have been influenced by the great wealth of the respondent and by their being members of the same Indian community. Let us assume that these factors operated to over-persuade the appellant on April 13. How is it credible that they could have survived the respondent's subsequent bad faith?

The reason the appellant gave for having withdrawn his instruction to defend suit No. 11 of 1954 stretches credulity to the utmost. He said that, after he had obtained leave to defend, the respondent put through a long-distance telephone call from Nairobi and said

> "As I promised you I am not going to sue you . . . If you defend the suit it will take a year before I get judgment against Mr. Patel and it will be delayed."

The appellant said he was satisfied with this reassurance and so instructed his advocate to withdraw.

There was no corroboration whatever of this conversation but the learned trial judge thought that the instructions to withdraw were consistent with its having occurred. No doubt they could be: but there are other factors inconsistent with this which appear to have been overlooked. It is surprising, to say the least, that the appellant should so readily have accepted an oral reassurance from the respondent if the latter had already broken his word by suing the appellant. It is still more surprising that in his written instructions to his advocate, no mention is made of this assurance nor any reason given for the withdrawal. Nor could the appellant attempt to explain why his defending the suit should delay *ex parte* judgment against the debtor.

The third occasion on which the appellant alleges he was deceived was, as we have said, in September, 1954, before he left for India. On September 6, the respondent's advocate sent to the appellant and to the debtor identical letters referring to the agreement and guarantee, to the unsatisfied judgment in suit No. 11 of 1954 and demanding payment of all further outstanding instalments to date. It is common ground that about ten days later, the appellant and Pandya made a special journey by car to

Nairobi to see the respondent on this matter. The witness Pitambar accompanied them but there was a conflict of evidence as to whether or not he was present at the ensuing discussion.

There was also a dispute as to what was said on this occasion. The respondent's evidence was that only the appellant and Pandya came to him and asked him to reduce the instalments to Shs. 1,000/- a month, he refused and they went away. The appellant swore that he, Pandya and Pitambar were all present, that he asked the respondent what was the meaning of the advocate's letter and respondent replied:

> "Don't you worry about it. You go to India. I will fulfil my promise which I have given to you."

He understood by this that "even if they got judgment they wouldn't proceed against me." Nevertheless, he said, he was very dissatisfied but did not expect an attachment to be made. His version of what took place was supported by Pandya and Pitambar, although they both said that the appellant came away "very pleased." Mr. Pandya's oral evidence was, as before, inconsistent with the documentary evidence. On September 29 he wrote to the respondent's advocate concerning this visit:

> "I had been to Nairobi for a few hours' visit when, at Ratilal's request I accompanied him. My purpose in going with him was to explain Dahyabhai's position to Laljibhai and no more. We met Laljibhai, but according to me, the visit was abortive.
>
> "Ratilal had a few words with him in private and I don't know what took place between them."

There is, of course, in the letter no reference to the assurances which he now claims to have heard the respondent give to the appellant.

As to Pitambar the respondent denied he was present at all. It is clear that this witness went to Nairobi in the same car as the appellant and Pandya but primarily on his own business. Mr. Nazareth drew our attention to numerous contradictions and inconsistencies in the relevant evidence which, he said, showed clearly that Pitambar was not and could not have been present at the respondent's house. If that were established it would, of course, mean that the appellant and Pandya had deliberately given false evidence. The learned judge does not refer to Pitambar at all in his judgment and we have no means of knowing what view he took on this aspect of the case. We do not propose to go through the evidence on this point in detail: It is difficult for a court which has not seen and heard the witnesses to form a definite opinion on a point of this nature. But we can at least say that the evidence on record is such as to create in our minds very strong doubts as to whether Pitambar was in fact present during the discussion in the respondent's house.

That leaves the appellant's own evidence. Although he had already been deceived by the respondent, he had taken no steps to have the judgment against him set aside. He allowed it to stand and merely asked that it should not be enforced. But his conduct when he heard of the respondent's second act of perfidy, the attachment of the shop goods, is even more incredible. He made no protest but sent the following telegram to the respondent's advocate:

> "Please withdraw attachment on auto spares collect by attachment and auction everything of Dahyabhai rest will pay myself have got thirty-two thousand with me reply."

In acknowledging this telegram on January 10, 1955, the respondent's advocate wrote:

> "I regret that I am unable to accede to your request mentioned above. Your liability as guarantor is co-extensive with the principal debtor and my client, in view of his experience, is not in a mood to be influenced by any promise."

Even this categorical assertion of the respondent's claim did not evoke any response from the appellant.

The only comment the learned judge made on this evidence was:

> "I believe, however, the creditor and Mr. Pandya. Admittedly the guarantor did for a short time speak alone

with the creditor, but I feel satisfied that had his purpose been to reduce instalments Mr. Pandya would be sure to have known, for their interests would have been mutual."

Here again, the acceptance of this evidence appears to be based merely on impression and there is complete failure to test this by the documentary evidence, by appellant's subsequent conduct or by the credibility or otherwise of Pitambar.

In contrast to this evidence, full of contradictions and inconsistencies, the respondent and his witness gave testimony which was simple, credible, unshaken in cross-examination and entirely consistent with contemporary documents. As we have already said, the learned judge gave no reason for rejecting their evidence.

We have said enough to show why, after a careful review of the evidence and not disregarding the judgment appealed from but carefully weighing and considering it, we came to the conclusion that the learned judge's estimate of the credibility of the witnesses was wrong. There were, as we have attempted to show, many other circumstances, apart from manner and demeanour, which showed the unreliability of the appellant and his witnesses. In addition there was the factor of the degree of proof required to establish allegations of fraud to which no reference at all was made in the judgment.

In dismissing the appeal, we awarded costs thereof to the respondent. We now direct that these be allowed for two advocates.

Appeal dismissed.

For the appellant:
HG Dodd and *PR Dastur*
PR Dastur, Dar-es-Salaam

For the respondent:
JM Nazareth, QC and *NS Patel*
Patel & Co, Dar-es-Salaam

Purshottam Narandas Kotak v A Ali Abdullah
[1957] 1 EA 321 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	22 July 1957
Case Number:	62/1956
Before:	Sir Newnham Worley P, Sir Ronald Sinclair V-P and Bacon JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Tanganyika – Davies, CJ.

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[1] Native – Definition of – Whether debtor a "native" – Credit to Natives (*Restriction*) *Ordinance, s.* 2, *s.* 3 *and s.* 5 (*T.*).

Editor's Summary

The appellant filed three actions against the respondent in the magistrate's court, each claiming under a dishonoured promissory note. The defence in each case was that the note made in favour of the appellant was for the price of certain goods sold by the latter to the respondent, and that as the respondent was an African and a "native" as defined by the Credit to Natives (Restriction) Ordinance, by virtue of s. 5 of that Ordinance the note was not enforceable or realisable as one being in respect of a debt which by s. 3 is irrecoverable.

The only issue was whether or not the respondent was a "native" within the definition of s. 2 of the Ordinance. The respondent claimed to be a Swahili and therefore a "native" within the definition in the Ordinance while the appellant contended that the respondent was an Arab and therefore outside the operation of the Ordinance. The magistrate upheld the respondent's contention and dismissed the actions. Thereupon the appellant unsuccessfully appealed to the High Court and thereafter appealed to the Court of Appeal.

Held – (expressing the same view as Davies, C.J., in the High Court below) "each case involving this question of whether a particular individual comes within the scope of the definition must be decided upon its facts and that in this instance the learned magistrate cannot be said to have reached an erroneous conclusion."

Per Bacon JA: "I am not to be taken as subscribing to any hard and fast rule based solely upon possessing specific proportions of the blood of different races.

To adopt such a purely arithmetical criterion for every case might well, I think, lead to difficulties before very long."

[2] Statute – Interpretation of – Whether evidence admissible to aid interpretation.

The appellant in the magistrate's court also adduced evidence as to the meaning to be attributed to the term "Swahili" as contained in the Ordinance and such evidence was accepted.

Held – the evidence of the Arab witnesses was not admissible as regards the meaning to be attributed to the term "Swahili" but they were entitled to give their views whether the respondent is in fact an Arab.

Camden (*Marquis*) *v. Commissioners of Inland Revenue*, [1914] 1 K.B. 641, considered.

Per Bacon JA: "The courts of Tanganyika are, in my view, entitled to take judicial notice of the well-established meaning of the term 'Swahili'."

Appeal dismissed.

Cases referred to in judgment:

(1) *Camden* (*Marquis*) *v. Commissioners of Inland Revenue*, [1914] 1 K.B. 641.

July 22. The following judgments were read.

Judgment

Bacon JA: The appellant, a merchant of Dar-es-Salaam, filed three plaints against the respondent in the district court, each claiming under a dishonoured promissory note. The defence in each suit was the same, namely, that the note was made by the respondent in the appellant's favour for the price of certain goods sold by the latter to the former, that the respondent is an African and a "native" as defined by the Credit to Natives (Restriction) Ordinance (Cap. 75 of Tanganyika) and that by virtue of s. 5 of that Ordinance the note is not enforceable or realisable as being one in respect of a debt which by s. 3 is irrecoverable.

Section 2 of that Ordinance reads as follows:

> "In this Ordinance, the expression 'native' means any member of any African race, and includes a Swahili, but does not include a Somali or an Abyssinian."

No definition of the term "Swahili" is to be found in the law of Tanganyika.

The three cases were heard together. As the learned magistrate observed at the outset in his judgment, the only point for decision was whether the respondent is a "native" within that definition. The appellant contended that the respondent is an Arab. It was conceded, and of course rightly so, that an Arab is not a "native" as defined in the Ordinance.

On evidence which fully justified his conclusions the learned magistrate found *inter alia* as follows: that in 1935 the then acting district officer, Bagamoyo, accepted the respondent's father as an African for all purposes; that the respondent has always paid native poll and house taxes; and that in applications to the Mines Department of Tanganyika in 1951 and 1953 the respondent described himself as an "Arab (half-cast)" and as an "Arab" respectively.

There was also some evidence tending to show that the respondent had held himself out as an Arab in 1953 for the purpose of rationing registration through the medium of the Arab Association.

The learned magistrate also admitted and considered evidence given by the vice-president and the secretary of the Dar-es-Salaam branch of the Arab Association. Founding themselves on the rules and accepted views of the association, and, in the case of the vice-president, to some extent on what he said he had been given to understand was the Mohamedan law, they gave confused evidence. The secretary evidently regarded the respondent as an Arab; the vice-president's evidence ended as follows:

> Cross-examined:
>
> "If his father is an African he would be called an African. If the father is an Arab and the mother African we would say he is an Arab.

> "Q. – Would it be true to say he is a Swahili?
>
> "A. – It would be upon himself.
>
> "Q. – If the mother is Arab and the father African would the child then be a Swahili?
>
> "A. – If he calls himself a Swahili he is following the tribe of his father.
>
> "If one parent is Arab and one African it is the choice of the child to call himself Swahili or Arab."

Re-examined:

> "If the father was an Arab we would call him an Arab."

Examined, by the court:

> "If the father was an Arab and the mother African and they were not married you cannot give him any tribe; he has got no father.
>
> "Q. – If an Arab married an African and their son marries an African what is their son?
>
> "A. – He will be called an Arab.
>
> "Q. – And if he marries an African woman?
>
> "A. – It would carry on as an Arab until the end; there would be no change despite the fact that there would be less and less Arab blood."

With all due respect to those witnesses, I am not surprised that the learned magistrate declined to be persuaded by their testimony to take the view that the respondent is an Arab. It seems to me that they were understandably actuated by what may be called a desire to uphold Arab solidarity so far as possible, even in the face of bard facts.

When it came to the crucial decision the learned magistrate said this:

> "It does, however, seem to me that the point at issue is not whether the defendant said he was an Arab or whether he said he was a native or even that he genuinely believed himself to be. The only question is what, in fact, is he? Now, what a man is racially must sometimes be deduced from what he says and does . . . In this case, however, the defendant is a young man and there is evidence which is not contradicted and hardly challenged that his grandfather (who appears to be accepted as an Arab) married an Ndengereko woman who was the mother of his father and that the parents of his own mother were Wazaramo. Mr. Anjaria has argued that his race must be judged by the way he lived. I fear I cannot accept that proposition . . . To hold otherwise would lead to absurd results. One has only to look round Dar-es-Salaam to realise that several Asians have adopted an European mode of life and more and more Africans appear to be doing the same."

With the learned magistrate's rejection of Mr. Anjaria's argument I entirely agree. If an Englishman or a Dane elects to live in a hut and cultivate a shamba to provide his food, the Ordinance does not turn him into a "native." Nevertheless in some cases mode of life might be a relevant factor. But in the end the learned magistrate based his decision on the following passage:

> "It seems to me that my decision in this case must follow the answer to a simple question or, more accurately, a question simple to state, that is: Is a man with one-fourth Arab blood and three-fourths African blood an Arab or a Swahili?"

Before answering that question the learned magistrate cited various works including The Encyclopaedia Britannica and Webster's Dictionary and then said this:

> "I feel that a person who only has one-quarter Arab as opposed to three-quarters African blood in his veins cannot be described as an Arab without abuse of language. . . .
>
> "It remains to be considered what the defendant is. I think he must be a Swahili which is the only other (sic)

word denoting an admixture of Arab and African. It is true that certain passages in the works to which I have referred give the impression that a Swahili is a member of a group that was established during the slave days, but there is nothing to show that the word cannot also be properly

> applied to an individual of mixed blood where the admixture occurred recently . . .
>
> "I hold, therefore, that the defendant is a Swahili and therefore a 'native' within the meaning of the Credit to Natives (Restriction) Ordinance."

The district court accordingly gave judgment for the respondent. Thereupon the appellant appealed unsuccessfully to the High Court of Tanganyika. Davies, C.J., expressed the view, with which I respectfully agree, that each case involving this question of whether a particular individual comes within the scope of the definition must be decided upon its facts, and that in this instance the learned magistrate cannot be said to have reached an erroneous conclusion.

In my opinion this second appeal fails for that same reason. In saying that, I am not to be taken as subscribing to any hard and fast rule based solely upon possessing specific proportions of the blood of different races. To adopt such a purely arithmetical criterion for every case might well, I think, lead to difficulties before very long. What, for example, should the decision be where it was proved that the defendant had what is called forty-five per centum Arab and an equal proportion of African blood, but nothing could be established as to the remaining ten per centum? Obviously some other test would have to be applied. The Ordinance has left the matter at large, and rightly so.

In the instant case, however, I think that the true position was sufficiently clearly proved. The courts of Tanganyika are, in my view, entitled to take judicial notice of the well-established meaning of the term "Swahili." It is the name given to an ethnic group, now recognised as a distinct community to be found in these coastal regions, consisting of heterogeneous persons descended in each instance from the union or various unions of African and certain non-African stocks such as Arab or Somali. I think it matters not whether the crossing of two or more bloodstreams commenced one or two or three or any number of generations ago. It seems to me that it is the resultant mixture in the veins of the individual concerned which tends to prove membership of this group, not the comparative antiquity or modernity of the fusion.

There remains the matter of the admissibility, in a case like this, of such evidence as that of the officials of the Arab Association which was given at the trial. The mere fact that it is open to the trial court to take judicial notice of its understanding of the term "Swahili" (or of the term "Arab") does not, of course, preclude the court from admitting expert evidence as to the meaning thereof. But there was a conflict of opinion, as between the two courts below in the instant case, as to whether that evidence was precluded for a different reason; before the learned magistrate there was no objection to its admission, and he admitted it without commenting in his judgment on its admissibility; the learned Chief Justice, however, observed that in his view its admission in relation to the term "Arab" was "contrary to the settled rules of the interpretation of legislative enactments." With respect, that observation cannot in my opinion have been well-founded, for the term "Arab" does not appear at all in the legislative definition with which we are concerned. I shall assume that the learned chief justice's criticism was intended to relate to the admission of oral evidence as to the meaning of the term "Swahili," which does figure in the definition.

The learned chief justice relied on *Camden* (*Marquis*) *v. Commissioners of Inland Revenue* (1), [1914] 1 K.B. 641. It is, of course, proper to look to the English decisions on the interpretation of statutes for guidance. The dispute in that particular case arose as to whether it was open to counsel to examine a surveyor upon the meaning attributed by persons dealing and conversant with the valuation of land to the expression "nominal rent" as it appeared in s. 13 of the Finance Act, 1910. The Court of Appeal held that the evidence which it was thus sought to elicit was inadmissible. Their reasons for so holding were as follows. Cozens-Hardy, M.R., said this (at p. 647 and p. 648):

“No case has been called to our attention, and I do not believe there is any case, in which, dealing with a modern statute, any such evidence has ever been admitted. The duty of this court is to interpret and give full effect to the words

> used by the legislature, and it seems to me really not relevant to consider what a particular branch of the public may or may not understand to be the meaning of those words. It is for the court to interpret the statute as best they can."

And again (at p. 649):

> "I think it would be altogether contrary to principle and of the worst example if we were to allow . . . evidence to be given as to the meaning which a certain branch of the community attached to these particular words 'nominal rent'."

Swinfen Eady, L.J., said this (at p. 649 and p. 650):

> "Now, the words 'nominal rent' are *prima facie* ordinary English words and they have been used from time to time not only colloquially and in common parlance, but in Acts of Parliament . . . It is the duty of the court to construe a statute according to the ordinary meaning of the words used . . . It is a public Act of Parliament, and the court must take judicial cognisance of the language used, without evidence."

Finally, Phillimore, L.J., based himself (at p. 650) on the following proposition:

> "It is enough to say that in construing a modern statute, not dealing with the particular customs of a particular locality, or the practice of a particular trade, but of general application, evidence such as is sought to be adduced in this case is inadmissible."

It seems to me that those reasons really turn upon three matters, two of which might well be said to constitute material distinctions as between that case and this. First, the words in question – "nominal rent" – are just as much words of ordinary day-to-day use as are innumerable other expressions contained in legislative enactments, as opposed to the term "Swahili" which is an ethnological term of art invented (probably as a derivative from the Arabic "sahil" meaning coast) to meet the need for a technical classification of a human group which previously had no name. That being its origin and purpose, the term appears in the Ordinance without any definition or explanation; it is, so to speak, an artificial conception which must have a definable meaning – but who is to define it and with what aid, the legislature having given no guidance? I am unable to find any authority on this aspect of the question.

The second arguable distinction between *Marquis Camden's* case (1) and the instant one arises out of the words of Phillimore, L.J., by which he expressly excepted the case of an enactment "dealing with the particular customs of a particular locality." It might be said that, by analogy, the rule prohibiting oral evidence should not apply as regards a word which has a particular local significance.

On the other hand, Cozens-Hardy, M.R.'s objection to the admission of the proposed evidence was that the court would thereby be inviting the opinion of "a particular branch of the public," or, as he later expressed it, "a certain branch of the community." That, in effect, is apparently just what the learned magistrate was doing in the instant case; for the officials of the Arab Association were called *qua* such officials, that is to say, as persons qualified to present the views of the Arab community, not as persons whose views were calculated to reflect the general or traditional understanding of the public at large.

My conclusion, on the whole, is that the evidence of the Arab witnesses as to the meaning to be attributed to the term "Swahili" as contained in the Ordinance was not admissible, but that they were entitled to give their views as to whether the respondent is in fact an Arab. There was, however, always the other question, namely, what weight, if any, was to be given to what they said.

For the reasons which I have stated I would dismiss this appeal with costs.

Sir Newnham Worley P: I agree. The appeal is dismissed with costs.

Sir Ronald Sinclair V-P: I also agree.

Appeal dismissed.

For the appellant:
NS Patel and *KL Jhaveri*
Patel & Co, Dar-es-Salaam

For the respondent:
KA Master
KA Master, Dar-es-Salaam

Velji J Mehta & Bros Limited v RO Hamilton Limited

[1957] 1 EA 326 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	7 January 1957
Case Number:	722/1957
Before:	McKisack CJ
Sourced by:	LawAfrica

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[1] Landlord and tenant – Premium paid to landlord for lease – Whether receipt of premium illegal – Rent Restriction Ordinance, s. 3 (2) (*U.*).

Editor's Summary

The plaintiff company sued the defendant company for the recovery of the sum of Shs. 12,000/- paid to the defendant company by way of premium for the sub-lease of a residential flat for a term of seven and half years. It was argued on behalf of the plaintiff company that the receipt of the premium by the defendant company was prohibited by s. 3 (2) of the Rent Restriction Ordinance, and that the plaintiff company was entitled to recover this sum from the defendant company.

Held – in view of the Rent Restriction Ordinance, s. 3 (2) it was not unlawful for the landlord to require payment of premium for lease exceeding seven years and accordingly the premium paid could not be recovered.

R. v. Norman Godinho, 17 E.A.C.A. 132, followed.

Judgment for the defendant.

Cases referred to:

(1) *Browning v. Morris*, 98 E.R. 1364.

(2) *R. v. Norman Godinho,* 17 E.A.C.A. 132.

(3) *Kampala Cotton Co., Ltd. v. Pravinlal V. Madhvani*, 21 E.A.C.A. 129.

(4) *Jamnadas Samalbhai v. Haribhai Mangalbhai Patel*, Uganda High Court Civil Appeal No. 20 of 1949 (unreported).

(5) *Green v. Portsmouth Stadium Ltd.*, [1953] 2 All E.R. 102.

Judgment

McKisack CJ: The plaintiff company is claiming the return of Shs. 12,000/- paid by it to the defendant company by way of premium for the sublease of a residential flat.

The facts are not in dispute except as to one matter which does not appear to me to be material to the decision of the case. In November, 1953, the defendant company – by an oral agreement – agreed to sub-lease to the plaintiff for the term of seven years and six months a flat in Kampala then in course of construction by the defendant company. The defendant is the registered proprietor of the leasehold of the plot on which this flat, along with others, was constructed. It was agreed that the plaintiff company should pay such rent as would be fixed by the Kampala Rent Board under the provisions of the Rent Restriction Ordinance (Cap. 115). The premium referred to above was paid by plaintiff to defendant in November, 1953. In 1954 the plaintiff company's managing director signed a written agreement setting out the terms of the sub-lease, and this agreement included provision for the payment of the Shs. 12,000/- premium. One of the sub-lessee's covenants in the agreement was to use the demised premises for residential purposes only.

According to the plaintiff, this written agreement was signed by its managing director at the end of September or the beginning of October, 1954, whereas defendant says that it was signed in April, 1954. The date of signature, however, does not appear to me to be material, and, whichever may have been the true date, neither counsel for the plaintiff nor counsel for the defendant has founded any argument upon it.

The plaintiff went into possession of the flat in October, 1954, and in the following April the Kampala Rent Board fixed the rent at Shs. 450/- a month.

The plaintiff's case is that the receipt of the premium by the defendant was illegal in that it was prohibited by s. 3 (2) of the Rent Restriction Ordinance, and that he is entitled to recover the amount of the premium from the defendant. Mr. James, for

the plaintiff, argues that the Rent Restriction Ordinance is a statute for the protection of one class of persons, viz., tenants, against another class, landlords, and that on the principle stated by Lord Mansfield in *Browning v. Morris* (1), 98 E.R. 1364, the plaintiff is entitled to recover under the contract because the plaintiff belongs to the class of persons whom the statute is designed to protect. The relevant passage in Lord Mansfield's judgment is as follows:

> "But, where contracts or transactions are prohibited by positive statutes, for the sake of protecting one set of men from another set of men; the one, from their situation and condition, being liable to be oppressed or imposed upon by the other; there, the parties are not in pari delicto; and in furtherance of these statutes, the person injured, after the transaction is finished and completed, may bring his action and defeat the contract."

Mr. Caldwell for the defendant says, in the first place, that the transaction in regard to the premium was not illegal because of the proviso in s. 3 (2) of the Rent Restriction Ordinance which excepts a lease for a term of seven years or more. Sub-s. (2) of s. 3 of that Ordinance read (until amended by Ordinance 16 of 1954) as follows:

> "(2) Any person whether the owner of the property or not who in consideration of the letting or sub-letting of a dwelling-house or premises to a person asks for, solicits or receives any sum of money other than rent or any thing of value whether such asking, soliciting or receiving is made before or after the grant of a tenancy shall be guilty of an offence and liable to a fine not exceeding Shs. 10,000/- or imprisonment for a period not exceeding six months or to both such fine and imprisonment;
>
> "Provided that a person acting bona fide as an agent for either party to an intended tenancy agreement shall be entitled to a reasonable commission for his services:
>
> "And provided further that nothing in this section shall be deemed to make unlawful the charging of a purchase price or premium on the sale, grant, assignment or renewal of a long lease of premises where the term or unexpired term is seven years or more.

The second proviso in that sub-section was repealed by Ordinance 16 of 1954 with effect from September 30, 1954. The premium which is the subject of this case had, however, been paid while that proviso was still in force.

It will be observed that the expression "dwelling-house or premises," which is found at the beginning of this sub-section and in sub-s (1) of the same section, is not repeated in the second proviso to sub-s. (2), where the term "premises" is found alone. It appears, therefore, to follow that this second proviso does not apply to "dwelling-houses" (as defined in s. 2 of the Ordinance) but only to "premises" (as defined in the same section), unless it is the case that a dwelling-house may also be premises within the meaning of the Ordinance. Those definitions are as follows:

> " 'dwelling-house' means any building or part of a building let for human habitation as a separate dwelling where such letting does not include any land other than the site of the dwelling-house or the garden or other land within the curtilage of the dwelling-house;
>
> " 'premises' means any building or part of a building let for business, trade, or professional purposes or for the public service, but shall not include any land other than the site of the premises or land within the curtilage of the premises."

In *R. v. Norman Godinho* (2), 17 E.A.C.A. 132, in which the second proviso to s. 3 (2) was held to apply to a lease for a term of five years with an option to the tenants to renew for a further two years, there is a reference to "the dwelling-house which formed the subject of the charges," from which it might appear that the court had in that case assumed that the term "premises" did include a dwelling-house; but it is apparent from the report of the judgment that this point, viz., the class of building to which the proviso

applied, was not in issue before the court. I do not, therefore, consider that the *Norman Godinho* case (2) can be taken as an authority on that particular point.

There is, however, authority for the proposition that, under the Rent Restriction Ordinance of Uganda, a building which is in fact let, and used, as a residence, may nevertheless be a building let for business purposes if it is let to a tenant who uses it to house his employee. See *Kampala Cotton Co. v. Pravinlal V. Madhvani* (3), 21 E.A.C.A. 129. In that case a house was let to a limited company and was occupied for residential purposes by the company's managing director; the court held that the house was let for business purposes since

> "it was let to the tenant, and used by him, as one of the features of his business operations"

(per Briggs, J.A., at p. 134).

I find it difficult to discern any distinction in principle between that case and the instant case, where the sub-tenant is a limited company and the flat is occupied by the managing director. It is true that there is no evidence as to what business is carried on by the plaintiff company. But the company is described in the agreement to lease (Exhibit D. 1) as "Indian merchants," and I think that is just sufficient to show that the house, being occupied by their managing director, was used "as one of the features of (the plaintiff's) business operations." If I am correct in that conclusion, then this house comes within the definition of "premises," and, since the lease was for more than seven years, the demanding of a premium was not unlawful, and the plaintiff cannot recover it.

Even if I am wrong in that conclusion, and the payment of premium was in fact a contravention of s. 3 (2) of the Ordinance, I am nevertheless of opinion that (as Mr. Caldwell contends) by reason of the decision in the *Norman Godinho* case (2) (above-cited), there is no right to recover such a premium. In that case (which was a second appeal from convictions in a magistrate's court) the Court of Appeal for Eastern Africa considered the precise point which falls to be considered by me in the instant case. The appellant in the former case had appealed against convictions for contravening s. 3 (2) of the Rent Restriction Ordinance and the court, after quashing the convictions on three of the counts and upholding the conviction on the remaining count, considered whether the trial magistrate's order for payment of compensation out of the fine imposed on the appellant in respect of the last-mentioned count had been lawful, having regard to the fact that the Criminal Procedure Code provided that such compensation could only be ordered if, in the opinion of the court, substantial compensation was recoverable by a civil suit. The court said:

> "If the learned magistrate was wrong in his opinion that the sums paid were recoverable by civil suit the orders made for compensation were ultra vires. It was the duty of the judge therefore, if he felt in doubt, to inquire into and to decide on the legality of the orders. For our part we are in no doubt-what the learned magistrate has done, doubtless quite unwittingly, is to import into the Uganda Rent Restriction Ordinance something which is not there, namely, a right to the tenant to recover from the landlord any payment made in contravention of s. 3 (2). We do not know the reason, but the Uganda legislature in its wisdom has included in the Ordinance no provision comparable to s. 8 (2) of the Rent Restriction Act of 1920. This sub-section provides that on summary conviction for an offence against the section the convicting court may order the amount paid by way of illegal premium to be repaid to the person to whom the same was given. Without this statutory right of recovery, the giver of the illegal premium is left in the position of one, who although he himself has committed no substantive offence, has aided and abetted the commission of an offence by another. In these circumstances he could not go to a civil court with clean hands and the principle stated by Lord Ellenborough in *Langton v. Hughes*, 1 M. & S., 593–596, would have application. 'What is done in contravention of an Act of Parliament cannot be made the subject matter of an action.' For this reason we are of the opinion that the sum paid by Mr. Fafek could not be recovered by him in a civil suit and that the learned magistrate was wrong in

> holding a contrary view. It follows that his order of compensation to Mr. Fafek must be set aside."

This ruling by the Court of Appeal, if it is binding upon me, concludes the matter in the defendant's favour. Mr. James, however, argues that it is not so binding, and has referred me to the judgment of Edwards, C.J., in *Jamnadas Samlabhai v. Haribhai Mangalbhai Patel* (4), Uganda High Court Civil Appeal No. 20 of 1949 (unreported). In that case the learned chief justice had to decide whether a tenant who had paid rent exceeding the standard rent could recover the excess from the defendant. The magistrate from whose decision the appeal was brought had found for the plaintiff (the tenant) and Edwards, C.J., dismissed the appeal brought by the landlord. The Ordinance which governed the transactions between the landlord and the tenant in that case was not the one which I have to consider but an earlier one, viz., the Rent Restriction Ordinance, 1943. That Ordinance provided for the fixing of standard rents, and made it an offence for a landlord to let at a rent exceeding the standard rent. Edwards, C.J., felt that the effect of the decision in the *Norman Godinho* case (2) was not such that he was bound to allow the appeal. His reasons, which are set out at length in his judgment, were twofold; he reached the following conclusion (at p. 4 of the typed copy of the judgment):

> ". . . with some hesitation, I incline to the view that a judgment of H.M. Court of Appeal for Eastern Africa in a criminal appeal does not have the same authoritative, or binding, effect as a judgment of the same court in a civil appeal."

And at p. 5 he says:

> ". . . the matter is not free from doubt as to whether they (i.e. the Court of Appeal for Eastern Africa) definitely decided that a tenant who has paid rent in excess of the standard rent could not recover in a civil action."

Different considerations, however, appear to me to apply in the instant case. In *Green v. Portsmouth Stadium Ltd*. (5), [1953] 2 All E.R. 102, Denning, L.J., said, with reference to the passage I have cited from Lord Mansfield's judgment in *Browning v. Morris* (1):

> "In my judgment those observations of Lord Mansfield apply only in cases where the statute, on its true construction, contemplates the possibility of a civil action. He said it was 'in furtherance of these statutes' that the action for money had and received could be brought. Just as in an action for damages, so, also, in an action for money had and received, it is a question of the true interpretation of the statute whether an action lies so as to recover the overcharge."

In the *Norman Godinho* case (2) the court did consider and decide the true construction of the relevant provisions in the Rent Restriction Ordinance (Cap. 115). Although it may be that, in general, a decision of H.M. Court of Appeal for Eastern Africa Arrived at in a criminal appeal has, in relation to a decision to be reached by a lower court in a civil case, a less authoritative or binding effect than if it had been arrived at in a civil appeal, I do not think that Edwards, C.J., was to be understood as going so far as to hold that such a decision, if it has decided a point of construction of a particular Ordinance, and is the only pronouncement by that court on that point, has no binding effect upon a lower court when the same point arises.

Nor can I regard the passages in the judgment in the *Norman Godinho* case (2) relating to the construction of s. 3 (2) as being merely obiter (as has been suggested by Mr. James). As a result of the construction put upon that sub-section the court set aside the order for compensation made by the lower court.

In the result I hold that I am bound to follow the *Norman Godinho* case (2) in so far as it decided that there is no right to recover a premium paid in contravention of s. 3 (2) of the Rent Restriction Ordinance

(Cap. 115). There will accordingly be judgment for the defendant with costs.

Judgment for the defendant.

For the plaintiff:
AI James
Baerlein & James, Jinja

For the defendant:
RA Caldwell
PJ Wilkinson, Kampala

R v Magata s/o Kachehakana
[1957] 1 EA 330(HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	24 August 1957
Case Number:	220/1957
Before:	Lyon J
Sourced by:	LawAfrica

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[1] Criminal law – Murder – Insanity – Defect of reason from disease of the mind – Belief that accused was bewitched – Burden of proof – Penal Code, s. 12 (*U.*).

Editor's Summary

The accused was charged of killing his father by one blow with a panga and it was proved and admitted that the accused killed his father because he believed that his father was Satan and had bewitched him. There was no apparent motive for the killing other than the belief of the accused that his father had bewitched him.

Held –

(i) when the accused killed his father he did not know what he was doing and he did not know that he ought not to have done the act.

(ii) the accused was guilty of the act charged but insane at the time.

Guilty but insane.

Cases referred to:

(1) *Eria Galikuwa v. R.*, 18 E.A.C.A. 175.

(2) *M'Naghten's Case* (1843), 10 C1. & Fin. 200; 8 E.R. 718: sub. nom. *McNaughton's Case*, 4 State Tr.

N.S. 847.

(3) *Godiyano Barongo s/o Rugwire v. R.*, 19 E.A.C.A. 229.

(4) *Jama Warsama v. R.*, 17 E.A.C.A. 122.

Judgment

Lyon J: The accused is charged here that on June 1, 1957, at Nyarushanje, Kigezi district, he murdered Kachehakana. The deceased man was accused's father. They had both been to a burial of a boy at the home of one Tadeo and were walking home in the company of Paulo Mashango. Paulo had a bicycle; and when he reached the road he went on ahead. The evidence is that on the way along accused and his father were on quite friendly terms. There was no quarrel, at any rate up to the time Paulo left them. Indeed, it seems clear that they were talking in a friendly way. Paulo continued on to the deceased's home. About 4.30 p.m. Mugongo reported something to him. Paulo turned back and found on the path the body of Kachehakana; the head had been almost severed from the trunk and was hanging by the windpipe only. It is proved and admitted that this accused killed his father by one blow with the panga produced, the cause of death being shock, haemorrhage and sectional cutting of the cervical spine. The same afternoon accused went to the acting Gombolola chief, Inyansio Matwigi, and volunteered the information that he had killed his father. They went to the scene of the killing and, soon after, accused said to the acting Gombolola chief, "I have killed him because he was Satan." That is, of course, the East African's expression of his belief that his father was bewitching him.

It at first appeared to me that Mr. Singh was trying to show that there was a sudden provocation in this case which would fall within the headnote of *Eria Galikuwa v. R.* (1), 18 E.A.C.A. 175. But later, when it became clear that there was no sudden provocation such as would reduce the offence to manslaughter, Mr. Singh relied upon the alternative defence that this man Magata was guilty but insane.

Now when accused had been formally charged and cautioned he made this statement to the police:

> "I killed Kachehakana because he bewitched my two sons and killed them, he again bewitched my wife and killed her, also he bewitched me and made me impotent. My feet got swollen.
>
> "He bewitched my goats and killed them all, he bewitched my cow which is still sick, he bewitched my second wife; she is always sick.

> "Kachehakana asked for two pots of beer so that he may treat my wife and get her fit. I did so, but nothing was done to her.
>
> "I never complained before the Gombolola chief. Having been provoked, I killed him. I have been unable to do my work because of being bewitched."

Accused now amplifies that statement. He told the court in an unsworn statement:

> "After I was bewitched, I was hated in the village and even my relatives hated me. My second wife also hated me and said about a year ago she was going to marry someone else.
>
> "Because I was bewitched, my head was not right. Even my ears were affected. I do not hear properly. My stomach became swollen. I was bewitched a long time ago by both my grandfather and my father. When I have sexual connections with my wife, my penis burns. My feet were swollen when I was a youth and they are still. My wife died because of 'this Satan.'
>
> "My two children died. That was 'Satan.' Because of all these things I killed my father. My cows and goats died. That is all I want to say."

Insanity is defined by s. 12 of the Penal Code:

> "A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission. But a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above-mentioned in reference to that act or omission."

That section must be read and construed together with the rules in *McNaughton's Case* (2) ((1843), 4 State Tr. N.S. 847), and decisions following that case (Archbold (33rd Edn.), p. 16 et seq.). Dr. Murphy testified that when he examined the accused on June 3, 1957, he appeared to be mentally normal. Other prosecution witnesses testified that accused never complained that his father had bewitched him, nor did they believe that accused had been bewitched nor that his family or that his animals had been bewitched. But it does not follow that accused did not think so.

It is no part of the duty of the prosecution to prove any motive. At the same time absence of motive must be considered. Mr. Few threw out a suggestion that accused and his father may have had a sudden quarrel. There is no evidence of that. There is no evidence from which such an inference could be drawn. Indeed, as far as it goes Paulo's evidence negatives that as does the statement accused made to the acting chief shortly after the killing. Deceased owned two cows and a few goats. Accused is his oldest son and would in normal circumstances have inherited some of those. But on the whole case I am satisfied that this was not the reason for the killing.

The first assessor was of the opinion that this man should be convicted of murder. On the other hand the second assessor told the court:

> "Accused killed his father because his head was not well – he was mad. He had those thoughts for a long time that his father was bewitching him. This affected his mind. As accused was coming from a burial of a child he thought of his own children and he believed his father was bewitching them. (I consider that a good point). When he killed his father his mind was so affected that he did not know he was doing wrong."

This case is not free from difficulty. I have considered the words "disease of the mind" in s. 12 of the Penal Code. I am of the opinion that an African living far away in the bush may become so obsessed with the idea that he is being bewitched that the balance of his mind may be disturbed to such an extent that it may be described as disease of the mind. Here the killing is unexplained, and in my opinion inexplicable;

except upon the basis that accused did not know what he was doing. I have directed myself along the lines of the decision in *Godiyano Barongo s/o Rugwire v. R.* (3), 19 E.A.C.A. 229. The headnote in that case is identical with the note of the learned editors of Archbold (33rd Edn.), p. 20:

> "The burden of proof which rests upon the prisoner to establish the defence of insanity is not as heavy as that which rests upon the prosecution. . . . It may be stated as not being higher than the burden which rests on the plaintiff or defendant in civil proceedings and may be discharged by evidence satisfying the jury of the probability of that which the prisoner is called on to establish."

I have also considered para. 27 in the Eleventh Cumulative Supplement of May 25, 1957.

I have come to the conclusion, mainly upon the evidence adduced by the prosecution but also upon the accused's statement to the police, that when this accused killed his father he did not know what he was doing and he did not know that he ought not to have done the act. In my opinion the evidence as a whole has established the reasonable probability that this was the accused's state of mind at the relevant time; and in this finding I am in agreement with the second assessor.

For all these reasons I find the accused guilty of the act charged but insane at the time. (*Jama Warsama v. R.* (4), 17 E.A.C.A. 122.)

Guilty but insane.

For the Crown:
HSS Few (Crown Counsel, Uganda)
The Attorney-General, Uganda

For the accused:
Sat Pal Singh
Sat Pal Singh, Kampala

Ramanlal Trambaklal Bhatt v R
[1957] 1 EA 332 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	20 July 1957
Case Number:	76/1957
Before:	Sir Newnham Worley P, Sir Ronald Sinclair V-P and Bacon JA
Sourced by:	LawAfrica

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[1] Criminal law – Practice – Burden of proof – When is a prima facie case established – Criminal Procedure Code, s. 205 (*T.*).

[2] Criminal law – Corruption – Police officer receiving and soliciting money – Penal Code, s. 91 (1) (*T.*).

Editor's Summary

The appellant, a sub-inspector of police, was charged in the district court of Bukoba on two counts of official corruption, namely, (i) that he corruptly solicited for himself Shs. 1,000/- from one Juma on account of his “closing a case” against Juma Sued and (ii) that he corruptly received Shs. 400/- from one Abdulla on account of having released Juma. The evidence for the prosecution showed that Juma Sued and one Isaac were used as agents provocateurs by the police in order to test the honesty of the appellant who was a police officer at Bukoba. The magistrate accepted the evidence of the agents that the appellant asked Juma Sued “Have you got Shs. 1,000/-?” but disbelieved Isaac who quoted the appellant as saying “Do not worry. I will finish the matter.” The magistrate considered that this “fragment of evidence,” namely, “Have you got Shs. 1,000/-,” was not sufficient to justify his calling on the defence on the count of soliciting, and though the evidence on the second count was strong he thought it did not constitute proof of the charge as laid. He therefore discharged the appellant on both counts. The Attorney-General then appealed to the High Court by way of case stated and obtained an order remitting the case to the same magistrate with a direction to put the appellant on his defence in respect of both counts and to hear and determine the case according to law. At the resumed trial the appellant was convicted on both the counts and sentenced to twelve months imprisonment on each

count, the sentences to run concurrently. An appeal to the High Court was dismissed and the sentence was increased to three years on each count, the sentence to run concurrently. The appellant appealed again against both conviction and sentence.

Held –

(i) the onus is on the prosecution to prove its case beyond reasonable doubt and a *prima facie* case is not made out if, at the close of the prosecution, the case is merely one "which on full consideration might possibly be thought sufficient to sustain a conviction."

(ii) the question whether there is a case to answer cannot depend only on whether there is "some evidence irrespective of its credibility or weight, sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence."

(iii) the judge hearing the case stated misdirected himself on the law when considering the question whether a *prima facie* case is made out, and, as it could not be said that the magistrate at the resumed trial would necessarily have reached the conclusion he did, had he not been influenced by this misdirection, it was not safe to allow the conviction on the first count to stand.

Appeal allowed on first count.

Cases referred to in judgment:

(1) *R. v. Jagjivan M. Patel and Others*, 1 T.L.R. (R.) 85.

Judgment

Sir Newnham Worley P: read the following judgment of the court: The appellant was convicted in the district court of Bukoba on two counts of official corruption contrary to s. 91 (1) of the Penal Code and sentenced to twelve months imprisonment on each count, the sentences to run concurrently. His appeal to the High Court was dismissed and his sentences increased to three years on each count, the sentences to be concurrent. He appealed to this court against the whole of that decision. At the close of the argument, we allowed the appeal in respect of the conviction on the first count only and reduced the sentence imposed in respect of the second count to eighteen months. We now briefly give our reasons.

The appellant was employed in the public service as a sub-inspector of police: he was charged (1) that he corruptly solicited for himself Shs. 1,000/- from one Juma on account of his "closing a case" against Juma; and (2) that he corruptly received Shs. 400/- from one Abdulla on account of having released Juma.

The evidence for the prosecution showed that Juma Sued and one Isaac were used as agents provocateurs by the police in order to test the honesty of the appellant who was a police officer at Bukoba. Juma and his companion were sent with a vehicle in which there was a quantity of coffee and they proceeded towards a river crossing where vehicles and goods could be transported from Tanganyika to Uganda. Before they got there they were intercepted by the appellant who had been instructed to do so and he found the coffee which he apparently considered was being illegally taken into Uganda. He told the two "agents" that they must return to Bukoba to the police station but on the way the appellant stopped the vehicle he was driving (a Jeep) and got into the vehicle in which the two "agents" were sitting (a Landrover).

The magistrate accepted the evidence of the two agents that, after getting into the Landrover, the appellant asked Juma “Have you got Shs. 1,000/- ?” (Isaac swore that the appellant also said “Do not worry. I will finish the matter” but, as will be seen, the magistrate did not believe that this was said.)

The learned magistrate considered that this “fragment of evidence” was not sufficient to justify his calling on the defence on the count of soliciting. The evidence on the second count was strong, but the magistrate thought that it did not constitute proof of the charge as laid. He therefore entered a discharge on both counts.

The Attorney-General appealed to the High Court by way of case stated and obtained an order remitting the case to the same magistrate with a direction to put

the accused on his defence in respect of both counts and to hear and determine the case according to law.

At the resumed trial the appellant made a statement and called witnesses, the gist of the defence on the first count being that the accused did not solicit money but Juma and Isaac sought to induce him to accept a bribe. The appellant and his witnesses also gave an explanation for the changeover of vehicles, namely that the Landrover was safer than the Jeep, and this was accepted by the magistrate.

The magistrate was therefore left only with the "fragment of evidence," namely that the accused asked the two agents "Have you Shs. 1,000/- ?". The appellant himself in his statement made no reference to this and, of course, could not be questioned on it. The magistrate therefore, in the absence of an explanation, decided to convict.

It is very evident from his judgment that as a consequence of the matter having been remitted to him for further hearing, he found himself in a serious dilemma.

In the ruling on the case stated Law, Ag.J., held that the question "Have you Shs. 1,000/-?" was evidence of solicitation by the appellant. Lowe, J., on first appeal held likewise and we respectfully agree with that view having regard to the circumstances in which the question was alleged to have been asked. Unfortunately the ruling of Law, Ag.J., did not stop there. He cited the following passage from the judgment of Wilson, J., in *R. v. Jagjivan M. Patel and Others* (1), T.L.R. (R) 85, with reference to s. 205 of the Criminal Procedure Code:

> ". . . all the court has to decide at the close of the evidence in support of the charge is whether a case is made out against the accused just sufficiently to require him to make his defence. It may be a strong case or it may be a weak case. The court is not required at this stage to apply its mind in deciding finally whether the evidence is worthy of credit or whether, if believed, it is weighty enough to prove the case conclusively, beyond reasonable doubt. A ruling that there is a case to answer would be justified, in my opinion, in a border line case where the court, though not satisfied as to the conclusiveness of the prosecution evidence, is yet of opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conviction."

Then, after referring to the fact that the magistrate had, before ruling on the defence submission of no case to answer, considered *inter alia* the credibility of the prosecution witnesses, Law, Ag. J., continued:

> "The fact remains that there was evidence on the record of a solicitation of Shs. 1,000/- by the accused. The fact that the witnesses might not be worthy of credit, or the possibility of the accused having a satisfactory explanation to account for the making of this solicitation, were not matters falling to be considered by the learned magistrate at this stage. The only point was – was there some evidence irrespective of its credibility or weight, sufficient to put the accused on his defence? In my opinion there was, and the learned magistrate erred in law in holding that there was not."

We find ourselves unable to agree wholly with either of the passages cited above.

Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a *prima facie* case is made out if, at the close of the prosecution, the case is merely one

> "which on full consideration might *possibly* be thought sufficient to sustain a conviction."

This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case.

Nor can we agree that the question whether there is a case to answer depends only on whether there is

“some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence.”

A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true, as Wilson, J., said, that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a "*prima facie* case," but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.

We think this misdirection may well have had an effect on the learned magistrate's mind. He was, as we have said, in a dilemma for he still thought (as his judgment shows) that there was no evidence of solicitation but the High Court ruling obliged him to hold otherwise. This may explain his apparent inconsistency in accepting the defence version of the reason for the changeover of vehicles but rejecting its account of the alleged solicitation. It is evident that, having found the changeover was fortuitous and innocent in purpose, the magistrate found it difficult to understand why the appellant waited for this fortuitous chance to ask for a bribe.

There was another aspect of the case, as remitted to him, which caused him difficulty. The Crown witness Isaac had stated that the appellant had also said "Do not worry. I will finish this matter." The magistrate, when ruling on the submission of no case, had said that he disbelieved this evidence: yet on the High Court's ruling he still had to consider it as part of the case against the appellant.

We have said enough to show the difficult position in which the learned magistrate was placed by that ruling. It would, in our view, have been a better course to order a re-trial before another magistrate who could have approached the matter with a fresh mind. As it is we cannot be sure that the learned magistrate on the resumed trial would necessarily have reached the conclusion he did had he not been influenced by the misdirection to which we have referred and, perhaps, felt his judgment fettered by the directions he had received. We accordingly thought it was not safe to allow the conviction on the first count to stand.

No question arose as to the second count: the evidence which the magistrate accepted was very strong and we respectfully agree with the learned judges of the High Court that it constituted proof of the offence charged.

The memorandum of appeal to this court sought to question the legality of the order of Lowe, J., in increasing the sentences. We find it unnecessary to consider that point. In reducing the sentence to eighteen months we acted as this court has often done in second appeals when quashing one of several convictions or when substituting a conviction for a lesser offence, namely we substituted the sentence which we thought would probably have been passed by the High Court had the alteration in the conviction or convictions been made by that court.

Appeal allowed on first count.

For the appellant:
WD Fraser Murray
Fraser Murray, Thornton & Co, Dar-es-Salaam

For the respondent:
JG Samuels (Crown Counsel, Tanganyika)

The Attorney-General, Tanganyika

Dinkerrai Ramkrishan Pandya v R

[1957] 1 EA 336 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	22 July 1957
Case Number:	102/1957
Before:	Sir Newnham Worley P, Sir Ronald Sinclair V-P and Bacon JA
Sourced by:	LawAfrica

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[1] Criminal law – Practice – Appeal – Conflict of testimony – Duty of appellate court to consider evidence and draw own inferences – Penal Code, s. 296 (1) (*T.*).

Editor's Summary

The appellant was employed as head clerk of a tea estate and he, with two (African) employees of the estate, was convicted in the district court of Kungwe of breaking and entering the estate office at night with intent to commit a felony therein and of stealing Shs. 5,181/52 contrary to s. 296 (1) of the Penal Code. At the trial the Crown case rested entirely on the evidence of two night-watchmen, Kakulu and Arusha, employed by the estate, who said that at the time when the offence was committed they had identified the appellant and his co-accused as the persons committing it. The identification of the appellant was the sole issue and on this point the two watchmen gave conflicting testimony. The appellant's defence was that of mistaken identity and he testified that he had nothing to do with the affair until he was called upon by the acting manager of the estate when the alarm was raised. His appeal to the High Court having been dismissed, he now brought this second appeal. The appeal turned entirely on a scrutiny of the watchmen's evidence when considered in the light of other testimony, and on the evaluation of the evidence as a whole by the trial and first appellate court. Counsel for the appellant in effect submitted three propositions: (*a*) that the trial magistrate did not give proper consideration to the evidence for the defence by balancing it against that for the Crown, but formed his view of the latter independently and therefore became obliged to reject the appellant's case; (*b*) that on the first appeal the appellant was entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon and (*c*) that the first appellate court's judgment was tainted throughout by a fundamental misdirection inasmuch as the court failed to appreciate its duty in law and virtually did no more than analyse and re-state the stages by which the trial magistrate had arrived at his decision to convict.

Held–

(i) the magistrate did form an unbalanced view of the evidence and reached a decision which was insupportable if the defence was duly taken into account.

(ii) (adopting defence counsel's second and third propositions) the first appellate court erred in law in that it had not treated the evidence as a whole to that fresh and exhaustive scrutiny which the

appellant was entitled to expect, and, as a result of its error, affirmed a conviction resting on evidence which, had it been duly reviewed, must have been seen to be so defective as to render the conviction manifestly unsafe.

Figgis v. R., 19 K.L.R. 32; *The Glannibanta* (1876), 1 P.D. 283, and *Coghlan v. Cumberland*, [1898] 1 Ch. 704 applied.

Appeal allowed.

Cases referred to:

(1) *Figgis v. R.*, 19 K.L.R. 32.

(2) *The Glannibanta* (1876), 1 P.D. 283.

(3) *Coghlan v. Cumberland*, [1898] 1 Ch. 704.

Judgment

Bacon JA: read the following judgment of the court: The appellant was the head clerk of the Kiganga Tea Estate in the Southern Highlands province of Tanganyika. Together with two African employees of the estate he was convicted by the district court of Rungwe of breaking and entering the estate office

during the night of March 13/14, 1957, with intent to commit a felony therein and of therein stealing Shs. 5,181/52 contrary to s. 296 (1) of the Penal Code. Having appealed unsuccessfully to the High Court of Tanganyika he brought a second appeal to this court. We allowed this second appeal and quashed the conviction, for which decision we now give our reasons.

At the trial the Crown case rested entirely on the evidence of two night-watchmen, Kakulu and Arusha, employed by the estate, who purported to prove that at the time when the offence was committed they had identified the appellant and his co-accused as the persons committing it. The identification of the criminal or criminals concerned was the sole issue, for it was clearly established that the office was broken into on the night in question and that the money was taken. The appellant's defence was that of mistaken identity; he testified that he had nothing to do with the affair until he was called upon by the acting manager of the estate when the alarm was raised.

Accordingly the appeal to this court turned entirely on a scrutiny of the watchmen's evidence when considered in the light of other testimony, and on the evaluation of the evidence as a whole by the trial and first appellate courts.

Mr. Fraser Murray for the appellant in effect submitted three propositions: first, that the trial magistrate did not give proper consideration to the evidence for the defence by balancing it against that for the Crown, but formed his view of the latter independently and therefore became obliged to reject the appellant's case; secondly, that on the first appeal the appellant was entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon; and, thirdly, that the first appellate court's judgment was tainted throughout by a fundamental misdirection inasmuch as the court failed to appreciate its duty in law and virtually did no more than analyse and re-state the stages by which the trial magistrate had arrived at his decision to convict.

We agree that Mr. Fraser Murray's second proposition is well-founded in law. In *Figgis v. R.* (1), 19 K.L.R. 32, on first appeal from a conviction under the Defence (Censorship) Regulations where the issue was entirely one of fact, the Supreme Court of Kenya (Sheridan, C.J., and Thacker, J.) set out what we believe was the true legal view of its duty as a first appellate court in these circumstances. We need only quote the following passages from the judgments cited and applied by the Supreme Court. In *The Glannibanta* (2) (1876), 1 P.D. 283, the Court of Appeal (James and Baggallay, L.JJ., and Lush, J.) said this (at p. 287):

> "Now we feel, as strong as did the Lords of the Privy Council in the cases just referred to, the great weight that is due to the decision of a judge of first instance whenever, in a conflict of testimony, the demeanour and manner of the witnesses who have been seen and heard by him are, as they were in the cases referred to, material elements in the consideration of the truthfulness of their statements. But the parties to the cause are nevertheless entitled, as well on questions of fact as on questions of law, to demand the decision of the Court of Appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in this respect."

In *Coghlan v. Cumberland* (3), [1898] 1 Ch. 704 the Court of Appeal (Lindley, M.R., Rigby and Collins, L.JJ.) put the matter as follows:

> "The case was not tried with a jury, and the appeal from the judge is not governed by the rules applicable to new trials after a trial and verdict by a jury. Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then

make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion

> that the judgment is wrong . . . When the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen."

In our view the principles declared in those passages are basic and apply with equal force to a first appeal from a conviction by a judge or magistrate sitting without a jury in any of the territories within the jurisdiction of this court. On a second appeal to this court (where, as in the present case, the trial was before a magistrate) it becomes a question of law as to whether the first appellate court, on approaching its task, applied or failed to apply those basic principles.

We now go back to Mr. Fraser Murray's first proposition and, for that purpose, to a consideration of the evidence itself. The whole issue at the trial turned, as we have said, on identification, and identification depended entirely on the word of the two watchmen. It followed that it was of paramount importance to decide whether the watchmen had promptly named the alleged criminals to a person in authority when they (the watchmen) reported the incident which they said they had witnessed. The importance of that point would be obvious in any such case as this, but it was here particularly plain because, having reviewed in his judgment various circumstantial matters relied on by the Crown, the magistrate said this:

> "Having dealt with all these points it will be seen that up to now the prosecution have failed to make out any case whatsoever against any of the three accused persons. I now come to deal with the main evidence, that of the night-watchmen upon which the case turns."

The passage in the magistrate's judgment which immediately followed that introduction is far from reassuring. He said this:

> "The evidence of these two witnesses given in court is that having come on duty on the evening of March 13, they proceeded with their normal duties. P.W. 3 turned off the electric plant; they then patrolled about the premises finding everything in order and eventually lay down and did or did not go to sleep on the verandah of the office. It is pretty clear to me that, whatever they may say to the contrary, and they both gave contradictory evidence on this point, they did both go to sleep. They were then awakened by three men whom both recognised as being the three accused. These men threatened to kill them and made them get up and pushed them over to the old office, now a woodshed; third accused stood guard over them whilst second and first accused went off and broke into the office."

We here observe that, with all due respect to the magistrate, that passage obviously gives the impression that the watchmen claimed to have recognised the appellant and his two co-accused in the ordinary way, namely by visual observation of them. Indeed, if the watchmen's story there set out were true, it would be difficult to imagine that they did not have ample opportunity of so recognising the men concerned. But that was not the watchmen's case, for whereas Kakulu said that, when the three accused awakened him and Arusha, the accused were only a yard from him (Kakulu), and inferentially claimed to have recognised them by sight, Arusha did not at first claim to have recognised the accused by sight at all. On the contrary, when asked in chief "How did you recognise these three people?", he answered "I recognised them as I heard them speaking," and, when further asked "Was this the only way you recognised them?" he said "This was the only way." We add that, according to Kakulu, Arusha had only been employed as a second night-watchman about three weeks before the incident; moreover Arusha is not recorded as giving any evidence as to what language the accused were talking or what they were

supposed

to be saying or how he claimed to be able to identify them by their voices. But at the end of his long testimony he is recorded as having asserted that he had seen the appellant's co-accused. It is impossible to discover what his case really was; probably he only claimed to have heard them.

We next record that there was in evidence a mass of contradiction as to whether the watchmen were asleep that night; as to whether they told others that they had been asleep; as to whether either or both of them had or had not named the alleged criminals to Abraham the cook (to whom Kakulu first went at 5 a.m. on the night in question) or to the acting manager of the estate (who was then awakened by Abraham and Kakulu) or to the police; as to whether they had or had not told the truth to the police; and as to whether they had contradicted themselves in the very course of their testimony at the trial. Over and over again they contradicted each other, each contradicted himself, and they were contradicted on vital points by much more satisfactory witnesses and by their own pre-trial statements. For example, the magistrate recorded the following in his note of the cross-examination of Kakulu:

> "Q.: Did you tell the police that you did not inform Abraham of the names of the three thieves?
>
> "Witness: Yes.
>
> "Note by court: This answer after about ten minutes' questioning.
>
> "Witness: I could not hide the names of the thieves. I made a statement to the police inspector now brought into court. I told him that I had told Abraham the names. . . .
>
> "Q.: Did you tell the police: 'I did not tell Abraham the names of the thieves because I knew that second accused was a friend of Abraham and I also thought that Abraham knew something about the theft'?
>
> "Witness: You are tying me up. This is what I told the police officer."

That passage is but a fragment of the long story of evasion and inconsistency with which the magistrate was faced. It should be added that he eventually found as a fact that neither of the watchmen named any of the accused either to Abraham or to the manager. He also found that, although the watchmen denied it at the trial, they had told the manager and the chief inspector who investigated the crime that on the night in question they were asleep and knew nothing of what happened.

We could labour the point at much greater length. Suffice it to say that the watchmen's evidence as a whole was a monumental hotchpotch of prevarication and lies. In short, it is impossible to put one's finger on any important part of their recorded evidence and to say with reasonable certainty: "At any rate *that* must be true."

These further points appear from the magistrate's judgment. With respect, we think he did not really weigh the probabilities regarding the watchmen's opportunities for recognising the appellant and his co-accused, a matter which called for particularly close consideration in view of their divergent assertions (and, in the case of Arusha, perhaps his change of story) as to the form of recognition. Nor did he weigh the probabilities as regards their story that, although armed with spears, they had been held prisoner by one of the thieves while the other two went off and broke into the office. Kakulu said that the appellant stood guard over them and that "we thought he might have a gun." Neither watchman ever suggested that he had seen any kind of weapon in the possession of any of the three accused, except that Kakulu said that the appellant's co-accused used iron bars to break into the office. When cross-examined by the third accused, Kakulu said that when they (the watchmen) wanted to spear him he persuaded them not to do so. Arusha, however, stated that Kakulu "fights with thieves." All this fantastic nonsense passed without comment in the trial judgment. Finally, the magistrate explained away the watchmen's apparent reluctance (or was it in reality their inability?) to disclose the names of the thieves in the following

sentence:

> "I find it more than probable that they only decided to disclose the truth after discussion – whatever it was they did discuss – with Gordon Mwansasu (P.W. 2), a man of influence in the area and of integrity."

That observation was made on the strength of Mwansasu's evidence to the effect that on the morning after the incident he had visited Kiganga and had spoken with the watchmen whom he came across while they were in a Government vehicle and accompanied by a corporal of police. Mwansasu said he was a chief and a member of Legislative Council. He was a stranger, previously unacquainted with either watchman. He said that Arusha seemed to be afraid. The corporal testified that Kakulu, the head-watchman, talked with Mwansasu for about half an hour. With respect, we think it was a most hazardous speculation to excuse the watchman's very unsatisfactory behaviour on that footing; for the court had no knowledge as to what story the watchmen told to Mwansasu or whether there was any truth in what they said, even though it be assumed that Mwansasu gave them good advice in so far as he could. Indeed, judging from the watchmen's verbal antics at the trial, it seems most probable that the account of their part in the affair which they gave to the visiting chief was, to say the least of it, highly coloured.

After a careful review of the trial record we were bound to come to the conclusion that the magistrate did, as Mr. Fraser Murray submitted, form an unbalanced view of the evidence and reached a decision which was insupportable if the defence was duly taken into account.

There remains Mr. Fraser Murray's third proposition. We found that this also was borne out by the first appellate judgment. With respect, the learned acting judge did not rehear and re-adjudicate as was his obligation in law; he recited what the magistrate had done, ratified his adoption of the watchmen's conversation with Mwansasu as the justification for the formers change of attitude towards the investigating authorities, and made no comment on the magistrate's failure to notice the inherent improbabilities of the watchmen's testimony to which we have referred. As regards the first of Mr. Fraser Murray's three propositions the learned acting judge recorded the fact that the Crown had accepted its basis. He said:

> "As remarked by learned Crown counsel, the magistrate, after having directed himself and having accepted the evidence of the two watchmen, of necessity rejected the evidence of the accused and their witnesses."

But he proceeded to exculpate the magistrate on the grounds that the latter is not a qualified lawyer and that:

> "a magistrate has a right to accept part of a witness's evidence and reject part provided that such parts are severable."

We respectfully agree with that general statement, but in our opinion the watchmen's evidence was so inextricably interwoven on all the vital matters to which they spoke that it was impossible to separate truth from untruth with any reasonable certainty. In concluding his judgment with the words

> "I find no misdirection or non-direction in the magistrate's judgment which could be said to have led the magistrate to a wrong conclusion"

the learned acting judge did not, in our opinion, cure the fundamental error of which we have spoken; for he had not treated the evidence as a whole to that fresh and exhaustive scrutiny which the appellant was entitled to expect.

Accordingly we came to the conclusion that the first appellate court erred in law and, as a result of its error, affirmed a conviction resting on evidence which, had that court duly reviewed and weighed it, must have been seen to be so defective as to render the conviction manifestly unsafe.

Appeal allowed.

For the appellant:

WD Fraser Murray
Fraser Murray, Thornton & Co, Dar-es-Salaam

For the respondent:
JG Samuels (Crown Counsel, Tanganyika)
The Attorney-General, Tanganyika

The Attorney-General of Uganda v Gaburiel Ottii
[1957] 1 EA 341 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	18 January 1957
Case Number:	411/1956
Before:	Bennett J
Sourced by:	LawAfrica

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[1] Criminal law – Uttering a false document – Finding by magistrate that "fraudulently" connotes causing economic loss – Accused acquitted – Appeal by Attorney-General – Penal Code, s. 330 (*U.*).

Editor's Summary

The respondent was charged *inter alia* with uttering a false document, namely, a driving permit, contrary to s. 330 of the Penal Code. The magistrate who tried the case made no finding whether the respondent knew the driving permit was false, but he held that the word "fraudulently" in s. 330 connotes the causing of some economic loss and, therefore, acquitted the respondent. The attorney-general appealed on the ground that the magistrate was wrong in the meaning he gave to the word "fraudulently."

Held – an intention to cause economic loss is not a necessary ingredient of the offence created by s. 330 of the Penal Code, but since knowledge of the falsity of the document uttered is an ingredient of that offence the case should be remitted to the magistrate to arrive at a finding on that question.

Case remitted to the magistrate.

Cases referred to:

(1) *Re London & Globe Finance Corporation Limited*, [1903] 1 Ch. 728.

(2) *R. v. Bassey*, 22 Cr. App. R. 160.

(3) *Legal Remembrancer v. Ahi Lal Mandal* (1921), 48 Cal. 911.

Judgment

Bennett J: The appellant was charged with uttering a false document, namely, a driving permit, contrary

to s. 330 of the Penal Code, and on a second count with retaining stolen property contrary to s. 298 (2) of the Penal Code. He was acquitted on both counts.

The attorney-general now appeals against the acquittal on the first count on the ground that the learned magistrate was wrong in holding, as he did, that the word "fraudulently" in s. 330 of the Penal Code connotes the causing of some economic loss.

It is certainly true, as the learned magistrate realised, that the earlier English cases go to show that the word "defraud" for the purposes of the crime of forgery was construed as meaning the causing of economic loss. In *Re London & Globe Financial Corporation Limited* (1), [1903] 1 Ch. 728, Buckley, J., said:

> "To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit; it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action."

Then came the case of *R. v. Bassey* (2), 22 Cr. App. R. 160, in which the appellant had obtained admission to the Inner Temple as a student on the strength of false documents purporting to show that he had passed examinations in a native college in Africa.

It was contended on his behalf in the court of Criminal Appeal that the conviction was wrong in that the Benchers of the Inn had not been deprived of anything, and that there was at most an intention to deceive. The Court of Criminal Appeal did not accept this argument, and after referring to the aforesaid passage from the judgment of Buckley, J., in the *London & Globe Financial Corporation* case (1), went on to say:

> "In this case there was in the opinion of this court, evidence on which the jury might properly say that, in making these forged documents and in subsequently uttering them, the appellant intended to defraud, because he intended to induce the Benchers to act to their injury in admitting as a student a person who, if they had known the true facts, it was not only their right, but also their duty, to exclude."

The learned magistrate declined to follow the decision in *R. v. Bassey* (2), commenting thus:

> "This case has always been regarded as a doubtful authority and carrying something of a bar sinister on its arms."

The learned author of Russell on Crime (10th Edn.) has the following comment to make on *R. v. Bassey* (2):

> "It is submitted, with respect, that this judgment is not in accordance with the meaning which Buckley, J., intended to convey, and is a logically erroneous interpretation of the words which he used."

While the learned author of Russell on Crime appears to discern a lack of logic in the judgment of the Court of Criminal Appeal in *R. v. Bassey* (2), he does not say that the decision is of doubtful authority.

The judgment in *Bassey's* case (2) is now over twenty-five years old and I am not aware of any other decision in which its correctness has ever been questioned. It must, I think, be regarded as containing a correct statement of the law of England.

It is interesting to note that the High Court of Calcutta reached a somewhat similar conclusion as to the meaning of the terms "fraudulently" and "to defraud" in *Legal Remembrancer v. Ahi Lal Mandal* (3) (1921), 48 Cal. 911. To quote from the judgment:

> "He is also in our opinion guilty under s. 423 of the Indian Penal Code. The statements in the document relating to the consideration for the transfer are false, and the only question then is whether the accused in making the document was acting fraudulently. Here the contention advanced on behalf of the accused is that the words 'fraud,' 'fraudulently' and 'to defraud' connote deprivation of property, and the deception of the person so deprived. We are unable to confine the words in question to this restricted meaning. We are not of opinion that deprivation of property, actual or intended, is an essential ingredient in fraud, or the intention to defraud, and we are further of opinion that it is not essential that the person deceived or to be deceived and the person injured or intended to be injured should be one and the same."

In my humble opinion an intention to cause economic loss is not a necessary ingredient of the offence created by s. 330 of the Penal Code of Uganda.

In the instant case the respondent uttered a false driving permit with the apparent intention of misleading the police and causing them to act, if not to their own injury, then at least to the injury of the public, by forbearing to prosecute the respondent for driving without a permit.

Having said as much it is unnecessary for me to decide the point raised by learned Crown counsel as to whether or not any distinction is to be drawn between the expression "fraudulently" and the expression "intent to defraud."

The decision in *Legal Remembrancer v. Ahi Lal Mandal* (3) seems to indicate that the High Court of Calcutta was of opinion that there was no distinction.

One of the ingredients of the offence of uttering contrary to s. 330 of the Penal Code is knowledge of the falsity of the document which is uttered.

The learned magistrate arrived at no finding as to whether or not the respondent knew that the driving permit was false. The case must, therefore, be remitted to the magistrate so that he can arrive at a finding

on this matter. In the event of his being satisfied that the respondent knew that the driving permit was false, he should record a conviction and proceed to sentence.

Case remitted to the magistrate.

For the appellant:
MJ Starforth (Crown Counsel, Uganda)
The Attorney-General, Uganda

The respondent did not appear and was not represented.

Narotthandas Parmanandas Vithlani v R
[1957] 1 EA 343 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	11 February 1957
Case Number:	445/1956
Before:	Bennett J
Sourced by:	LawAfrica

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[1] Criminal law – Appeal – Conviction of felony – Accused absent for portion of trial – Whether proceedings a nullity – Criminal Procedure Code, s. 206 (*U.*).

Editor's Summary

The appellant was convicted in the district court of Mengo of fraudulent false accounting which under s. 305 of the Penal Code is a felony. The appellant had been absent at the opening of his trial owing to sickness but his counsel agreed that the trial should proceed in his absence and, in fact, the appellant was present after the midday adjournment on the first day and during the rest of the trial. On his appeal against conviction and sentence his counsel did not rely on the absence of the appellant during part of the trial as a ground of appeal, but the appellate decided to hear arguments on the question whether the trial was a nullity in view of s. 206 of the Criminal Procedure Code.

Held – the district court had no jurisdiction to try the appellant in his absence and the proceedings were a nullity.

Conviction quashed and sentence set aside; order for a new trial before another magistrate.

Judgment

Bennett J: The appellant was convicted on two counts of fraudulent false accounting contrary to s. 305 of the Penal Code and sentenced to one year's imprisonment with hard labour on each count, the sentences to run concurrently. He appeals against his conviction and sentence.

The appellant was brought before the district court of Mengo on September 4, 1956, when he pleaded not guilty. He was remanded on bail from time to time and the trial began on the morning of November 8, 1956. At the opening of the trial the appellant was absent due to sickness. His advocate, Mr. Dholakia, agreed to the trial proceeding in the absence of his client in order to suit the convenience of the prosecution. The appellant was absent throughout the first morning of the trial, during the whole of the examination-in-chief and part of the cross-examination of an important police witness, Mr. Taylor. After the midday adjournment the appellant surrendered to his bail and appeared before the court, and was present during the rest of the trial.

The offence of fraudulent false accounting contrary to s. 305 of the Penal Code is a felony, and the question arises whether the accused's absence during the first morning of the trial invalidates the conviction. No authorities have been cited to me by counsel. Indeed, Mr. Dholakia who appeared on behalf of the appellant both in this court and in the district court, is not relying upon the accused's absence during part of the trial as a ground of appeal.

Section 206 (1) of the Criminal Procedure Code provides that:

> "If at the time or place to which the hearing or further hearing shall be adjourned, the accused person shall not appear before the court which shall have made the order of adjournment, it shall be lawful for such court, *unless the accused person is charged with felony*, to proceed with the hearing or further hearing as if the accused were present, and if the complainant shall not appear the court may dismiss the charge with or without costs as the court shall think fit."

Sub-s. (4) of the same section provides:

> "*If the accused person who has not appeared as aforesaid is charged with felony*, or if the court, in its discretion, refrains from convicting the accused in his absence, the court shall issue a warrant for the apprehension of the accused person and cause him to be brought before the court."

Now, it seems to me that the effect of those two sub-sections is perfectly plain, and that they mean that if an accused person is charged with an offence other than felony the court may, in its discretion, proceed with the hearing of the case as if the accused were present, but that if the accused is charged with felony the court

> "shall issue a warrant for the apprehension of the accused person and cause him to be brought before the court."

I think that s. 206 was designed to preserve the principle of English law and that no trial for felony can be heard except in the presence of the prisoner – see Archbold (33rd Edn.), p. 189.

There are certain exceptions to this rule, as where the accused creates a disturbance so that the trial cannot proceed if the accused is permitted to remain in court, but the case of illness would appear not to be one of the well-recognised exceptions.

The case of illness of an accused person is dealt with in the following passage from Roscoe's Criminal Evidence (16th Edn.), p. 242:

> "ILLNESS OF DEFENDANT: If he cannot remain at the bar, the jury may be discharged and when he is well enough either the same jury is resworn or another is sworn; witnesses may be resworn or, by consent (only), their evidence read over to them and sworn to as a whole; even in a misdemeanour, Park, J., would not continue the trial merely with the consent of the defendant's counsel; Streek (1826), 2 C. & P. 413; Stevenson (1791), 2 Lea, 546."

Mr. Dholakia for the appellant contended that the appellant did appear before the district court by advocate, and that therefore the court had jurisdiction to deal with the case in his absence by virtue of s. 206 (1) of the Criminal Procedure Code. To accept that argument would involve construing the expression "accused person" wherever it occurs in the sub-section as if it read "accused person or his advocate," and placing a similar construction on the expression "accused person" in sub-section (4).

The golden rule of construction is that words should be given their ordinary meaning unless it can be gathered from the language of an enactment that the legislature intended that they should bear some other meaning.

It is to be observed that in s. 208 of the Code the expression "accused person or his advocate" is used. The reference to the accused's advocate in s. 208 would have been unnecessary had the expression "accused person" included his advocate.

In my judgment the words "accused person" in s. 206 mean the accused person and do not mean the accused person or his advocate.

Mr. McMullin, for the Crown, has suggested that the absence of the appellant is an irregularity which might be curable under s. 347 of the Criminal Procedure Code if it appears that no failure of justice has been occasioned. He contends that so far as the Crown is concerned there has been no failure of justice, and Mr. Dholakia has made a similar concession as regards the appellant.

In my judgment s. 347 cannot avail to cure the irregularity for the reason that the district court had no jurisdiction to try the appellant in his absence, and s. 347 cannot cure lack of jurisdiction.

In my opinion there has been a mistrial and the proceedings in the court below were a nullity.

Accordingly I quash the conviction and set aside the sentence.

The case is to be remitted to the district court with a direction that the appellant be tried by another

magistrate according to the law.

Pending the trial the appellant may be released on his own bond for Shs. 4,000/- with two sureties in a like amount to be approved by the registrar.

Conviction quashed and sentence set aside; order for a new trial before another magistrate.

For the appellant:
BD Dholakia
Parekhji & Co, Kampala

For the respondent:
AM McMullin (Crown Counsel, Uganda)
The Attorney-General, Uganda

Timiseo Karyarugokwe v R
[1957] 1 EA 345 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	6 May 1957
Case Number:	341/1956
Before:	McKisack CJ
Sourced by:	LawAfrica

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[1] Licensing – Sale of "beer" without licence – Accused acting only as waiter – No evidence of the beverage described by witnesses as "beer" – Liquor Ordinance, 1955, *s.* 10 (2) (*U.*).

Editor's Summary

The appellant was convicted in the district court of Kigezi at Kabale of selling liquor without a licence contrary to s. 10 (2) of the Liquor Ordinance, 1955. The Ordinance defines "liquor" as any intoxicating liquor other than native liquor, and "native liquor" means any intoxicating liquor made in accordance with native custom and includes liquors known as "mwenge," "pombe" and others. The magistrate had found that the appellant had been selling "beer" without a licence but made no finding that the beer was liquor as defined in the Ordinance. There was no indication in the judgment of the magistrate whether the beer was what is implied by the English word "beer" or was native beer, and the evidence of witnesses as recorded by the magistrate simply mentioned beer. Moreover, the evidence gave no indication whether these witnesses gave their evidence in English or in an African tongue and, if the latter, what was the word used by them which was interpreted into English as "beer." For the appellant it was contended that there was no evidence of the nature of the beverage and, if it was beer, what kind of beer. Further the evidence only showed that the appellant was acting as a waiter bringing to the tables bottles of beer and removing empty bottles.

Held–

(i) since s. 10 (2) of the Ordinance only applies to "liquor" as distinct from "native liquor" there should have been evidence that the beverage was non-native beer.

(ii) to support a conviction of the appellant for selling or distributing liquor without a licence, it would be necessary to prove that he knew the person for whom he was acting as waiter had no licence.

Appeal allowed.

Judgment

McKisack CJ: The appellant was convicted on two counts of contravening s. 10 (2) of the Liquor Ordinance, 1955, and was sentenced to a fine of Shs. 500/- or four months' I.H.L. in default on each count. Section 10 (2) creates various offences including that of selling liquor without a licence, and it was with that offence that the appellant was charged in each count.

The Liquor Ordinance, 1955, contains the following definitions of "liquor" and "native liquor":

> " 'liquor' means any intoxicating liquor other than native liquor;
>
> " 'native liquor' means any intoxicating liquor prepared or manufactured in accordance with native custom and includes the liquors known by the following names: mwenge, pombe, kangara, muna, marissa, marwa and nule;"

The learned trial magistrate found that the appellant had been selling "beer" without a licence and convicted him of the offences as charged. He did not, however, expressly find that the "beer" was liquor within the meaning of the Ordinance. The English word "beer" is commonly used in this country as applying both to native beer and to non-native beer. Section 10 (2) of the Ordinance applies only to "liquor" as distinct from "native liquor." It does not appear from the magistrate's judgment that he applied his mind to the question whether the beer was non-native beer, and

not native beer. The various witnesses, as recorded by the magistrate, spoke of "beer" and gave no further indication of the precise nature of the beverage in question. The position is made more obscure by reason of the fact that the record does not disclose whether these witnesses gave their evidence in English or an African tongue. It is conceivable that, if they were not speaking in English, they used one of the words such as "mwenge" which appear in the definition of "native liquor" in the Ordinance. But unfortunately the record does not disclose what word they in fact used, or in what language they were speaking.

It was argued for the appellant that in a case such as this there should be what Mr. Thacker termed "scientific" evidence as to the nature of the beverage. I do not think that in a charge of selling liquor without a licence it is normally necessary for the nature of the beverage to be proved by an analysis or test by a scientifically qualified person. It should ordinarily be sufficient for a person who is accustomed to drinking, or is otherwise familiar with, the beverage to state what it is. But in the present case, as I have said, we have nothing beyond the statements by the various witnesses that "beer" was being consumed, and we have no indication whether it was native beer or non-native beer.

On this ground alone I think the appeal must succeed in respect of both counts. But I may add that in any event there does not appear to have been adequate evidence in respect of count two to justify the magistrate in convicting. The only material evidence was that persons were consuming beer on the premises in question, and that the appellant was outside these premises. The evidence in relation to count one – which was for selling beer on the day preceding the date of the offence charged in count two – was that the appellant was serving people with bottles of beer and removing the empties. The magistrate's reasons for convicting on count two were as follows:

> "Taken in conjunction with the first occasion and the fact that he was found next door in his brother's shop where there was a supply of beer and also because I am satisfied that he is falsely accusing Drani and Kafureka of telling lies when they say he was present, I am satisfied that he was doing the same thing on the second occasion and I convict him on both counts."

Crown counsel agrees that these were not adequate grounds for convicting on count two, and he does not support that conviction.

There is a further point. The magistrate found, in respect of count one, that the appellant was "in fact acting as a waiter," going from table to table bringing full bottles of beer and taking empty ones away. There was no evidence as to where or from whom he obtained the bottles except for a suggestion that they came from the shop of his brother next door, who holds a liquor licence in respect of that shop. If the appellant was merely acting as a waiter and no more, I doubt if he could properly be convicted of selling or distributing liquor without a licence. It would be necessary for the prosecution to prove, in addition, that he knew that his employer, or other person for whom he was acting as a waiter, lacked the necessary licence.

The appeal is accordingly allowed and the convictions and sentences on both counts set aside. The fines, if paid, must be refunded.

Appeal allowed.

For the appellant:
RS Thacker
RS Thacker, Kampala

For the respondent:
HHS Few (Crown Counsel, Uganda)
The Attorney-General, Uganda

R v Kalsons Limited and others
[1957] 1 EA 347 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	29 April 1957
Case Number:	3/1957
Before:	McKisack CJ
Sourced by:	LawAfrica

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[1] Chemist – Offences by – Case stated – Business carried on by company in absence of registered pharmacist – Registered pharmacist a director – Sale of poisons without supervision of registered pharmacist – Pharmacy and Poisons Ordinance (*Cap.* 96), *s.* 4 *and s.* 16 (*U.*)

Editor's Summary

Kalsons Ltd. carried on business as pharmacists at Kampala. The directors were Mr. J. K. Patel, a registered pharmacist, and Mr. R. K. Patel who was not registered. During the absence of Mr. J. K. Patel in India the company continued to carry on business and to supply poisons although no registered pharmacist was employed personally to manage and control the business. The company and the directors were then charged in the district court at Mengo with seven offences against the Pharmacy and Poisons Ordinance and the Poisons Rules. They were acquitted on five counts, one of which alleged a contravention of s. 4 (*a*) of the Ordinance and the others alleged a contravention of s. 4 (*b*) of the Ordinance. Section 4 of the Ordinance provides that no person other than a registered pharmacist shall, except as provided by s. 16 to s. 19, (*a*) carry on the business of a pharmacist or (*b*) in the course of business prepare, mix, compound or dispense any drug or supply any poison "except under the immediate supervision of a registered pharmacist." Section 16 enables a company to carry on business as a pharmacy if the business is under the personal management and control of a registered pharmacist.

The particulars of each offence upon which the company and the directors were acquitted (to which the accused pleaded not guilty) contained an averment against the accused of "not being registered pharmacists" but after the pleas had been recorded these words were deleted on the application of the police officer conducting the prosecution. In his judgment the magistrate held that, although a company could not be registered as a pharmacist, a slip in the evidence of the Registrar of the Pharmacy and Poisons Board (who had said that the company was registered with the Board) might mean that the company was licensed to sell poisons or that the premises were registered; and this, combined with the omission of the averment which had been deleted at the request of the prosecution, led him to find that no offence under s. 4 had been proved. The Attorney-General appealed to the High Court under s. 325 of the Criminal Procedure Code on the ground that the acquittals were erroneous in law.

Held–

(i) since the Ordinance did not permit the company to be registered as a pharmacist, the omission of the words “not being registered pharmacists” was not fatal and it was sufficient to aver that the accused was a company.

(ii) the accused directors having been joined with the company by virtue of s. 16 (2) of the Ordinance (which makes directors generally liable for the offences committed by the company) it would have been better if they had been expressly charged as directors.

Appeal allowed. Order for a new trial.

Judgment

McKisack CJ: A limited company named Kalsons Ltd. and its two directors, Mr. R. K. Patel and Mr. J. K. Patel, were charged in the district court, Mengo, with seven offences under the Pharmacy and Poisons Ordinance (Cap. 96) and the Poisons Rules (Vol. VII, 1951 Revised Edn., p. 1432). They were all acquitted on a count charging a contravention of s. 4 (*a*), as read with s. 16, of the

Ordinance and on four counts of contravening s. 4 (*b*) of the Ordinance. The Attorney-General, exercising the power conferred by s. 325 of the Criminal Procedure Code, has appealed against these acquittals on the ground that they are erroneous in law.

The relevant portion of s. 4 of Cap. 96 is as follows:

> "4. No person other than a person duly registered as a pharmacist under the provisions of this part shall, except as may be specifically provided by any of the provisions of s. 16 to s. 19 of this Ordinance–
>
> (*a*) carry on, either on his own behalf or on behalf of another, the business of a pharmacist;
>
> (*b*) in the course of any trade or business prepare, mix, compound or dispense any drug or supply any poison except under the immediate supervision of a registered pharmacist."

Section 16 of the Ordinance is as follows:

> "16. (1) Notwithstanding anything contained in the foregoing provisions of this part–
>
> (*a*) it shall not be necessary for a company carrying on the business of a pharmacist to be registered under this Ordinance provided that–
>
> (i) the business is under the personal management and control of a registered pharmacist;
>
> (ii) a copy of the certificate of incorporation of the company is lodged with the board; and
>
> (iii) the other provisions of this Ordinance are complied with;
>
> (*b*) a company carrying on the business of a pharmacist in accordance with the provisions of this section shall be an authorised seller of poisons within the meaning of this Ordinance and may use the description of chemist and druggist or of dispensing chemists or dispensing druggists and may use the description "pharmacy" in connection with the premises.
>
> "(2) Any act which if done by an individual would be an offence against this Ordinance shall, if done by a company, be an offence by every director, secretary or manager thereof unless he proves that the act or omission constituting the offence took place without his knowledge or consent."

Count one (upon which the respondents were acquitted) was as follows:

"STATEMENT OF OFFENCE

"Unlawfully carrying on the business of a pharmacist, contrary to s. 4 (*a*) read with s. 16 of the Pharmacy and Poisons Ordinance.

"PARTICULARS OF OFFENCE

"Messrs. Kalsons Limited, R. K. Patel and J. K. Patel, between May 13, 1956, and June 8, 1956, carried on the business of a pharmacist at Plot 58, Kampala Road, Kampala, in the district of Mengo, otherwise than under the personal management and control of a registered pharmacist."

Counts two to five (upon which the respondents were acquitted) were in the following form:

"STATEMENT OF OFFENCE

"Unlawfully supplying poisons, contrary to s. 4 (*b*) of the Pharmacy and Poisons Ordinance.

"PARTICULARS OF OFFENCE

"Messrs. Kalsons Limited, R. K. Patel and J. K. Patel, on (date) supplied certain Part I poisons, namely (description of poisons) to (name of a doctor) otherwise than under the immediate supervision of a registered

pharmacist."

All these counts as originally drafted contained, in the particulars of offence and after the date set out therein, the words "not being registered pharmacists," but the police officer conducting the prosecution asked, after the pleas of not guilty had been

recorded, that those words be deleted in all the counts, and the magistrate, after ascertaining that defending counsel had no objection, allowed the amendment. The reason given by the prosecuting officer for this amendment was, according to the magistrate's note in the case record, "because the registered pharmacist was away in India at the time."

The prosecution case was that Kalsons Ltd., which carries on the business of a pharmacist, is managed by the two directors, R. K. Patel and J. K. Patel; that J. K. Patel is a registered pharmacist and R. K. is not; that J. K. Patel was away in India from May 13 to June 8, 1956; and that, in his absence, the company continued to carry on the business of a pharmacist and to supply poisons although no other registered pharmacist had been brought in to replace J. K. Patel. These facts were not disputed by the defence.

The learned magistrate held that a count for contravening s. 4 of the Ordinance is bad if it does not aver that the accused is not registered as a pharmacist, since it discloses no offence. He further held that a company is not capable of being registered as a pharmacist, since registration applies to individuals only. He also referred to the evidence of the registrar of the Pharmacy and Poisons Board which (as recorded by the magistrate) contains the following passage:

> "I deal with businesses and have a knowledge of Kalsons. They are registered with the board. Their address is Kampala Road. I know their premises."

The magistrate concluded that, since a company is incapable of being registered as a pharmacist, the witness cannot have meant that Kalsons Ltd. was so registered, but may have meant that it was licensed under s. 25 (2) to sell poisons or that its premises were registered under s. 15.

Despite his ruling that a company cannot be registered, the magistrate gave the following reasons for acquitting the respondents:

> "Nevertheless Mr. Watson (the prosecuting officer) allowed this slip (i.e. the statement by the registrar of the Pharmacy and Poisons Board that Kalsons Ltd. was "registered with the board") to pass without correction. This, combined with his deliberate omission to allege that the accused were not registered pharmacists because J. (i.e. J. K. Patel) was away in India, has caused me to come to the conclusion that he has not shown that an offence has been created under s. 4. This is an essential part of a charge under s. 4 – except possibly by reference to the opening words of s. 16. Accordingly I hold that these counts do not lie, under s. 4, and I dismiss them and acquit the accused."

The magistrate has thus dismissed all the five counts for one and the same reason, but I think it is necessary to bear in mind that, whereas counts two to five are for a contravention of s. 4 (*b*), count one is for a contravention of s. 4 (*a*) read with s. 16. The prohibition which s. 4 imposes on persons doing certain acts unless they are registered pharmacists is not absolute; it is qualified by the words

> "except as may be specifically provided by any of the provisions of s. 16 to s. 19 of this Ordinance."

Section 16 provides that

> "notwithstanding anything contained in the foregoing provisions of this part–
>
> (*a*) it shall not be necessary for a company carrying on the business of a pharmacist to be registered under this Ordinance"

provided that it complies with certain conditions (which include the requirement that the business shall be under the personal management and control of a registered pharmacist). The combined effect of s. 4 (*a*) and s. 16 (and, as I have pointed out, in count one the respondents were charged under both those

sections), in relation to a company, is, therefore, that a company which carries on the business of a pharmacist commits an offence if it fails to comply with certain conditions. These conditions do not include the requirement that the company be registered as a pharmacist, but they do include the requirement that the business be under the personal management and

control of a registered pharmacist. The learned magistrate erred, therefore, in holding that it was necessary, in count one, to aver that the company was not a registered pharmacist.

For the purposes of the offence charged in count one the prosecution might, perhaps, have laid the charge under s. 16 and s. 36 instead of s. 4 (*a*) and s. 16, since s. 36 of the Ordinance has an "omnibus" provision making it an offence to contravene "any provision of this Ordinance," but I think that the course which the prosecution did adopt was probably the better one.

In respect of counts two to five the charge was laid under s. 4 (*b*) and contained no reference to s. 16. Section 4 (*b*) makes it an offence for a person other than a duly registered pharmacist to (*inter alia*) supply poisons otherwise than under the supervision of a registered pharmacist, and in counts two to five the company (and its directors) have been charged accordingly. It will be noticed that in these counts the prosecution has not relied on s. 16, that is to say, it has not charged the company with supplying poisons while the business was not under the personal management and control of a registered pharmacist. In the case of these four counts, therefore, the lack of registration as a pharmacist was a necessary ingredient of the offence, and the words "not being registered pharmacists" could properly have remained in the particulars of the offence. The question is, however, whether the magistrate was right in holding that their omission was fatal. The answer appears to me to depend on whether a company is capable, under the provisions of Cap. 96, of being registered as a pharmacist. If it is, then these counts were bad. If it is not, then it was sufficient to aver that the accused was a company. The counts are, I think, sufficient for this purpose in that they describe the first accused as "Messrs. Kalsons Limited," a designation which could properly be applied to a limited company only. But I may here mention that, since R. K. Patel and J. K. Patel were apparently joined as co-accused with the company by virtue of sub-s. (2) of s. 16 (which makes every director, secretary or manager of a company liable for an offence committed by the company unless it was without his knowledge or consent), it would have been better if the charge sheet had expressly averred that they were charged as directors.

The learned magistrate decided, as a matter of law, that a company is not capable of being registered as a pharmacist. I agree with that view. Section 9 of the Ordinance is as follows:

> "9. (1) No person shall be entitled to registration as a pharmacist unless such person–
>
> (*a*) is, at the time of the commencement of this Ordinance, registered and licensed as a druggist and carrying on the business of a druggist in the Protectorate; or
>
> (*b*) shall satisfy the board that he is a duly qualified chemist and druggist in the United Kingdom of Great Britain and Northern Ireland or the Republic of Ireland, or holds a certificate or diploma of competency as a chemist and druggist from any college, society, council, or board, recognised by the Pharmaceutical Society of Great Britain, or recognised by the board under any rules made under this Ordinance; or
>
> (*c*) shall satisfy the board that he has received such preliminary practical training as may be prescribed by any rules made under this Ordinance and shall pass such examination as may be required by the board.
>
> "(2) The board may issue to candidates who reach the required standard at an examination held under para. (*c*) of sub-s. (1) of this section a certificate in the prescribed form."

Para. (*b*) and para. (*c*) of sub-s. (1) are clearly applicable to individuals only, and Mr. Wilkinson, for the respondents, concedes that that is so. But he argues that para. (*a*) of that sub-section is applicable to a company as well as an individual. I am unable to agree with that construction. The Pharmacy and Poisons Ordinance (Cap. 96) repealed an Ordinance entitled the Drugs and Poisons Ordinance (Cap. 59 of the

1935 Revised Edition) – see s. 37 of the first-mentioned Ordinance as printed in the

1946 Annual Volume of the Laws. The repealed Ordinance made provision for persons to be registered and licensed as druggists, and it is clear that para. (*a*) of s. 9 (1) of Cap. 96 must be referring to that provision. The effect of s. 9 of the repealed Ordinance (which makes it lawful for a company to carry on the business of a druggist under certain conditions) and of s. 11 (which provides that no druggist's licence shall be granted except to a person who holds certain qualifications) show that a company could not, under that Ordinance, be registered and licensed as a druggist. Consequently para. (*a*) of s. 9 (1) of Cap. 96 cannot apply to a company.

It is true that the words in s. 16 of Cap. 96, viz.,

> "it shall not be necessary for a company . . . to be registered under this Ordinance . . ."

do *prima facie* suggest that a company can, in some circumstances, obtain registration. But, since none of the conditions necessary for registration is such that a company could comply with them, that construction cannot stand closer examination.

It follows, therefore, that the learned magistrate erred in holding that counts two to five were bad because they contained no express averment that the company was not a registered pharmacist.

It will be observed, from the passage in the magistrate's judgment which I have already cited, that, in coming to the conclusion that the charges should be dismissed, he was influenced by a passage in the evidence of the registrar of the Pharmacy and Poisons Board which I have set out above and which, to the magistrate's mind, apparently suggested that the company had somehow secured registration as a pharmacist. But, even if the registrar's statement that Kalsons Ltd. "are registered with the board" was properly interpreted (which is doubtful) as meaning that the witness thought the company was registered as a pharmacist, it was not open to the magistrate to find that the company was in fact duly registered as such, since (as the magistrate himself had rightly held) the law does not permit such registration. I do not think, however, that the magistrate is to be understood as having found that fact. I think he was merely pointing out that the prosecution case, already weakened by what he took to be a defect in the charge, was further weakened by evidence which might be interpreted as conflicting even with a properly framed charge.

The magistrate was of opinion that the reason given by the prosecuting officer for altering the wording of the counts was not a sufficient justification for omitting the averment that the respondents were not registered as pharmacists. But I agree with Crown counsel that what matters is not the reason which may have been proffered but whether the counts, after amendment, were proper and sufficient.

Mr. Wilkinson argues that, in any event, the mere absence abroad of J. K. Patel did not mean that the business of the company was not under his personal management and control. The magistrate did not deal with that argument, beyond stating he was doubtful of its validity, since he decided the case on other grounds. No evidence was called at the trial on behalf of the respondents to show that personal control and management by J. K. Patel continued despite his absence abroad, and in any event this point is relevant to count one only and not to counts two to five.

In the result, since I have found that the learned magistrate erred in law in coming to certain conclusions to which he did come and upon which he acquitted the respondents, I must allow this appeal. The case will go back to the district court, Mengo, for retrial.

Appeal allowed. Order for a new trial.

For the appellant:
AM McMullin (Crown Counsel, Uganda)
The Attorney-General, Uganda

For the respondents:
PJ Wilkinson
PJ Wilkinson, Kampala

WSO Davies v Mohanlal Karamshi Shah
[1957] 1 EA 352 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	9 August 1957
Case Number:	35/1957
Before:	Sir Newnham Worley P, Sir Ronald Sinclair V-P and Briggs JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Edmonds, J

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[1] Libel – Publication – Whether strict proof necessary or plaintiff can rely on address on documents and general probabilities.

[2] Libel – Damages – Punitive or exemplary damages – Basis of assessment.

Editor's Summary

The appellant who at the time was a Deputy Registrar of the Supreme Court at Mombasa and is a member of the English Bar brought an action in respect of libels published of him by the respondent which contained serious allegations of dishonesty, wilful misconduct in the course of his official duties, and professional misconduct. They were contained in three documents, a letter addressed to the Chief Justice of Kenya, with copies to the Attorney-General and Mr. Justice Macduff, then Judge at Mombasa, a letter addressed to the Secretary of State for the Colonies, with copies to a firm of London solicitors and the Chief Justice of Kenya, and a petition addressed to the Prime Minister, with copies to the Secretary of State, "The Members of Parliament, House of Commons," and the Chief Justice of Kenya. Publication to the Chief Justice and some of his staff was strictly proved. As regards the other addressees, the appellant relied on the addresses on the documents and the general probabilities. As regards the Secretary of State, there was no direct evidence of publication but the Government of Kenya instituted an enquiry into the allegations made against the appellant and when this was completed the report was sent to the Secretary of State. The allegations having been found to be false, the Supreme Court awarded the appellant Shs. 2,000/- as damages. In assessing damages the trial judge confined his consideration of publication to the Chief Justice, the Minister for Legal Affairs and the Acting Registrar of the Supreme Court and a limited number of the members of the court staff. The appellant appealed

against the inadequacy of the amount awarded and contended that the trial judge had erred in law in three respects, viz. (*a*) that he had misdirected himself as to the extent of publication (*b*) that he had improperly reduced the damages on the ground that the libels had not been believed and (*c*) that he had erred in his approach to the question of punitive or exemplary damages.

Held–

(i) when some publication has been sufficiently proved in a case of libel the court should have regard to probabilities as regards the further extent of publication. If a carbon copy of a letter reaches the person indicated as one who should receive it, there is reasonable presumption that the "top" and other carbons were sent as was apparently intended, and were duly received. Therefore, as regards the Secretary of State and his staff the court below took an erroneous view as regards the extent of publication;

(ii) because a libel is sufficiently outrageous so as not to be believed is no ground for depriving the person libelled of appropriate damages;

Bendzel v. Kartar Singh, 20 E.A.C.A. 53 followed.

(iii) the trial judge had failed to appreciate that punitive or exemplary damages are, as their names imply, damages by way of punishment or deterrent. They are given entirely without reference to any proved actual loss suffered by the plaintiff. The conduct of the defendant and his persistence in repeating the libels was very relevant on this point.

Appeal allowed. Damages increased to £500.

Cases referred to in judgment:

(1) *Bendzel v. Kartar Singh*, 20 E.A.C.A. 53.

Judgment

Briggs JA: read the following judgment of the court: This was an appeal from a judgment of the Supreme Court of Kenya by the plaintiff, who, having obtained judgment for Shs. 2,000/- damages for libel, contended that those damages were inadequate. We allowed the appeal with costs and varied the judgment and decree of the Supreme Court by increasing the damages from Shs. 2,000/- to Shs. 10,000/-. We now give our reasons.

The respondent, though he entered appearance in the Supreme Court and took some part in interlocutory proceedings, did not appear at the trial, and, although duly served, he did not appear either in person or by counsel on the appeal. His last material step in the action was to send to the plaintiff's solicitors a copy of his intended defence, which contains a plea of justification in offensive terms. This defence was not filed. We were told from the bar that the reason was believed to be that it was rejected on the ground that it was sent for filing by post. If this be correct, we are unable to understand the action taken by the Registry. It is true that it has been thought necessary to enact an amendment to the rules (O. IX r. 1A) to permit entry of appearance by post. But there is nothing whatever in the rule governing filing of defence and subsequent pleadings (O. VIII r. 18) which precludes a party from filing by "delivering the defence or other pleading to the court" through the assistance of the Postmaster General and his staff, as his agents for that purpose. We have referred to this point in another appeal, but the decision does not appear to have been reported or to be generally known.

The libels pleaded, which it is unnecessary to set out, were extremely serious allegations of dishonesty, wilful misconduct in the course of his official duties, and professional misconduct, made against the plaintiff, who was at that time Deputy Registrar of the Supreme Court of Kenya at Mombasa and is a member of the English Bar. They were contained in three documents, a letter addressed to the Chief Justice of Kenya, with copies to the Attorney-General and Mr. Justice Macduff, then Judge at Mombasa, a letter addressed to the Secretary of State for the Colonies, with copies to a firm of London solicitors and the Chief Justice of Kenya, and a petition addressed to the Prime Minister, with copies to the Secretary of State, "The Members of Parliament, House of Commons," and the Chief Justice of Kenya.

Publication to the Chief Justice and some of his staff, particularly the Registrar, Supreme Court, and to the Attorney-General, who is also Minister for Legal Affairs, and some of his staff was strictly proved. As regards the other addressees, the plaintiff not unreasonably relied on the addresses on the documents and the general probabilities. As regards the Secretary of State, however, there is a strong additional probability, amounting almost to proof, of publication, in that the Government of Kenya instituted an enquiry into the allegations made against the plaintiff, and when this was completed the report was sent to the Secretary of State. It would have been contrary to normal practice to do this if the enquiry had not been made under orders from the Colonial Office. It is almost needless to add that all the allegations were reported to be entirely false. Later the Supreme Court found, and we agree, that they were false.

It was submitted for the appellant that the learned trial judge, in assessing damages, had erred in law in three respects. First, it was said, he had misdirected himself as to the extent of publication. He said in

his judgment:

> "In assessing damages, therefore, I must confine my consideration of publication to the Chief Justice, the Minister for Legal Affairs and Mr. Hamel, and, necessarily, certain though a very limited number of the members of their staff."

Secondly, it was contended that he had improperly reduced the damages on the ground that the libels had not been believed. On this point the learned judge said:

> "As the plaintiff has been cleared of all the allegations by the defendant I cannot think that any stigma affecting the plaintiff remains with those to whom the libels were published."

Thirdly, it was contended that the learned judge had erred in his approach to the question of punitive or exemplary damages. On this point he said:

> "The libels were undoubtedly serious, but in the result the damage to the plaintiff cannot be said to be such as to merit a punitive or exemplary award."

We found ourselves obliged to accept all three submissions. As regards the first, we thought that when some publication has been sufficiently proved in a case of libel, the court should have regard to probabilities as regards the further extent of publication. If a million copies of a newspaper are published there is a presumption that many of them are read. So also, if a carbon copy of a letter reaches the person indicated as one who should receive it, there is, as we thought, a reasonable presumption that the "top" and other "carbons" were sent as was apparently intended, and were duly received. On this basis, and particularly as regards the Secretary of State and his staff, who, as the Crown's representatives, might be regarded as the plaintiff's employers, we thought the court below took an erroneous view as regards the extent of publication.

On the second point it is only necessary to refer to *Bendzel v. Kartar Singh* (1), 20 E.A.C.A. 53. If a libel is sufficiently outrageous, it may be that no one in the world will believe it, but that is no ground for depriving the person libelled of appropriate damages. In this case, moreover, the plaintiff was exposed to all the annoyance and expense of an official enquiry into his conduct, a direct consequence of the libels, for which the respondent is responsible in damages.

The third point indicated a failure by the learned judge to appreciate that punitive or exemplary damages are, as their names imply, damages by way of punishment or deterrent. They are given entirely without reference to any proved actual loss suffered by the plaintiff.

For these reasons we thought that the learned judge's award of damages was based on incorrect principles and was inadequate. The conduct of the defendant and his persistence in repeating the libels was very relevant on this point. We thought a sum of £500 represented a reasonable *solatium* for the plaintiff.

Appeal allowed. Damages increased to £500

For the appellant:
A Wynn-Jones
Atkinson, Cleasby & Co, Mombasa

The respondent did not appear and was not represented.

Mohanlal R Trivedi v R
[1957] 1 EA 355 (HCU)

Division: HM High Court for Uganda at Kampala

Date of judgment:	29 June 1957
Case Number:	136/1957
Before:	Bennett, Lewis and Keatinge JJ
Sourced by:	LawAfrica

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[1] Criminal law – Appeal – Search warrant – Article found different from objects searched for – Search warrant not proved at trial – Whether production necessary.

Editor's Summary

The appellant was convicted in the District Court of Busoga of being in possession of property reasonably suspected of having been stolen and failing to give a satisfactory account of his possession. The police, acting on information received, searched the house and shop of the appellant. Searching for a camera and an expensive pair of sunglasses which they did not find, they did find in a tin box under the counter of the shop an exposure meter. The appellant told the police that it had been left at the shop three months before by one, V, who, when questioned by the police, admitted leaving an exposure meter with the appellant but denied that the meter in question was the one deposited by him with the appellant. At the trial before the magistrate V was called as a prosecution witness when he denied ownership of the meter found in the shop and also said he had never deposited an exposure meter with the appellant. No search warrant was produced by the police in the course of the trial and the only evidence that a search warrant in respect of the premises of the accused had been issued was that given orally by a police officer, which was inadmissible since the requisite facts to bring this evidence within s. 63 of the Evidence Ordinance were not proved. There was no proof that a complaint had been received of the loss or theft of an exposure meter.

Held–

(i) it is impossible to establish that a particular search was conducted under the authority of a warrant without proving the contents of the warrant;

(ii) the evidence did not justify a reasonable suspicion that the exposure meter had been stolen.

Appeal allowed.

Cases referred to:

(1) *Tajdin Kara v. R.*, Uganda High Court Criminal Appeal No. 304 of 1951 (unreported).

(2) *Tafazzal Ahmed Chowdhry v. Queen Empress* (1899), 26 Cal. 630.

Judgment

Bennett J: read the following judgment of the court: The appellant was convicted by the District Court of Busoga of being in possession of property reasonably suspected of having been stolen and failing to give an account of his possession to the satisfaction of the court, contra. s. 299 (1) of the Penal Code, and sentenced to three months imprisonment with hard labour. Against this conviction he appealed.

On June 17, 1957, we allowed the appeal, quashed the conviction and set aside the sentence. We now give our reasons for so doing.

The short facts of the case were that the police, acting on certain information, searched the house and shop of the appellant. They were apparently searching for a camera and an expensive pair of sunglasses which they did not find. They did, however, find an exposure meter in a tin box under the counter in the appellant's shop. When questioned about this exposure meter the appellant said that it had been left in his shop by one, Vadhgama, some three months previously. Vadhgama

when questioned by the police in the presence of the appellant admitted that he had deposited an exposure meter with the appellant, but when shown the meter which was found in the appellant's shop, denied that it was the one which he had deposited with the appellant. Vadhgama was called as a prosecution witness and in his evidence he not only denied ownership of the meter found in the appellant's shop, but he also denied ever having deposited an exposure meter with the appellant.

The exposure meter found in the appellant's shop was in fact not claimed by anyone.

On behalf of the appellant it was contended that this conviction ought not to be allowed to stand for the reason that no search warrant was produced in evidence and, that if such a warrant existed, there was no evidence to show that the appellant's house and shop were the buildings named in the warrant.

The appellant's advocate cited to us the judgment of this court in *Tajdin Kara v. R.* (1), Uganda High Court Criminal Appeal No. 304 of 1951 (unreported), where precisely the same point arose. In that case the accused's store was searched and a quantity of copper wire was found therein. At the close of the case for the prosecution the accused's advocate submitted that there was no case to answer since the search warrant authorising the police to search the accused's store was not produced in evidence. There was no evidence that the original warrant had been lost or destroyed and, consequently, secondary evidence was not given of the contents of the warrant. The court, consisting of Edwards, C.J., and Pearson, J., quashed the conviction. To quote from the judgment:

> "In our view there should have been proof that the building actually searched was the building named in the warrant. This seems implicit from s. 117 of the Criminal Procedure Code. We, accordingly, hold that the conviction cannot stand."

We have been invited by the learned Crown Counsel to say that that case was wrongly decided and that the facts are clearly distinguishable from the Indian case of *Tafazzal Ahmed Chowdhry v. Queen Empress* (2) (1899), 26 Cal. 630, which is cited with approval in the judgment in Criminal Appeal No. 304 of 1951 (1). Irrespective of whether or not the two cases are distinguishable, we are of opinion that Criminal Appeal No. 304 of 1951 (1) was rightly decided.

In our judgment the words:

> "searched any building, vessel, carriage, box, receptacle or place pursuant to a search warrant issued under s. 117 of the Criminal Procedure Code"

which occur in s. 299 (1) of the Penal Code limit the application of the sub-s. to cases in which the search is conducted under the authority of a warrant, unless the search is justified under s. 20 of the Criminal Procedure Code, in which case no warrant is necessary. It is impossible to establish that a particular search was conducted under the authority of a warrant without proving the contents of the warrant.

In the instant case there was no evidence to prove that the appellant's house and shop were named in the warrant since the warrant itself was not produced and secondary evidence of its contents was not admissible. It is true that Mr. Steeden, one of the police officers who searched the appellant's house, said in evidence:

> "I applied for and obtained a search warrant in respect of the house and shop owned by Mohanlal, the accused."

But the witness' statement to the effect that the premises to which the warrant related were the house and shop of the accused was secondary evidence of the contents of the warrant, and was only admissible on proof of facts which brought the case within the scope of s. 63 of the Evidence Ordinance.

No attempt was made by the prosecution to prove such facts, nor was any explanation given for the non-production of the warrant. In these circumstances secondary evidence of its contents was not admissible.

There is a further reason why we consider that this conviction cannot be allowed to stand. In our judgment the evidence led by the prosecution did not give rise to a

reasonable suspicion that the exposure meter which was found in the appellant's shop was stolen. The police had apparently received no complaint relating to the theft or loss of an exposure meter. They were searching for a camera and sun-glasses.

The learned magistrate in his judgment refers to the fact that the meter was hidden in a box under the counter. We can see nothing suspicious in this. If the meter was left with the appellant for safe custody, it was his duty as a bailee to keep it in a place of safety out of reach of his customers and other persons who might be tempted to steal it.

The fact that the appellant's story was contradicted by the evidence of Vadhgama did not lend weight to the prosecution case since the learned magistrate very properly regarded Vadhgama as an unreliable witness. This being so it is difficult to understand the passage in his judgment in which he said:

> "It is true that in view of P. 3's inconsistent statements he cannot be regarded as a reliable witness, but considering the somewhat unusual nature of the charge under s. 299, his unreliability far from damaging the prosecution case made me feel all the more strongly that it would take a very convincing story from the accused to shake my belief that this light meter was stolen property."

We fail to see how the unreliability of a prosecution witness can place upon the accused any heavier burden than that which would have rested upon him had the witness been a witness of truth. If Vadhgama was an unreliable witness his evidence should have been ignored.

The passage to which we have adverted is plainly a misdirection and shows that the learned magistrate's approach to the case was wrong. In our view there was no sufficient evidence, at the time of the appellant's trial, to lead to a reasonable suspicion that the exposure meter was stolen property.

For these reasons we consider that the appellant was wrongly convicted, and the appeal was accordingly allowed.

Appeal allowed.

For the appellant:
AA Baerlein
Baerlein & James, Jinja

For the respondent:
HSS Few, (Crown Counsel, Uganda)
The Attorney-General, Uganda

Heptulla Brothers Limited v Jambhai Jeshangbhai Thakore trading as "London Photographic Arts"

[1957] 1 EA 358 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	9 August 1957
Case Number:	23/1957

Before: Sir Newnham Worley P, Sir Ronald Sinclair V-P and Briggs JA

Sourced by: LawAfrica

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[1] Landlord and Tenant – Business premises – Construction of lease – Premises leased not ascertainable – Whether occupier tenant or licensee – Landlord and Tenant (*Shops*) *Ordinance* 1956 (*K.*).

[2] Damages – Basis of assessment – Licensee in wrongful possession of premises – Meaning of "mesne profits" – Civil Procedure Ordinance, s. 2 (*K.*).

Editor's Summary

The respondent was a tenant of certain business premises, the ground floor of which was a shop. He originally occupied the whole of the premises but some time in 1938, one, Heptulla occupied a part of the shop either as tenant or licensee. On May 1, 1941, the respondent and Heptulla executed a document which purported to be a registrable lease of part of the premises to the latter, but which was never in fact registered, the parcels set out therein reading as follows:

> "All the ground floor of the said premises with the exception of one shop window and the space which is at present occupied by the lessee's counter put on the ground floor of the premises and at present occupied by the sub-lessee forming part of the building erected on the said piece of land."

In 1942 Heptulla assigned his rights to the appellants. The respondents in 1953 brought an action in the Supreme Court to recover possession of the premises and damages. The main issue was whether, in view of the terms of the document which purported to be a registrable lease, the appellants were tenants or licensees in respect of that part of the shop which they occupied. The respondent contended that the appellants were licensees while the appellants claimed to be tenants and contended that under the Landlord and Tenant (Shops) Ordinance, 1956, they were protected tenants and therefore not subject to ejectment. The Supreme Court held that the appellants were licensees and accordingly made an order for possession and awarded damages of Shs. 2,000/- per month under the head of "mesne profits," while no damages were awarded under the head of nuisance. The appellants now appealed against the order for possession and the amount of damages, and the respondent cross-appealed claiming that the amount of damages awarded was inadequate.

Held–

(i) no tenancy was ever created by or in reference to the document of May 1, 1941, because the premises intended to be let could never be ascertained with sufficient precision;

(ii) the compensation which the respondent should receive for loss of the use and enjoyment of the premises wrongfully occupied by the appellants should be reduced to Shs. 1,800/- per month; and

(iii) the facts constituting the nuisances alleged having been proved, damages under this head should have been given.

[By consent of the parties the court proceeded to assess the damages and arrived at the figure of Shs. 2,000/-]

Per Briggs, J.A., referring to "mesne profits":

“Its meaning in this country appears to be wider and to extend to all cases of wrongful possession of land; but when damages are sought for trespass by a former licensee whose licence has been lawfully terminated, I know of no rule that the damages must be only such as would have been payable as mesne profits if the licensee had been a tenant.”

Appeal dismissed. Order as to damages varied.

Cases referred to:

(1) *Kamruddin Esmail Rajwani v. Govindji Kalidas Degamwala,* 17 E.A.C.A. 37.

(2) *Savill Brothers Ltd. v. Bethell*, [1902] 2 Ch. 523.

(3) *Martyr v. Lawrence*, 46 E.R. 375.

(4) *Hardwick v. Hardwick* (1873), L.R. 16 Eq. 168.

(5) *Magee v. Lavell* (1873–74), L.R. 9 C.P. 107.

(6) *Bramwell v. Bramwell*, [1942] 1 All E.R. 137.

August 9. The following judgments were read.

Judgment

Briggs JA: This is an appeal from a judgment and decree of the Supreme Court of Kenya. The respondent is the tenant of certain business premises in Government Road, Nairobi, of which the ground floor is a shop. At first he occupied the whole of the premises, but some time in 1938 a Mr. A. M. Heptulla began to occupy a part of the shop, either as tenant or licensee. On May 1, 1941, the respondent and Heptulla executed a document, Exhibit 2, which purported to be a registrable lease of part of the premises to Heptulla, but was never in fact registered. In 1942 Heptulla assigned his rights under Exhibit 2 to the appellants, a company which was apparently formed to take over his business, and of which he is a director. The appellants are still in occupation of the premises comprised in Exhibit 2. The respondent sued for recovery of possession of the premises and damages, and recovered judgment. There was an alternative claim for an injunction, which is not now material. The appellants appeal against the order for possession and the amount of damages. There is a cross-appeal as to damages, the respondent contending that the sum awarded is inadequate.

The basic issue is whether, in view of the terms of Exhibit 2, the appellants are tenants or licensees in respect of that part of the shop which they occupy. The learned trial judge decided that they are licensees, and it is not contested that, if that is correct, the order for possession must stand; but the appellants claim to be tenants, and contend that under the Landlord and Tenant (Shops) Ordinance, 1956, they are protected tenants and not subject to ejectment.

The parcels are set out in Exhibit 2 as follows:

> "All the ground floor of the said premises with the exception of one shop window and the space which is at present occupied by the lessee's counter put on the ground floor of the premises and at present occupied by the sub-lessee forming part of the building erected on the said piece of land."

Before examining these words in detail it may be well to clear up a few related matters. The term of Exhibit 2 expired in 1944. The rent reserved was Shs. 225/- per month, and the respondent at that time paid Shs. 400/- per month for the whole building. There is no doubt that the parties intended to make a lease, and believed that they were doing so. The document could never be effective as a lease for want of registration, but it could be evidence of the terms of a monthly tenancy created by occupation and implied contract. If, however, by reason of uncertainty of the premises intended to be demised, or by reason that exclusive possession of the premises was not given to the appellants or their predecessor, no

tenancy could be shown to have been created, the document would be evidence of the terms of a licence, similarly created by occupation and implied contract. *Kamruddin Esmail Rajwani v. Govindji Kalidas Degamwala* (1), 17 E.A.C.A. 37. Two important facts were established by oral evidence. First, Heptulla did not immediately after the execution of Exhibit 2 occupy any larger or different part of the shop from that which he had occupied previously. Secondly, the front of the shop consists of two shop-windows of equal size and a door between them.

Mr. Nazareth for the appellant contends that the extent of the premises can be precisely ascertained from the words of Exhibit 2 on the following basis. The

governing words are "All the ground floor of the said premises." The remainder of the parcels falls into three parts, (1) the words from "with the exception" to "premises", (2) the words "and at present occupied by the sub-lessee" and (3) the words "forming part of the building erected on the said piece of land." No question arises concerning (3): these words are apt on any view of the rest. As regards (1) the words create an exception. Hill & Redman, (11th Edn.) 121. When the general extent of a grant or demise is clearly expressed and an exception from the generality is in terms of such uncertainty that its meaning cannot be ascertained, the general grants or demise is good, and the exception is to be disregarded as being ineffective. 11 Halsbury (3rd Edn.) 392, s. 641. *Savill Brothers Ltd. v. Bethell* (2), [1902] 2 Ch. 523. As regards (2) the words "and at present occupied by the sub-lessee" would certainly be inaccurate if the demise was of the whole ground floor, the exception being ineffective; but the words intended to create the exception would sufficiently explain the presence of these words and they should be disregarded as merely *falsa demonstratio. Martyr v. Lawrence* (3), 46 E.R. 375. *Hardwick v. Hardwick* (4) (1873), L.R. 16 Eq. 168.

The appellants' case on this line of argument does not require them to contend either that the words of exception are certain or that they are uncertain. Mr. Nazareth was, I think, at first inclined to submit that they were certain, in which case the words "and at present occupied by the sub-lessee" might be apt. But when asked "Which of the two shop-windows was the respondent to have?" he saw the difficulty, and I think accepted the view that the words were uncertain. His reluctance to do so is understandable, since he was most anxious to show that oral evidence as to the condition and use of the premises given in the Supreme Court ought not to have been admitted. To succeed on this submission, it was necessary to persuade the court that the parcels as a whole were capable of construction so as to have a precise meaning. I do not think he could possibly do so. As Turner, L.J. said in *Martyr v. Lawrence* (3),

> ". . . in determining the effect to be given to deeds and instruments, regard is to be had to the state of the property affected by them at the time when the deeds and instruments were executed."

As regards the physical state of these premises, the outstanding fact is the existence of the two shop-windows. Once that was proved, the parcels as a whole could not have a certain meaning, though certainty might be achieved by disregarding some of the words as ineffective. I think, however, that "state of the property" in the dictum quoted goes beyond mere physical description and comprehends user. Once a degree of uncertainty in the parcels was established I think all the evidence of user could properly be taken into account. I would pause here to say that Mr. Nazareth made some attempt to show that the findings of fact of the learned trial judge were wrong. I need only say that this attempt completely failed and I accept the findings *in toto*.

The respondent is a photographer. At the time of execution of Exhibit 2 he had his studio upstairs and his reception and sales arrangements in the shop. The appellants' business is that of glass merchants, including the framing of pictures and photographs. So long as the parties were friendly, such businesses could be conducted in close proximity with mutual advantage. The staircase to the upper floor rose from behind the left-hand shop window, which was the respondent's. The counter and some other furniture of the respondent ran along the left side of the shop. The appellants' predecessor had a counter down the right side of the shop and the space between these counters was approximately eight feet wide. There was no dividing line or mark of any kind between the counters or elsewhere in the shop which could define the parties' respective areas. These facts were established by the oral evidence, and, save for the submission that the evidence should have been excluded, they are not disputed. It is apparent that the customers of both businesses, using the same door, must have used the central space indifferently, and as

between the parties it was in fact a “shared area,” with only a tendency for customers to go to one counter or the other according to their needs. To say that the respondent had the use not

only of the space covered by his counter, but also of the space behind it and some space in front of it and at the end away from the door is to stress the obvious. The important fact is that, although there was a wide discrepancy in the evidence given for the parties as to the quantum of space so used, there was complete agreement that such space was never defined and could not be precisely ascertained.

If the parcels are considered in the light of these facts the wording, which is admittedly clumsy and ungrammatical, seems nevertheless to have a definite meaning. It was never intended to let the whole of the ground floor, but only part of it. That part is described by deduction from the whole. The shop-window excluded was the one on the left. The words "space which is at present occupied by the lessee's counter" must be read so as to include some space round the counter, which was to be used by salesmen and customers for conducting business, not to stand in isolation like a monument. The words so understood referred to an area on the left side of the shop. But what were the limits of that area and Heptulla's? The draftsman was content to say that they should be as they had been before. In my opinion the words "at present occupied by the sub-lessee," far from being *falsa demonstratio*, are in this case not merely apt, but, as similar words were in *Magee v. Lavell* (5) (1873–74), L.R. 9 C.P. 107, "an essential part of the description of the subject-matter of the agreement." I think it is important to observe that in most of the cases where property is described as "now in the occupation of X," and the words have been held to be merely *falsa demonstratio*, X was a stranger to the agreement. Where, as in *Magee v. Lavell* (5), and in this case, property is described as being in the occupation of one of the parties to the agreement, it is to be expected that the words will be accurate and I think the court should be more ready to read them as "an essential part of the description" than it would be in other cases. Here they seem to me to be fundamental. They complete the otherwise inadequate description of Heptulla's area in a way which he at least must have understood. The word "and" before "at present occupied" is, I think, merely meaningless. It is an error of grammar exactly like the "and" so often inserted by the illiterate before a relative clause.

On this reading of the parcels oral evidence was of course admissible to show what part of the shop was, immediately before the execution of Exhibit 2, occupied by Heptulla, and therefore what part was occupied by the respondent. The evidence might have shown that there was a precise line of division. In that case there would probably, I think have been a letting, in spite of factors such as common user of the front door. But in fact the evidence showed just the contrary. There had never been any recognizable "frontier," and I am of opinion that no tenancy was ever created by or in reference to Exhibit 2 because the premises intended to be let could never be ascertained with sufficient precision. In the circumstances I find it unnecessary to decide whether there was exclusive occupation of the premises by Heptulla. There could not be exclusive possession in law, and I doubt whether there was exclusive possession in fact.

Although subsequent facts should not be allowed to influence interpretation except as a last resort, it is satisfactory to note that the parties themselves clearly understood the document in the sense I have described, since they continued for some time to occupy the same areas as they had had before its execution. Later there were movements, alleged to be encroachments, by both sides, and from those, I think, this litigation probably originated.

I agree with the learned judge below that the appellants are holding over after the determination of a licence, and I think the order for possession was rightly made against them as trespassers. The learned judge considered the question whether it was reasonable to make an order for possession. With respect, I do not think that question arose. It would have arisen, as perhaps various others would, if the appellants

had been found to be tenants. Since they were only licensees, possession was a matter of right, not of discretion.

As to damages, I think both the judgment and the arguments before us lost something of clarity through use of the phrase “mesne profits.” I understand mesne profits

to be in England the particular form of damages ordered to be paid by a tenant who has held over. See *Bramwell v. Bramwell* (6), [1942] 1 All E.R. 137. Its meaning in this country appears to be wider and to extend to all cases of wrongful possession of land; but when damages are sought for trespass by a former licensee whose licence has been lawfully determined, I know of no rule that the damages must be only such as would have been payable as mesne profits if the licensee had been a tenant.

There were, I think, two heads of damage in this case, first the compensation which the respondent should receive for loss of the use and enjoyment of the premises wrongfully occupied by the appellants, and secondly the compensation which he should receive for nuisance, in the sense of damage done to the area in his own occupation or diminution of his legitimate enjoyment of it. I will deal first with the second head. The only nuisance pleaded was a series of acts set out in five sub-paragraphs of para. 11 of the plaint and also relied on as being breaches of the covenants in Exhibit 2. Sub-paragraphs (i) to (iv) inclusive allege acts of such a nature as to obstruct the reasonable and profitable use by the respondent of his part of the shop. Sub-paragraph (v) alleges an act which might have been a breach of covenant or of contract, but cannot in my opinion have amounted to nuisance. I think the learned judge failed to appreciate the special position of the respondent as occupier of property adjoining that occupied by the appellants. He says in his judgment:

> "On the final issue of damages, Mr. Salter has submitted that damages should be assessed under two heads – namely, special damages in the way of mesne profits; and general damages to compensate the plaintiff for the defendant company's persistence in remaining in occupation and for the irritations, nuisances, etc., caused by it to the plaintiff. I think it may be said that every owner suffers irritation and nuisance at the hands of the person in wrongful possession, but I know of no authority for condemning such a person in additional damages therefor. I think that the award of damages in the way of mesne profits is meant to reimburse the plaintiff for all loss or damage that he may have suffered, other than actual damage to the property. I do not propose, therefore, to consider this issue upon any footing other than damages in the way of mesne profits."

This suggests that the only "nuisance" proved was the nuisance (in the colloquial sense) of being kept out of possession. I think that was erroneous. I think the facts constituting the nuisances alleged were proved, and I do not think the learned judge took any different view. The damages under this head should therefore have been assessed, and must be assessed now. This would normally require remission to the Supreme Court; but in order to save costs the parties have wisely consented that we should, if necessary, make the assessment ourselves, and I shall make a proposal later.

Assessment of the other head of damages was considered in great detail by the learned trial judge, who intended to adopt the method which would have governed mesne profits, but, as I think with deference, in once respect departed from that method. He considered at length the rent which could have been obtained by the appellants for the premises wrongfully occupied. Considering them as severed from the area occupied by the respondent and making a substantial allowance for that severance, he arrived at a figure of Shs. 1,265/25 per month. He than made a lump sum addition, representing the additional value of the premises to the appellants by reason of the fact that they carry on a profitable business therein. The lump sum was Shs. 734/75 per month, making Shs. 2,000/- in all. If these damages had to be calculated as mesne profits I think this would have been erroneous. The definition of mesne profits in s. 2 of the Civil Procedure Ordinance speaks of profits received, or which might have been received, from the land. For this purpose rent is clearly received from the land, and profits of agricultural cultivation are similarly received from the land, but I do not think that the profits of commerce, though made on the land, are received from it. Suppose the appellants were stock-brockers or solicitors making profits of some thousands of pounds per month in these premises, I do not think it can be

contended that all those profits should go to the respondent. I think their actual business stands on the same footing. The appellants do not in fact receive any profits from the land. They might with reasonable diligence have received a considerable sum by way of rent or consideration for a licence.

The present rent of the whole premises is Shs. 2,845/- per month. The appellants formerly paid 9/16 of the whole rent of the building. Shs. 2,845/- x9/16 is Shs. 1,600/-. I think their liability cannot be less than that. But I think there may be good reason in this case to depart from the precise rules applicable to mesne profits. These premises could not be let separately, because they are not precisely ascertainable. The severance for which the learned judge made so substantial an allowance would not have prevented the respondent from letting profitably if all the ground floor had been, as it should have been, in his possession. In this case, as opposed to a case of mesne profits in the strict sense, I think one must consider the loss to the respondent, so long as it is only a normal loss and not unfairly enhanced by any special circumstances. The evidence shows that a fair average economic rent over the whole period for the whole of the ground floor would be Shs. 2,400/- per month. I accept the learned judge's estimate that ¾ of this would be the fair proportion for the appellant's area. This would be Shs. 1,800/- per month. Rent restriction should not be allowed to limit the respondent's claim, for he desired to keep the premises in his own occupation. On this basis I would reduce the sum of Shs. 2,000/- allowed by the learned trial judge to Shs. 1,800/-.

The damages for nuisance must be limited by the nature of the acts done. Their effect on the respondent's pocket was slight, though he must have suffered much annoyance. I would allow a lump sum of Shs. 2,000/-.

In my opinion the appeal should be dismissed, but the decree of the Supreme Court, so far as it relates to damages, should be varied in the two respects indicated. As both parties have been partially successful on the appeal and cross-appeal as to damages, I would in effect treat the costs of those matters as cancelling one another out, and would order that the appellants should pay four-fifths of the whole costs of the appeal, there being no separate taxation of the costs of the cross-appeal, but time spent on it being treated as spent on the appeal. I would certify for costs of two counsel.

Sir Newnham Worley P: I have read the judgment of the learned Justice of Appeal and agree with it. An order will be made in the terms he has proposed.

Sir Ronald Sinclair V-P: I also agree.

Appeal dismissed. Order as to damages varied.

For the appellant:
JM Nazareth, QC and *SS Mandla*
Shah & Gautama, Nairobi

For the respondent:
CW Salter, QC and *HC Oulton*
Gledhill & Oulton, Nairobi

Noor Mohamed v Shree Vishvakrma

[1957] 1 EA 364 (HCU)

Division:	HM High Court for Uganda at Jinja
Date of judgment:	28 June 1957
Case Number:	11/1957
Before:	Lewis J
Sourced by:	LawAfrica

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[1] Rent Restriction – Claim for possession – No evidence to show nature and purpose of original letting – Whether actual user when possession claimed determining factor.

Editor's Summary

The appellant appealed from the judgment of the District Court of Busoga awarding vacant possession of Plot No. 6, Clive Road East, Jinja, to the respondent. In his judgment the learned magistrate said he found it "impossible to believe that the premises were, in fact, let as living quarters" and he reached this conclusion because he found that the appellant did not reside there till 1954 whereas his tenancy had begun in 1947. There was no evidence to show the true nature of the letting to the appellant in 1947 but the respondent knew the appellant had been living on the premises for years and had not objected.

Held – since there was no evidence as to the use of the premises contemplated by the parties at the time of the letting, the actual user at the time possession was claimed must be the determining factor, and accordingly the appeal would be allowed.

Appeal allowed.

Cases referred to:

(1) *Williams v. Perry*, [1924] 1 K.B. 936.

(2) *Epsom Grand Stand Association Ltd. v. Clarke*, [1919] W.N. 170.

Judgment

Lewis J: This is an appeal from a judgment of the District Court of Busoga awarding vacant possession of Plot No. 6 Clive Road East, Jinja, to the respondent.

The sole question for determination was whether the appellant, in view of Legal Notice No. 120 of 1954, still held a protected tenancy under the Rent Restriction Ordinance.

The learned magistrate held that the tenancy agreement did not include living quarters and that the premises do not include living quarters.

In his judgment the magistrate said that . . .

> "I find it impossible to believe that the premises were, in part, let as living quarters . . .".

The magistrate came to this conclusion because he found that the appellant did not reside in the premises

till June, 1954, whereas his tenancy thereof began in June, 1947. In my opinion, the fact that the appellant did not commence residing in the premises till 1954 cannot determine the nature of the letting to him in June, 1947. Legal Notice No. 120 of 1954 is as follows:

Exemption

IN EXERCISE OF the powers conferred upon him by the above-mentioned Ordinance, His Excellency the Governor in Council has been pleased, with effect from the 1st day of January, 1956, to vary the Schedule of the said Ordinance by the addition thereto of the following:

Class of dwelling-house or premises.	*Provisions of the Ordinance from which the class is exempted.*
Premises in the municipality of Kampala and the township of Jinja which do not include any living quarters and are not included in one tenancy agreement or lease with any living quarters	All.

My difficulty is the meaning of the words

> "Premises . . . which do not include any living quarters and are not included in one tenancy agreement or lease with any living quarters."

It is clear from the Legal Notice that the exemption applies only to "premises." This word is defined under the Rent Restriction Ordinance and must have the same meaning in the Notice. I think the Notice intends to protect any premises which included living quarters on May 18, 1954, and any premises included in one tenancy agreement or lease with any living quarters. It is noted that the letting of the premises and the living quarters must be by one agreement or lease. Applying this test to the facts proved in the lower court, it is clear that the premises must have included living quarters as the appellant had, on the respondent's own admission, lived there since 1953. As to whether the original letting included living quarters, the evidence is inconclusive. The appellant said that when he took over the premises in June, 1947 – not June, 1954, as the magistrate stated in his judgment – he told Megji Kurji (deceased), a trustee of the plaintiffs' religious association who had let him the premises, that he was going to live in them. The appellant then said that he had not lived anywhere else. The magistrate rejected this evidence in favour of the evidence of the respondent's witnesses. However, the acceptance of this evidence could not determine the nature of the letting in June, 1947. As to this there was only the evidence of the appellant and I consider it should have been accepted.

It is clear from the decision in *Williams v. Perry* (1), [1924] 1 K.B. 936 that premises may be partly a dwelling-house and partly business premises and so at one time within the protection of the Rent Restriction Ordinance and at another time outside the Ordinance. It is also clear from the judgment of Swift, J., who said:

> "I can see no reason why a dwelling-house should not be converted into business premises just as much by the agreement of the parties and their user as by structural alteration,"

that business premises could also be converted into a dwelling-house by agreement and user to the knowledge of the parties. The mere fact that the respondent could not have obtained an order for possession of the premises on the ground that they were being used as a dwelling-house is immaterial. The fact is that the respondent knew that the appellant had been living on the premises since 1953 and never objected thereto.

In my opinion the important matter is the rights under the letting and not the de facto user. As was said by Bankes, L.J. in *Epsom Grand Stand Association Ltd. v. Clark* (2), [1919] W.N. 170

> "If an agreement were to let premises as a barn, the tenant, even though he lived there, could not be heard to say that they were let as a dwelling-house."

On this I refer to Megarry on The Rent Acts (4th Edn.) p. 19:

> "Where the terms of the tenancy provide for or contemplate the use of the premises for some particular purpose, that purpose is the essential factor, not the nature of the premises or the actual use made of them".

Mr. Megarry goes on to say that the actual user at the time when possession is claimed must be considered where the tenancy agreement contemplates no specified use.

In this case appealed from there is, in my opinion, no evidence to show the true nature of the letting to the appellant in 1947. Such evidence as there was favours the appellant rather than the respondent.

I think the respondents were not concerned as to how the premises were used so long as they were paid the rents. In these circumstances, the magistrate erred in law in not holding that the actual user at the time possession was claimed was the determining factor. The appeal must, therefore, be allowed.

Appeal allowed.

For the appellant:
AA James
Baerlein & James, Jinja

For the respondent:
JM Shah
Patel & Shah, Jinja

Nagarbhai Ramchand Patel v The Trustee of the Property of Bhagubhai Nagarbhai Patel (a Bankrupt)

[1957] 1 EA 366 (CA)

Division:	Court of Appeal
Date of judgment:	5 September 1957
Case Number:	84/1955
Before:	Briggs JA
Sourced by:	LawAfrica

(Reference on taxation under r. 6 (2) of East African Court of Appeal Rules from the Taxing Officer's decision.)

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[1] Costs – Reference on taxation – Same counsel appearing in appellate and lower courts – Certificate for two counsel given – Principle to be applied when taxing costs for the appeal.

Editor's Summary

A certificate for two counsel had been given to the successful respondent and he claimed as brief fee paid to leading counsel who was a Queen's Counsel a sum of Shs. 2,100/- but this was reduced to Shs. 1,500/- by the Taxing Officer. A sum of Shs. 5,000/- was also claimed as instructions fee but this too was reduced to Shs. 1,000/-. The Taxing Officer in making these reductions took into consideration that both counsel who had appeared for the respondent in the Supreme Court also appeared on the appeal. On reference to a judge under r. 6 (2) of the East African Court of Appeal Rules.

Held – although the work necessary to be done must always be the primary criterion, it is a notional quantum of work rather than a factual quantum, and the Taxing Officer had made an error of principle.

Taxing Officer's decision varied accordingly.

Judgment

Briggs JA: This was a reference on taxation, on which the successful respondent sought to vary the

Taxing Officer's decision in respect of two items reduced on taxation.

A certificate for two Counsel had been given and Shs. 2,100/- was claimed as brief fee paid to leading Counsel, who was a Queen's Counsel. The other item in question was the instruction fee, which was claimed at Shs. 5,000/-. The learned Associate Registrar allowed Shs. 1,500/- for the brief fee, and Shs. 1,000/- for the instructions fee. It is clear from his ruling that in making these reductions he took into account all the matters which he was obliged to consider on the issue of quantum, but in addition he was influenced by the fact that the two Counsel who appeared for the respondent on the appeal had also appeared for him as successful applicant in the Supreme Court. The effect of this may have been that, if they had full notes of the case and it remained fresh in their memories, the preparation of the appeal may have caused them less work than Counsel coming fresh to the matter would have needed. This, however, was not in my opinion a proper ground for reducing the fees in question. Although the work necessary to be done must always be the primary criterion, it is a notional quantum of work rather than a factual quantum. This is clear when one considers that inexperienced and unskilled Counsel might take very much longer to prepare a case then skilled and experienced Counsel would take. It clearly cannot be suggested that higher fees should be allowed to the unskilled and inexperienced. I think that in this respect the Taxing Officer made an error of principle.

It was also submitted that the Taxing Officer had regarded as a factor justifying reduction the fact that the Respondent's Counsel were not called on at the hearing. If he did so, that would clearly be another error of principle. The question whether Counsel are heard in court cannot affect the necessary amount of preparation, and

so cannot properly affect the amount either of an instructions fee or a brief fee. I am not satisfied, however, that the Taxing Officer, although he referred to this point, did take it into account as a reason for reducing the fees in question.

Having regard to the error to which I have referred I am obliged to consider the fees which I think should properly have been allowed in this case. It was in all senses a heavy case involving a substantial sum of money and some difficult points of law. It was essentially a case in which it was proper to retain a leader of high standing.

In the circumstances I do not think it can possibly be said that a brief fee of one hundred guineas was excessive, particularly as no fees were claimed as paid to Counsel for consultation, opinion or refreshers. I think therefore that the brief fee should have been allowed in full.

As regards the instructions fee, I think the Taxing Officer was influenced, and quite properly influenced, by the amount of the brief fee which he had allowed. If Shs. 400/- is deducted from this as representing the notional fee to the leader for the first day's hearing, the amount allowed for getting up the appeal would be only £55. Bearing in mind both the two-thirds rule and the fact that the instructions fee must contain an element for solicitor's work, in addition to the element for getting up by second Counsel, I think the sum of Shs. 1,000/- allowed would have been reasonable if the sum of £75 allowed to the leader had been adequate. As it is, I think the instructions fee should also be increased and I would allow Shs. 1,500/- instead of the Shs. 1,000/- allowed by the Taxing Officer. The bill should be completed and taxed accordingly.

The appellant is to pay the costs of this reference assessed at the sum of Shs. 100/-.

This decision may be reported.

Order accordingly.

For the respondent/applicant:
DV Kapila
DV Kapila, Nairobi

For the appellant/respondent.
EP Nowrojee
EP Nowrojee, Nairobi

Gopalbhai Nathubhai Mistry v R
[1957] 1 EA 368 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	4 July 1957
Case Number:	60/1957
Before:	Sir Newnham Worley P, Sir Ronald Sinclair V-P and Bacon JA

Sourced by: LawAfrica

Appeal from: H.M. Supreme Court of Kenya – O'Connor, C.J. and Forbes, J

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[1] Criminal law – Sentence – Enhancement on first appeal – No opportunity to show cause – That "Audi alteram partem" is a fundamental rule of justice.

Editor's Summary

The appellant had been convicted by a magistrate who had imposed sentences which were illegal. On appeal against conviction only, the Supreme Court dismissed the appeal, set aside the sentences imposed, and substituted enhanced sentences. The Crown had not complained of inadequacy nor had an intimation been given that the court contemplated enhancement. The appellant appealed against the whole order of the Supreme Court.

Held – although the Supreme Court undoubtedly had jurisdiction to substitute more severe sentences, the maxim "audi alteram partem" was a fundamental rule of justice that could be ignored only in exceptional cases of which this was not one, and the discretion to enhance the sentence could not be judicially exercised without first giving the appellant an opportunity to show cause.

Appeal against conviction dismissed. Case remitted to the Supreme Court with a direction to impose sentences after hearing the appellant and respondent.

Cases referred to:

(1) *R. v. Robert Sinoya and Davide Sinoya* (1939), 6 E.A.C.A. 155.

(2) *R. v. Abdul Aziz and another* (1948), 15 E.A.C.A. 51.

July 4. The following judgment was read by direction of the court.

Judgment

The appellant was convicted by the resident magistrate, Nairobi on one count of uttering a false document contrary to s. 349 of the Penal Code and on two counts of knowingly making a false statement for a passport contrary to s. 316 of the same Code. The court imposed the following sentence:

> "Shs. 1,500/- or three months' imprisonment with hard labour on each count non-cumulative and concurrent."

This sentence was, of course, illegal: the Penal Code does not provide for non-cumulative fines and the concurrent sentences of imprisonment contravened the proviso to s. 38 of the Penal Code. The appellant preferred a petition of appeal to the Supreme Court against his conviction but did not appeal against the sentence. The Supreme Court dismissed the appeal against conviction and substituted different and enhanced sentences in circumstances which we shall consider later in this judgment. This appeal is brought against the whole of the order of the Supreme Court.

So far as concerns the appeal against conviction, we think the order of the first appellate court was entirely correct and this appeal must fail. At the trial the case for the prosecution depended almost entirely on two inculpatory statements, one oral and one written alleged to have been made voluntarily by the appellant to Immigration Officers. The written statement was made almost immediately after the oral

admission and was in effect a detailed admission of the facts necessary to establish the offences charged. When the written statement was tendered, the advocate then defending the appellant objected to its admission on the ground that it had been made as the result of inducement and his client wished to retract it. The resident magistrate then tried the issue thus raised and the appellant gave evidence on oath.

In his evidence, however, he repudiated the statement saying that he had never made it and only put his signature to it under threats of imprisonment. The court overruled the objection holding that the appellant made the statement and made it voluntarily: the statement was accordingly admitted in evidence. The prosecution case then closed and the appellant, called upon for his defence, elected not to give or call any evidence, but merely stated from the dock "I wish to withdraw my statement." In convicting the appellant the resident magistrate said:

> "I believe the evidence for the prosecution and believe that (the written statement) is true."

He did not refer to the presence or absence of corroboration of the statement.

The only ground of appeal to the Supreme Court with which we are concerned is that which alleged that the trial court erred in failing to warn itself that it was dangerous to convict on the uncorroborated evidence of a retracted statement. The learned judges of that court dealt with that argument in the following passage:

> "We think that the appellant at first repudiated his confession, but when it had been held by the magistrate that he had in fact made it, the appellant abandoned that line and expressly retracted the confession which he then admitted he had made. He said 'I wish to withdraw my statement.' The case should, therefore, have been dealt with on the basis that the statement was a retracted, and no longer a repudiated, confession. This the learned magistrate failed to do, and accordingly, the appeal might have to be allowed, if s. 381 of the Criminal Procedure Code is not applicable.
>
> "In *R. v. Robert Sinoya & Davide Sinoya* (1) (1939), 6 E.A.C.A. 155, it was suggested by the Court of Appeal for Eastern Africa that the danger of acting upon a retracted confession in the absence of corroboration must depend to some extent upon the manner in which the retraction is made. It seems to us that if ever there was a case to which that dictum would apply it is this one. The retraction is made not on oath and without reasons after a repudiation on oath. As we have said, it was clearly a mere device by the Defence to make the rule relating to retracted confessions applicable. In the circumstances of the case, we think it was understandable that the learned magistrate should give no weight to the purported retraction, though we do not think he should have ignored it to the extent of failing to give himself the proper warning."

They accordingly dismissed the appeal.

With respect we think that the first part of this passage is, if anything, too favourable to the appellant. The Supreme Court elsewhere in its judgment says that the appellant was in effect, saying "As it has been held to be my statement, I now retract it," and that his object was to make it necessary for the magistrate to apply the rule relating to corroboration of a retracted confession. In other words, the attempted retraction was not a genuine defence at all but mere chicanery, which in our opinion the trial court was fully entitled to disregard. However that may be we think the first appellate court was entirely correct in applying to this case the dictum in Sinoya's case (1) and in dismissing the appeal against conviction.

There remains, however, the question of the sentences. As we have said the appellant did not complain of these and although the Supreme Court drew attention to the illegality at the beginning of the hearing, no argument appears to have been addressed to the court on this aspect, the Crown made no complaint of inadequacy and no intimation was given to the appellant that the court contemplated enhancement. Nevertheless, the Supreme Court not only set aside the sentences imposed by the resident magistrate (as it was bound to do) but, being of opinion that they were manifestly inadequate, imposed, in lieu thereof, on count one, a sentence of eighteen months imprisonment with hard labour; on count two, a fine of Shs. 2,000/-, in default four months imprisonment without hard labour; and on count three, a fine of Shs. 20/-, in default one week's imprisonment without hard labour.

The sentences of imprisonment in default were to be consecutive to the sentence on count one and to each other.

The appellant complains that the Supreme Court erred in law in thus enhancing the sentences without any prior notice of intention to do so and without affording him any opportunity of showing cause to the contrary, and he has put forward in his memorandum of appeal to this court a number of circumstances which he claims ought to have been but could not have been considered by the Supreme Court in relation to the sentences. He also states, as a very relevant fact which was unknown to the Supreme Court, that the Governor has ordered him to be deported as a consequence of these convictions.

In *R. v. Abdul Aziz & another* (2) (1948), 15 E.A.C.A. 51, which was a second appeal from the High Court of Uganda, this court said:

> "One of the appellants' grounds of appeal in their appeal to the High Court was that the sentences were excessive. Where that is so, it is clear that the Appeal Court has the power to reduce or enhance the sentences as justice may require. We think, however, that an Appeal Court in such circumstances should not enhance sentences without giving the appellants an opportunity of showing cause against enhancement where, as in this case, Crown Counsel appearing for the respondent in the court below did not ask for enhancement. If in reply to the appellants' advocate's address in the court below Crown Counsel had asked for enhancement that of course would have given the appellants' advocate in reply the opportunity of showing cause and the court below could properly have enhanced sentences having heard both sides on the question. In the present case the court below heard neither side of this question."

Although, in that particular appeal, this was not the actual ratio decidendi, we think that the dictum lays down a rule of general application which must govern the case before us. The maxim "Audi alteram partem" expresses such a fundamental rule of justice that it can be ignored only in exceptional cases, of which this was not one. The Supreme Court undoubtedly had jurisdiction to substitute more severe sentences if it thought fit to do so, but we think the discretion could not be judicially exercised without first giving the appellant an opportunity to show cause.

We therefore allow this appeal to the extent of setting aside the sentences imposed by the Supreme Court and remitting the matter to the Supreme Court with a direction to impose, in lieu of the illegal sentences imposed by the resident magistrate, such sentences as the court shall think fit and proper after hearing and considering such representations, if any, as the appellant or the Crown-respondent may wish to make thereon.

Order accordingly.

For the appellant
AR Kapila
SR Kapila & Kapila, Nairobi

For the respondent:
JP Webber (Crown Counsel, Kenya)
The Attorney-General, Kenya

John Moody Lawrence Brown and others v R

[1957] 1 EA 371 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	14 May 1957
Case Number:	21/1957
Before:	Sir Newnham Worley P, Briggs and Bacon JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Forbes, J

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[1] Criminal law – Conspiracy to defraud – Conspiracy to commit misdemeanour – Whether separate summing-up necessary – Penal Code s. 312 *and s.* 395 (*K.*).

Editor's Summary

The three appellants were convicted of conspiracy to defraud and the first and third appellants were also convicted of conspiracy to commit a misdemeanour. The main grounds of appeal were that a separate summing-up should have been given in respect of each of the accused, that a passage in the evidence of a Crown witness referred to in the summing-up was inadmissible and that there was an omission in the summing-up of any warning to the jury that a conviction on the first count could only be justified if the non-delivery of goods ordered and paid for in at least one of the eleven transactions was proved beyond reasonable doubt.

Held–

(i) whether a separate summing-up should be given in respect of each accused in a case of conspiracy is a matter within the discretion of the trial judge and an appellate court will not interfere with that discretion except for one or more well-recognised reasons which were not applicable in this case; the trial judge had taken great pains to put to the jury the case for and against each appellant and they were not prejudiced by the course which he adopted;

(ii) the evidence complained of, which was brought out in re-examination without objection from counsel for the defence, being relevant to a suggestion made by the second accused in his defence, was admissible;

(iii) the evidence on some of the transactions was sufficient to establish the non-delivery of goods beyond reasonable doubt and the explanations given by the first and second appellants regarding payments made to them by the third appellant were so obviously untruthful that any jury must inevitably have found that the payments were made for some improper and corrupt reason.

Appeal dismissed.

Cases referred to in judgment:

(1) *R. v. Newland and Others*, [1953] 2 All E.R. 1067; [1954] 1 Q.B. 158.

May 14. The following judgment was read by direction of the court.

Judgment

These three appellants appealed as of right against their conviction by a jury on a charge of conspiracy to defraud contrary to s. 312 of the Penal Code of Kenya. The first and third appellants also appealed against their conviction at the same trial upon a charge of conspiracy to commit a misdemeanour contrary to s. 395 of the same Code. There were other counts on the indictment of which they were acquitted by direction of the trial judge and another conspiracy count on which the jury returned no verdict and which was left on the file. After a full hearing in which counsel for the appellants said all that could be said on their behalf, we dismissed the appeals and now give our reasons for so doing.

The conspiracy alleged in the first count, on which the three appellants were convicted, was one to defraud Gailey & Roberts Ltd. of Nairobi (who were at the material dates the employers of the appellants, Brown and Nicholson) by inducing

that Company to pay for goods ordered from Bhatti Garage, Nairobi (of which firm the appellant Bhatti was a partner), by falsely representing that goods so ordered had been delivered, when in fact they had not been. The Crown did not lead any direct evidence of conspiracy but relied upon evidence of eleven allegedly fraudulent transactions or overt acts and a number of payments by Bhatti Garage to Brown or to Nicholson from which the existence of the conspiracy could be inferred. The system of fraud alleged was in essence a simple one: either Brown or Nicholson would make out a local purchase order for goods (mostly mechanical spare parts) to be supplied by Bhatti Garage; an invoice would be made out by the third appellant; Brown or Nicholson would certify the goods as having been received, either on the invoice or the duplicate of the local purchase order, and payment would be duly made by Gailey & Roberts to Bhatti Garage. The deficiency in the stock would be covered up by manipulation of the records, and the unlawful gains would be shared by the conspirators.

The conspiracy alleged in the charge on which the first and third appellants were convicted (the eighth count) was that Brown should receive corrupt payments from Bhatti as a reward for selling goods as agent for Gailey & Roberts Ltd. to Bhatti Garage. Here again the Crown led no direct evidence of conspiracy but relied on the inference to be drawn from two sales of articles written down in price, effected by Brown to Bhatti Garage and the payment by Bhatti Garage to Brown of eight sums totalling Shs. 50,000/-.

Although these conspiracies were relatively simple, the facts of the relevant transactions were more complicated. The trial, which lasted nearly a month, was conducted with great care and patience and, at the close, the learned trial judge delivered a very full and careful summing up in which he stated the law of conspiracy with complete accuracy and also put before the jury with scrupulous care the evidence relevant to each transaction, leaving the jury to form their own opinion on its effect. Nevertheless, the appellants complain of various misdirection’s and non-directions, about twelve in all. We shall now examine the more substantial of these complaints; any to which we do not specifically refer are, in our opinion, either wholly without merit or of so little significance as not to warrant discussion.

The first complaint was that

> “having regard to the complexity of the case and the number of the exhibits, some of which were admissible only against one of the accused, the learned trial judge erred in failing to sum up to the jury separately in respect of each accused.”

In putting this forward on behalf of all the appellants Mrs. Kean cited and adopted as her own the following passage from The Proof of Guilt by Dr. Glanville Williams (1955 at p. 183):

> “Where two persons are charged with conspiracy or with committing a crime together, they may be charged and tried jointly.
>
> “A defendant who is thus tried jointly with another or others is placed at several disadvantages. In the first place, the increase in the complexity of the case through having several defendants creates a risk that the jury may muddle one with another. To obviate this risk the recognised practice in a case of any complexity is now for the judge to sum up separately for one defendant, and take a verdict in respect of him, before passing on to the next defendant.”

Dr. Williams supports his proposition with a reference to *R. v. Newland and Others* (1), [1954] 1 Q.B. 158, but, with all due respect, that case does not warrant the statement that the course adopted by the trial judge in that case is now “the recognised practice in a case of any complexity.” In *Newland’s* case (1) there were six persons accused of a complicated conspiracy to effect a public mischief. The summing-up took five days and the trial judge adopted the procedure of giving the jury a general outline of the case

and a charge on the law and then dealing with the case of each accused separately and took separate verdicts thereon. At the conclusion of each day

the jury were allowed to separate but they in no case separated while they were considering a verdict. The Court of Criminal Appeal held that although the course taken by the trial judge was "no doubt unusual" there could be no objection to it in law, and, in fact, the justice of the case required it. Mrs. Kean also referred to a case tried in 1925 where there were nineteen accused tried jointly for conspiracy and where the same procedure was followed: see Turner's Edition of Kenny's Outlines of Criminal Law (1952) at p. 344. Two instances, however, do not establish a practice.

The true position, we think, must be that it is a matter for the discretion of the trial judge, and his exercise of that discretion will not be interfered with by an appellate court except for one or more of the usual well-recognised reasons. In trials for conspiracy, the provisions of s. 10 of the Indian Evidence Act introduce a special complication.

In our opinion the instant case did not call for the usual course taken in *Newland's* case (1). The learned trial judge took great pains to put to the jury the case for and against each of the appellants and there is no justification for any suggestion that they were prejudiced by the course which he adopted.

A further objection has been made that the learned trial judge did not sufficiently direct the jury

> "on the nature of the common criminal purpose essential to sustain a charge of multiple conspiracy"

and should have specifically warned them that the evidence relevant to the first count might show the existence of two conspiracies, between Brown and Bhatti and between Nicholson and Bhatti respectively. There is no merit in this complaint: the learned judge fully and sufficiently directed the jury, not once only but several times, that they must find the acts proved were done in pursuance of a criminal purpose common to all the conspirators and he carefully reviewed the evidence relevant to that aspect of the charge.

We will next consider the seventh ground of appeal, which is an objection to the admissibility of a passage in the evidence which was read to the jury in the course of the summing-up. The matter arose in this way. In the course of seeking to prove each of the eleven overt acts to which reference has already been made, the prosecution produced the relevant local purchase order and they also produced evidence of payments by Bhatti to either Brown or Nicholson which they sought to relate to the various local purchase orders. Now the passage in the summing-up to which exception is taken reads as follows:

> "In Nicholson's case all the payments made to him by Bhatti are coincident with one or other of the transactions which have been called in question. At the end of his evidence Nicholson suggested, and this was repeated in the addresses for the defence, that the Crown had proceeded on the basis of finding a payment and then finding a L.P.O. to coincide with it. It is a matter for you to consider, but I think I must draw your attention to Inspector Arnall's evidence in re-examination in this connection. This is what he said:
>
> > 'I checked the goods through the records of Gailey & Roberts. I checked each local purchase order apart from one or two very small ones. I found evidence that goods had come in on those L.P.Os. Found that in the case of these local purchase orders the documentation was quite straightforward. Stock cards were correct with one or two exceptions about which I had other information. If invoices were needed to show disposal of goods those invoices were all correct. In the case of L.P.Os where evidence of goods delivered, no evidence of a payment from Bhatti to the person originating the L.P.O. except in one case.' "

It is objected that this evidence of Inspector Arnall (who was one of the investigating officers) was inadmissible as being secondary evidence of the contents of these local purchase orders and other documents and not within the exception of s. 65 (*g*) of the Evidence Act, the inspector not being a person "skilled in the examination of such documents." Let us see then how this evidence came to be given. In

the course of

cross-examination by Mr. Bechgaard, Inspector Arnall was asked whether in his investigations he had not examined a number of other local purchase orders on Bhatti Garage in addition to the eleven produced relating to the impugned transactions. He agreed that he had and that there might have been about thirty of them. There the cross-examination on this point stopped, leaving its purport undisclosed, but capable of supporting the insinuation which Nicholson and his counsel later made. It was also capable of supporting an argument that by producing only the eleven local purchase orders the prosecution was not presenting a fair picture in that the thirty or so other transactions might have shown similar irregularities as the eleven but without any coincident payments to Brown or Nicholson. The prosecution was therefore fully entitled to anticipate any such attack on the thoroughness of the investigation or the fairness of its presentation of the case. The purpose of the re-examination was to enable the investigator to explain his conduct and, in particular, to explain why only eleven local purchase orders were produced. That evidence we think was relevant and admissible and was not rendered inadmissible because it also indicated in general terms the effect of the contents of other documents examined. It is significant that none of the three defence counsel raised any objection to the re-examination, though Mr. Bechgaard has told us that he remained silent against his better judgment. Had there been an objection or had the defence expressed a wish to test the accuracy of the inspector's evidence, the relevant documents would not doubt have been forthcoming. In our opinion the evidence complained of was admissible and no prejudice was caused to the appellants or any of them by the use made of it in the summing-up. It was clearly relevant to the suggestion made by Nicholson in his defence.

The ground of appeal on which, we think, the appellants' counsel relied most strongly was that the learned judge's summing-up was defective, in that he should have warned the jury that a conviction on the first count could only be justified if the Crown proved beyond reasonable doubt the non-delivery of goods ordered and paid for in at least one of the eleven transactions to which we have referred. Linked with this was the submission that in none of the eleven transactions was the evidence of non-delivery so cogent that a jury properly directed would have found it proved. We accepted the appellants' view of the issues of law involved in this. Although it is not ordinarily necessary in a trial for conspiracy to prove that the accused did in fact that which they conspired to do, the position may be different when the existence of the conspiracy is not established by direct evidence, but must be inferred from overt acts alleged to have been done in pursuance thereof. In this case the payments to the first and second appellants by the third appellant's firm were proved beyond question, and indeed admitted in most cases. The reasons for those payments given in evidence by the first and second appellants were so obviously untruthful that any jury must inevitably have found that the payments were made for some improper and corrupt reasons. Some sort of conspiracy might readily be inferred from them alone, but not, as we thought, the precise conspiracy charged. For that it was necessary that the jury should consider the relevant transactions and should find that the only reasonably possible conclusion from the proved facts was that in some one or more of them the goods in question were not delivered. We could not, however, go further than this towards accepting the appellants' submissions. The jury had copies of the charges, and they were repeatedly warned by the learned judge that they could not convict on the first count unless the conspiracy was proved as laid. From the great care with which the learned judge dealt with the evidence directed to non-delivery the jury must have been perfectly aware of their duty in this respect. It was not, of course, necessary that they should find non-delivery proved in all the transactions. In one at least of them it appeared clearly from the evidence that most of the relevant goods had been delivered. Accordingly, whether or not corruption or conspiracy of another kind could have been inferred from the facts of that transaction, it did nothing to support the Crown's case on the first charge. On one or two

other transactions the evidence was such that, had it stood in isolation and unrelated to the other facts of the case, a jury could not have said that non-delivery was proved beyond doubt. The appellants submit that

none of the transactions goes further than this, and they say a number of dubious transactions cannot be treated as establishing one act of non-delivery with the necessary precision. It was not necessary for us to consider how far the inference of non-delivery might legitimately have been drawn from a number of cases in which non-delivery was shown merely as a probability, since we were of opinion that the evidence on some of the transactions was such as to establish non-delivery as a fact proved by the Crown beyond reasonable doubt. To justify our conclusions in this respect it will be necessary to set out the facts of two of the eleven transactions in considerable detail. We deal first with the eleventh, which was the latest in time and concerns primarily the second and third appellants.

On February 19, 1954, the second appellant signed a written order on Bhatti Garage for five items of spare parts for Caterpillar tractor equipment. Each part is described with its number according to the Caterpillar Company's spares catalogue.

The items were as follows (Exhibits 32 (*a*), (*b*) and (*c*)):

1	Drum	6B2153
6	Ring Groups	5F331
8	Ring Groups	5F332
23	Seals	7B4375
4	Shafts	1F8292

The total price shown was Shs. 1,552/50. On the same day Bhatti Garage sent an invoice accordingly (Exhibit 33). The second appellant, by way of authority to the accounts section to pay the bill, certified on the invoice that the goods were bought "for stock" and by implication that they had been duly received (but not, in this instance, that they had been entered on the relevant stock cards). On this Bhatti's bill was paid. The second appellant's department maintained, among a great number of others, stock cards for each of the above parts, identified by the part number (Exhibits 34, 35, 36, 37 and 38). The source of every intake was shown and the authority for any issue. The company had a section known as Central Parts Control, whose written authority was required for adjustment of errors resulting in differences between stock physically held and stock recorded on the cards. In addition, it had to authorise transfer of any stock from one card to another. It will be seen later how this might become necessary. Action by the Central Parts Control could be initiated by the second appellant by means of a stock adjustment note addressed to them, but he could not himself issue the necessary order. Immediately prior to February 19, 1954, the stock card for Drums 6B2153 showed a physical excess of one, discovered at stocktaking in January. This was regularised by Central Parts Control's order C.P.C. 1311 (Exhibit Z2) dated 17.2.54. The stock cards for Seals 7B4375 had on 23.6.53 shown a physical deficiency of 23 on stocktaking. According to the Crown's evidence these 23 seals had merely been mislaid and were soon afterwards found. As their loss had been regularised by writing-off, their discovery resulted in a physical excess which again had to be regularised. This was done on 17.2.54 by the same order, C.P.C. 1311. The ring groups in question are sets of piston rings for engines. The evidence showed that two types of pistons, for which these rings were suitable, had to be scrapped for some inherent defect. They were held in stock as piston assemblies, i.e. complete with rings, and the stock card numbers were 4F5225 and 4F5657. When the pistons were scrapped the rings were taken off and retained, but had to be transferred and re-entered on the appropriate stock cards for ring groups. On 17.2.54 six groups were so entered on card 5F331 and eight on card 5F332 under authority of order C.P.C. 1310 of that date (Exhibit Z1). Both

the order and the stock cards show that they were taken in on “transfer from 4F5225 and 4F5657.” Most of the transfers of piston rings of those types took place at an earlier date, but as many piston assemblies had to be called in from outstations the timing causes no suspicion. Stock cards 4F5225 and 4F5657 could not be produced, but since they became obsolete when the last of these pistons were scrapped they would naturally then be destroyed. The numbers are proved correct by the spares catalogue (Exhibit 97). The stock cards for Shafts 1F8292 shows receipt of four from the company’s Dar-es-Salaam branch on February 16, 1954.

The Crown's case was that the second appellant made up the order to Bhatti's Garage (Exhibit 32) with deliberate reference to the five entries on the stock cards which we have described, in the belief that they could be used to conceal the fact that the goods ordered from Bhatti had not been delivered. Having regard to the dates and items it was uncontrovertible that the order and the entries must be linked either in this or in some other way, and the defence did not deny this, but alleged a quite different link. The stock card for Drums 6B2153 (Exhibit 34) shows immediately after the entry of an excess of one drum under C.P.C. 1311 (Exhibit Z2) an entry dated 19.2.54 purporting to cancel C.P.C. 1311, and consequently reducing stock by one, and thereafter an entry dated 20.2.54 showing an intake of one, the source of which is shown as "ex Bhatti." No authority was given, so far as can be ascertained, by Central Parts Control for the cancellation of C.P.C. 1311, and there should be some reason for the reduction of stock by one. If Bhatti delivered a drum the last entry would be correct, but the previous one required explanation. If they did not, the two entries would appear to be fraudulently made to conceal the fact. They are in the second appellant's handwriting.

Before giving the appellant's account of this matter it should be noted that Bhatti Garage maintained, as one would expect, a deliveries book (Exhibit DD). It contains no reference to any delivery of these five items to Messrs. Gailey & Roberts. It should also be noted that after this, the last questioned transaction, suspicion attached and in consequence a physical check was made of the company's stock of these five items. The stocks were in accordance with the stock cards.

The second appellant said in evidence that all the items contained in the order (Exhibit 32) and invoice (Exhibit 33) had been taken from a box of miscellaneous spare parts sent by Bhatti Garage some time prior to the date of the order to enable Gailey & Roberts to make a selection for purchase. He had selected the five items and then made out the order. The five items had been included in physical stock and the five stock card entries related to them. The references to the drum and seals as being "excesses," to the ring groups as being transferred from scrapped pistons, and to the shafts as being sent from Dar-es-Salaam office were mere errors made by the stock card clerk, and were a "completely baseless invention" on his part. It was mere coincidence that on February 19, 1954, he received Shs. 200/- from Bhatti, and on February 22 a further Shs. 1,000/-. In the case of the drum he himself had "corrected" the erroneous entry on the stock card. He had instructed the clerk similarly to "correct" the other four items, but the clerk did not do so. He did not call, or identify, the clerk or give any explanation why the clerk should have devised three different fictitious stories to account for an occurrence which it was not his duty to account for at all. He did not deal with the coincidence that he should find it desirable to buy twenty-three seals for stock and that twenty-three had been unaccountably lost (and on his story never recovered) some months before. He gave no explanation of the origin or existence of the orders C.P.C. 1310 and 1311, which, in his story, would appear to suggest that the original fiction-writer was Central Parts Control itself. It is unnecessary to go into further detail. We were satisfied beyond all doubt that this evidence was untrue, and that the only possible explanation of the known facts was the one suggested by the Crown. Non-delivery was in our opinion proved conclusively.

We turn now to the ninth transaction. On September 28, 1953, the second appellant signed an order on Bhatti Garage for 180 Oil Seals at a price of Shs. 1,350/- (Exhibit 26). Bhatti Garage invoiced these on the same day (Exhibit 27). The second appellant authorised payment by writing "O.K. Stock" and signing on the invoice and also completing a standard endorsement on the duplicate order. This states that the goods have been received and stock-carded and gives Bhatti's invoice number. It will be observed that no identifying part number is given and the invoice refers to "assorted" oil seals. Stock-carding would have required sorting and identification by number. Bhatti Garage's bill was paid by Gailey & Roberts. Again

there is no relevant entry in Bhatti's delivery book. In examination-in-chief the second appellant said these seals were never intended to be stock-carded; they bore no identifying marks; they were delivered and were put in an odd box which contained assorted and unidentified

oil seals from which buyers could match a sample. In cross-examination he admitted that his certificate of stock-carding was false. He then said that he had intended to stock-card the goods, but it was never done. On September 28 he received from Bhatti Garage a cheque for Shs. 850/- (Exhibit 132). The cheque stub (Exhibit 133) is in the third appellant's handwriting and says "for oil seals." It related, so the witness said, to a sale by him of some oil seals, his private property, to Bhatti Garage on the same day as he bought other oil seals from Bhatti Garage for Gailey & Roberts, and it was mere coincidence that in relation to the latter he signed a false certificate without which Bhatti Garage's bill would not have been paid. This requires no comment from us. Again we were satisfied that non-delivery was proved to conclusion.

It may be noted that both these transactions concerned the second and third appellants, and not directly the first. We thought they established perfectly clearly a conspiracy by the second and third appellants in terms of the first charge. On the question whether the first appellant was a party to that conspiracy, either with or without the knowledge of the second appellant, the following points were relevant. There were three transactions, the first, second and third, which directly concern only the first and third appellants. Each of them involved a large sum paid by Gailey & Roberts for goods which were ordered from Bhatti Garage by Brown, and which, to put the matter most favourably to the defence, were not shown to have been delivered. Each of these transactions is closely related in time to one or more large payments by Bhatti Garage to the first appellant. He swore that they were payments for tractor parts which belonged to him personally, having been given to him as a present by a man in Mombasa whose name he either never knew or had forgotten. The jury clearly disbelieved this, as well they might. The third appellant did not give evidence, but some of his written statements were of the utmost importance. His cheque stub (Exhibit 113) reads "8.1.53 J. M. L. Brown. For D8 P.C.U. Shs. 6,000/-." Another cheque stub (Exhibit 115) reads "28.2.53 Cash for D7 track and spares. Paid to Brown. Taken receipt Shs. 7,000/-." The first appellant admitted receipt of the Shs. 6,000/-, but denied receiving the Shs. 7,000/-. The cheque for that sum (Exhibit 114) is made out to "Cash or bearer" and is not endorsed. Some attempt was made to argue that the stub read "paid to *Browne*" and referred to some other person. It need hardly be said that the receipt was not forthcoming. We were of opinion that the word was "Brown." The Crown relates these cheque stubs to an order (Exhibit 8) for four secondhand D7 tracks, two secondhand D8 tracks and one secondhand Le Tourneau Power Control Unit, which could admittedly be used with a D8 Caterpillar tractor. We thought that in connection with Exhibits 113 and 115 the provisions of s. 10 of the Indian Evidence Act as applied to Kenya came into play. Without them, there was ample *prima facie* evidence of a criminal conspiracy involving all three appellants as soon as the first appellant's explanation of the payments to him were rejected. The nature of the conspiracy was almost certainly to defraud Gailey & Roberts and there was reasonable ground to believe that the method was to be as charged. Accordingly the statements of the third appellant on the cheque stubs were evidence, for what they were worth, not only against him, but against the first and second appellants, both as to the "existence of the conspiracy" (which words we understand to cover the precise nature of the conspiracy) and to show that each of the three was a party to it. We had no doubt that this sum of Shs. 7,000/- was paid to the first appellant and that the two sums of Shs. 6,000/- and Shs. 7,000/- were his share of the total of Shs. 16,000/- paid by Gailey & Roberts for goods ordered by Exhibit 8 but not in fact delivered. The learned trial judge was not invited by the Crown to rely on s. 10. Prosecuting counsel are sometimes nervous that its application may afford grounds of appeal to an accused whose guilt could be sufficiently proved without it. And in fact the learned judge instructed the jury that Exhibits 113 and 115 were evidence only against the third appellant. This was perhaps the only blemish in an almost impeccable

summing-up. It is not, however, one of which the appellants can or do complain.

The remaining grounds of appeal against the convictions on the first charge amount in effect to a complaint that the learned trial judge did not give the jury a fair picture

of the evidence by specific omissions or by failure to stress adequately various facets of the case. It is also suggested that he put an improper onus on the defence. These complaints are unjustified. In a long summing-up, as this was, the ingenuity of counsel will nearly always be able to suggest that something should have been said which wasn't said, or something said should have been left unsaid or said differently. In the instant case the learned judge put the evidence for both sides with scrupulous care and impartiality, generally refraining from intruding his own opinion but making it abundantly clear to the jury where the onus lay. The dominant fact in the case was the admitted payment of large sums of money by Bhatti to Brown and Nicholson. Bhatti never volunteered any explanation of these payments and the explanations offered by Brown and Nicholson were wildly improbable, and must have been rejected by the jury. No doubt after that stage had been reached the jury found no difficulty in rejecting the assertions of Brown and Nicholson that the goods ordered on the impugned local purchase orders had been delivered. The verdict was in our view fully supported by the evidence which proved to conclusion precisely that calculated system of fraud which was charged in the first count.

The ninth ground of appeal was the only one specifically related to the eighth count, on which the first and third appellants were convicted. It alleges a misdirection by failure to direct the jury that an essential ingredient of the misdemeanour, alleged to be the subject matter of the conspiracy laid, is that the corrupt practice should bear relation to the principal's affairs or business. We were unable to see any merit in this ground of appeal. The relevant enactment is the first clause of s. 385 of the Penal Code which was read to the jury at the beginning of the summing-up though in relation to the second count in the indictment. The particulars alleged were as follows:

> "John Moody Lawrence Brown and Om Parkash Bhatti on divers days between the 1st day of January, 1955, and the 31st day of March, 1956, in the Colony of Kenya, conspired together and with other persons unknown that John Moody Lawrence Brown and other persons unknown should corruptly obtain, and Om Parkash Bhatti and other persons unknown should corruptly give money as a reward for the said John Moody Lawrence Brown selling goods on behalf of Gailey & Roberts Ltd., of which firm he was the agent, to Bhatti Garage, of which firm the said Om Parkash Bhatti was a partner."

The case made out was that Brown as agent for Gailey & Roberts sold to Bhatti Garage certain written-down articles from his employer's stock and that he received from the third appellant eight payments totalling in all Shs. 50,000/-. The Crown alleged that these were corrupt payments related to the sales: Brown said that they represented an interest-free loan. On the facts proved, if these payments were corrupt gifts they could only be so in relation to the business of Gailey & Roberts Ltd., and no special direction to that effect was necessary.

Leave to appeal against sentence was refused.

Appeal dismissed.

For the first and second appellants:
Mrs L Kean

For the first appellant:
Stephen & Roche, Nairobi

For the second appellant:
DN Nene, Nairobi

For the third appellant:
K Bechgaard and *DN Nene*
K Bechgaard, Nairobi

For the respondent:
DW Conroy, QC (Solicitor-General, Kenya) and *KC Brookes* (Crown Counsel, Kenya)
The Attorney-General, Kenya

Taj Deen v Dobrosklonsky and Bhalla & Thakore
[1957] 1 EA 379 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	23 May 1957
Case Number:	32/1956
Before:	Sir Newnham Worley P, Sir Ronald Sinclair V-P and Briggs JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Harley, Ag. J

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[1] Costs – Taxation – Objection in appellate court to quantum allowed in court below – Trial unduly prolonged – No discovery between parties – Whether Taxing Officer erred in principle – Whether appellate court should assess costs.

Editor's Summary

Note: This appeal is reported only on the question of costs. The action concerned a suit for Shs. 5,100/- being fees claimed by a structural engineer for services rendered. The trial judge directed that a shorthand note of the evidence should be taken and that the transcript should be the official record. This transcript ran to nearly five hundred pages and the charges for one copy amounted to about £100. The hearing which lasted for sixteen days was unduly prolonged by the failure of the advocates to effect discovery of documents and prepare an agreed bundle, by repetitive cross-examination and the time spent on collateral issues. The trial judge gave judgment for the amount claimed with costs against the appellant and dismissed the claim against the second respondents with costs. On taxation costs amounting to about Shs. 24,000/- were allowed. The appellant claimed on appeal *inter alia* that the costs allowed were excessive.

Held–

(i) the court could rarely form a better view of a case from a shorthand transcript than from the judge's notes and in small claims a transcript could make the costs entirely disproportionate to the claim; if the costs of litigation were allowed to rise to a point where the claim itself became relatively unimportant, the law was not being properly administered and public confidence in the

courts would be destroyed;

(ii) in all ordinary civil cases in the Supreme Court it is the duty of advocates to make discovery of documents and prepare an agreed bundle for the court and when this is not done the taxing officer should in proper cases make a deduction from the instruction fee for work not done and from the hearing fee for time wasted;

(iii) the case was not one of great difficulty and the certificate for two counsel for the first respondents should be excised from the Supreme Court decree;

(iv) the Supreme Court taxing officers in assessing the fees for instructions had acted on a wrong principle in allowing a larger sum than they would ordinarily have allowed because of the "phenomenal expansion of what should have been a moderately sized case";

(v) under the powers given by r. 75 of Eastern African Court of Appeal Rules 1954, in lieu of costs allowed on taxation a sum of Shs. 6,000/- would be allowed to each of the successful parties for profit-costs in the court below plus the amount of disbursements allowed on taxation there in each case.

Appeal dismissed, appellant to pay three-quarters of the costs of appeal.

Judgment

In the judgment of **Briggs JA:** read by direction of the court, the facts were stated and the judgment continued:

This outline of the facts, a good many of which were undisputed, suggests that this small claim might have been tried in two or three days. In fact the trial lasted sixteen days, the hearing of the appeal before us took four, although we heard the respondents only on one or two minor points. It is necessary to consider how this

came about. The learned judge directed that a shorthand note should be taken of the evidence, and that the transcript should be the official record. It runs to nearly five hundred pages. The plaintiff gave evidence and called two expert witnesses on the reasonableness of his charges. For Bhalla & Thakore the witnesses were Bhalla, Moddie, an assistant in the firm, Lawrence and Mohan Singh. Tajdeen gave evidence and called five witnesses. The time occupied on each of these can be judged from the pages of the transcript.

	In Chief	*Cross-examination*	*Re-examination*
Sutcliffe	7	7	–
Zapatal	7	3	–
Dobrosklonsky	13	9	1
Moddie	13	51	4
Mohan Singh	4	25	3
Lawrence	6	31	6
Bhalla	34	80	4
Tajdeen	31	55	8

The remaining five witnesses occupy ninety-five pages in all. There are, I think, three principal reasons why the matter took so long. The first is the failure to effect discovery of documents and to prepare an agreed bundle. The exhibits form about 140 pages of our record and this is nearly all ordinary correspondence. A great deal of time is wasted by putting in these documents one by one. Advocates should realise that it is their duty in all ordinary civil cases in the Supreme Court to carry out discovery and have the documents prepared in a proper agreed bundle for the court. If this is not done the taxing officer should in proper cases make a deduction from the instructions fee for work not done, and from the hearing fees for time wasted. Judges should draw attention to this and give such directions as may be necessary. The second main reason is what I can only call improper repetitions in cross-examination. On one occasion Mr. Nazareth for Bhalla objected that Mr. Khanna for Tajdeen had asked the same question of the same witness five times. Similar objections might well have been taken on dozens, almost hundreds, of occasions. I think a trial judge should take strong measures to prevent this. In this case it was a ground of appeal that the learned judge put too many questions to witnesses. In many cases he was obliged to do so in order to clear up obscurities created by the improper repetitions to which I have referred. This was in no way wrong; but it would have been better if he had intervened and prevented the obscurities from arising. The third reason is a failure on the part of the advocates to distinguish between matters genuinely in issue and matters so far collateral as to be of no value or importance to either side. The final speeches in this case lasted four days. This is mere waste of the court's time and the clients' money. The result of all this is that on this simple claim for £255 the bills of costs in the court below to be paid by the unsuccessful party have been taxed at about £1,200. I shall revert to this. I would add at this stage that, unless a party wishes a shorthand note to be taken at his own expense, which will seldom happen, I do not think such a note should be taken in civil cases involving only small sums. And in any event I do not think it should be ordered that a transcript shall be the official record. The cost of a transcript is entirely disproportionate in small claims. In this case the charges for one copy appear to have been about £100. The effect of the order is seen from the appeal record, which is three times as long as it

need be. This increases unnecessarily the cost of an appeal, without giving either party any real advantage. It is only in the rarest cases that this court can form a better view of a case from a shorthand transcript than it can from the judge's own notes. A transcript should be regarded as a luxury appropriate only to litigation involving large sums, where costs are relatively unimportant. If the costs of civil litigation are allowed to rise to a point where the claim itself becomes relatively unimportant, the law is not being properly administered, and public confidence in the courts will be destroyed. I would invite counsel to consider how long the trial of this suit would have taken in a County Court in England, and what the party and party costs would have been there. [After disposing of the other issues in the appeal the judgment continued]

The only remaining question is as to costs. The appellant complains that the costs taxed against him are excessive, first, by reason of the learned judge having given to Bhalla and Thakore a certificate for two counsel. He says in his judgment that this was done "in view of the difficulty of the case." I do not think this was in any way a difficult case. It was monstrously prolonged, mainly, I think, through the fault of the appellant's counsel, but that does not make it difficult. Again, although under the wording of the rule a certificate may be granted

> "having regard to the amount sued for or the relief claimed or the nature, importance or difficulty of the case,"

I think it is an incorrect exercise of the discretion to grant a certificate on one of these grounds alone when consideration of the others would suggest that it should be refused. Unless a case is a test case, and the amount involved is thus much larger than it appears to be, I do not think a certificate should ever be given where the claim is as small as this. I would vary the decree by excising the certificate for two counsel. I would remark in passing that the bill of Messrs. Bhalla & Thakore's advocates was drawn in a wholly improper manner in that it shows the costs of both advocates as profit costs of Messrs. Maini & Patel, whereas the leader, Mr. Nazareth, was not a member of that firm. Whatever fees were paid to him could only be claimed in Messrs. Maini & Patel's bill as disbursements.

The other objection raised by the appellant as regards costs is that, having regard to the small amount involved in the suit and the very large amount of the two bills of costs, the taxing officer must be presumed to have acted on a wrong principle. We are accordingly asked to reduce the amount of the bill. I feel great sympathy for this request, for I think the amount of the bills indicates that the taxing officer may not have paid sufficient attention to the smallness of the claim. I think the instructions fees allowed appear *prima facie* to have been too large. On the other hand I think most of the blame for the inordinate length of the trial must fall on Mr. Khanna and the innocent and successful parties should not be penalised for it. Counsel before us argued that we had no jurisdiction to deal with the costs in the way proposed, but they did not refer to, and must, I think, have overlooked, r. 75 of the rules of this court, which reads,

> "The court may make such order as to the whole or any part of the costs of appeal or in the court below as may be just, and may assess the same or direct taxation thereof."

Mrs. Kean asked that she might be heard further on the question of quantum, but I do not think any useful purpose would be served by detailed discussion of individual items. I would consider the bills under four heads:

(1) the items in Messrs. Maini & Patel's bill which arise from the certificate for two counsel. These go out en bloc.

(2) the hearing fees. If Mr. Khanna's client had won, I think there would have been good ground for disallowing some of these on the basis of wasted time. As it is, I think they were properly allowed.

(3) other items of profit costs (except the instructions fees) and disbursements. I think no question arises on these.

(4) the instructions fees. We have before us the original Supreme Court record, including the bills of costs and the rulings of the taxing officers, and we are fully aware of the nature and course of the proceedings. There seems to be no other material which could assist us in the matter. The amounts claimed in the bill, Shs. 9,000/- by Mr. Maini and Shs. 7,500/- by Mrs. Kean, are in any event fantastic, and the particulars given in support are, I think, quite misleading. One bill mentions:

> "difficult and obscure points of law . . . involving close and careful study and research."

The other sets out the questions of law involved in twenty-three lines of description. In fact there were no difficulties of law in the case at all. The law applicable, once the facts were established, would not have taxed the knowledge of a student. If

advocates make obviously excessive claims as regards instructions and support them by misleading particulars, taxing officers should deal drastically with them. There is every indication that very little getting up was done in this case. There was no discovery: the proofs of evidence were not long, and in Mr. Maini's bill were separately charged for; the law required little or no investigation. These matters might not be sufficient to entitle us to intervene on a matter of quantum; but I think it is clear that the taxing officers have in one respect acted on a wrong principle. It is clear from Mr. Lownie's ruling that he allowed a larger sum for instructions than he would otherwise have done, because of what he calls

> "the phenomenal expansion of what should have been a moderately sized case."

The actual length of the hearing is already allowed for in the hearing fees, and there is no reason why it should increase the instruction fee. Length of the case is ordinarily a good index of its complexity and may thus be very relevant; but here the taxing officer is saying in effect that this should have been a short case and therefore simple to prepare, but because in fact it was long he allows more for its preparation. This is, I think, both illogical and contrary to principle. Mr. Heim has said in his ruling that he followed the principles adopted by Mr. Lownie, and must be presumed to have erred in the same way. While recognizing that it is only in exceptional cases that this court will deal with questions of quantum of costs, I think this is an exceptional case and we should do so.

I think this is a proper case for the exercise of this court's power to assess costs, and having regard to all relevant considerations I would allow in lieu of the amounts allowed on taxation a sum of £300 to each of the successful parties for profit costs in the court below, plus the amount of disbursements allowed on taxation there in each case. The appellant should pay three-quarters of the costs of both respondents of this appeal. His only success has been on the question of costs and this occupied only a very small part of the time of hearing. The costs in this court will be taxed as usual.

Sir Newnham Worley P: I have had the advantage of reading the judgment prepared by Briggs, J.A., and I agree that, for the reasons he has given, this appeal fails on the issue of the appellant's liability to pay the first respondent's claim, but succeeds in part on the issues raised as to the costs of the proceedings in the court below. I wish particularly to say that the comments of the learned Justice of Appeal on the manner in which the case was conducted, on the use of the shorthand transcript and on the taxed costs of the trial represent the considered views of the court which heard the appeal. The decree appealed from is accordingly confirmed, subject however to the excision therefrom of the order that the suit be certified reasonable and proper for costs of two counsel employed by any of the three parties to the suit and subject also to the inclusion therein of a proviso that the taxed costs of the plaintiff and of the first defendant be limited to the sum of Shs. 6,000/- each, plus the amount of disbursements already allowed by taxation in each case. Further, it is ordered that the costs of the respondents to this appeal be taxed and paid, as to three-quarters thereof in each case, by the appellant to the respondents. If any sum received by either respondent in payment of the taxed costs of the trial is due to be refunded to the appellant in consequence of this order, it may be appropriated pro tanto to any sum payable to him as his costs of the appeal under this order. If any question arises as to the working out of this order the parties have liberty to apply.

Sir Ronald Sinclair V-P: I agree and have nothing to add.

Appeal dismissed, appellant to pay three-quarters of the costs of appeal.

For the appellant:

DN Khanna
DN & RN Khanna, Nairobi

For the first respondent:
Mrs L Kean
Sirley & Kean, Nairobi

For the second respondents:
PL Maini
Maini & Patel, Nairobi

Damianus Orinda s/o Otieno v R

[1957] 1 EA 383 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	14 May 1957
Case Number:	42/1957
Before:	Sir Ronald Sinclair V-P, Briggs and Bacon JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Rodwell, Ag. J

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[1] Criminal law – Judgment – Non-direction and misdirection – Perjury of witnesses in material respect – Need for scrutiny of remainder of their evidence.

Editor's Summary

The appellant had been convicted of murder mainly on the evidence of two Crown witnesses who in material particulars had repudiated their earlier statements to the police. The judge having found that they had committed perjury in one particular did not in his judgment consider the need for careful scrutiny of the rest of their testimony, nor stress the significance of other evidence supporting the appellant's defence of self-defence or provocation. The direction to the assessors also failed to consider whether there was a reasonable doubt of the appellant's guilt.

Held – the evidence of the main Crown witnesses having been found to be perjured in a material respect, the truth of the vital part of their evidence became intrinsically improbable, and called for a careful scrutiny but in the judgment it received none; moreover, other testimony confirming the appellant's evidence merited more attention and it was a serious non-direction to overlook its significance; had the learned judge directed himself fully and properly on the evidence the court was unable to say that he would have convicted the appellant.

Appeal allowed, conviction and sentence for murder quashed.

May 14. The following judgment was read by direction of the court.

Judgment

The appellant was convicted of murder by the Supreme Court of Kenya. We allowed his appeal, set aside the conviction and sentence and ordered that he be set at liberty. We did so for the following reasons.

It was not disputed that the deceased died of a stab wound inflicted by the appellant with a knife. The incident occurred within an hour or two after midnight, in moonlight, near a cattle-pen belonging to the deceased in the village of Ponge, where he lived very near to the pen.

A party had been held during the previous evening at another village some distance away. The first two witnesses for the Crown, upon whose evidence, as the learned trial judge said, the prosecution mainly rested, testified that they had not attended the party; in cross-examination each repudiated an assertion to the contrary contained in his statement to the police. The appellant opened his evidence by adopting the statement which he had made on being charged. In that statement he had said that he had attended the party, that the above-mentioned witnesses had also been present, that he and they had together left the party and that on their way home the others had taken him to the deceased's village. A sub-headman testified that the party had been held without the chief's permission and that an attempt to arrest those attending had been made without success. The learned trial judge found that the two Crown witnesses had "committed perjury" when they testified to not having been there.

The case for the Crown was briefly to the following effect.

The first two witnesses, who shared a hut in Ponge, said that they had left their hut at 1 a.m. or 2 a.m. on the night in question to see the first witness' mother's hut, which was in the same boma as was that of the deceased, his uncle. They had then seen the appellant for the first time that night; they had seen him opening the gate of the cattle-pen and had thereupon awakened the deceased. The deceased had come

outside and had approached the pen, calling out “Who are you?” The appellant had started to make off. The deceased, armed with a rungu (described by the first witness as “a rungu with a knob”) had raised it on approaching the appellant but had not struck him. The second witness said that the appellant had then produced a knife and stabbed the deceased. Both said that the appellant had then run away and that they had tried in vain to catch him. The first witness said in cross-examination: “When he saw the deceased accused walked away from him.” The second witness said in cross-examination that “deceased walked towards accused, who moved away.”

A half-brother of the deceased testified that he had found the appellant after the incident and that the latter had only said “I killed him in a fight.”

A sub-headman said that he had asked the appellant if he had killed someone; in reply, the appellant had said that he had, and that when the deceased had come to him he had hit him (the appellant) with a stick on his head and thigh. The witness added: “I saw swellings on the accused’s head and thigh, which appeared to be recent.”

The medical evidence was that the deceased had died from a single clean cut wound, delivered downwards, in the left side of the chest.

The only witness for the defence was the appellant himself. He testified to the effect that, after returning from the party with the first two Crown witnesses, the latter had brought the deceased from his hut, the deceased and one of the others had approached him, the deceased had said “Where is Orinda?”, the others had pointed him out, the deceased had struck him with the rungu while he was lying on the ground held by the others, and he had then stabbed the deceased at a moment when his hands were free but while he was still on the ground with the deceased bending over in order to hit him on the head.

The defence was thus, in the first instance, self-defence. If that failed, there remained the question of provocation.

After referring to a considerable part of the evidence the learned trial judge concluded his judgment as follows:

> “I directed the assessors in my summing-up to them, as I did myself, that they should keep in mind when considering the evidence of first and second witnesses that if they believed their statements (Exhibits A and B) then they, first and second witnesses, were committing perjury about not going to a party on the evening in question, but that (if) while keeping this in mind they believed the rest of their evidence then it is clear evidence that accused had murdered the deceased. I told them that if they believed the evidence of the accused they should acquit him.
>
> “I also told them that if they thought that if in the heat of the struggle the accused had stabbed the deceased without meaning to kill him they should say that accused was guilty of manslaughter.
>
> “I believe the evidence for prosecution and in particular that of first and second witnesses, while keeping in mind the fact of their perjury to which I have referred and of which I am satisfied. I do not believe the statement or the evidence of accused.
>
> “I am satisfied beyond reasonable doubt that accused stabbed the deceased intentionally when the accused was surprised breaking into the deceased’s cattle-pen.”

With respect, we think that that passage was such an over-simplification of the case as to amount to non-direction and, as regards one very material matter, to misdirection. Having found – and we agree that it was clearly the right finding – that the first two Crown witnesses had committed perjury by testifying that they had not attended the party the learned judge set aside, so to speak, that falsehood in a

compartment by itself and proceeded to accept and to found the conviction on the remainder of their story. In so doing, we think, he failed to appreciate that, once their story had been shown to be untrue to that extent, the truth of the vital part of

their evidence became intrinsically improbable. It was impossible in this instance to sever the untrue part and to treat the remainder as unaffected. At the very least, the remainder called for a careful scrutiny, but in the judgment it received none. For it was manifestly unlikely that the appellant had been so ingenious or so fortunate as to hit on the story of having walked back from that party that night with the Crown witnesses – which story he told to the sub-headman immediately after the deceased's death and again in detail to the police – without its being true. He could not have known or guessed that it would tally with the fact, as eventually found, that the Crown witnesses were indeed at the party. And, once it is accepted as probably true that they all walked back together, it becomes unlikely to be true that (as the Crown witnesses said) they went without the appellant and from their own hut to visit the boma in which the deceased lived. Even the versions of the two Crown witnesses themselves were at variance. The first said:

> "On the night of the 24th August I was with some girls in a hut. I then returned to my hut and found Odenyo already there. At 1 a.m. Odenyo and I went out to look at my mother's hut . . ."

The other said:

> "First witness and I had been out that night and were in deceased's boma; we had been to see first witness' mother's hut. We had got up at about 2 a.m.; we had not been anywhere else."

We thus arrive at the conclusion that, on the evidence as a whole, it was more likely that, as the appellant said, they all three went to the deceased's boma together. Once that point is reached, in our opinion the remainder of the Crown witnesses' story is seriously undermined. The learned judge did not, so far as can be understood from the judgment, direct his mind to those considerations at all.

Again, though he mentioned in passing that the sub-headman had seen the recent swellings on the appellant's head and thigh, he never referred to the point again. With respect, we think it was a point which merited more attention than that. To overlook its significance was in our view a serious non-direction, for the existence of such swellings was valuable confirmation of the appellant's evidence and strongly tended to refute the Crown witnesses' story that the deceased had never struck the appellant at all.

We were accordingly quite unable to say that, had the learned trial judge directed himself fully and properly on the evidence, he would have convicted the appellant. The evidence must, we think, when properly considered as a whole, at least have given rise to a reasonable doubt. And we respectfully agree with the learned trial judge that, if the appellant's story was true, it amounted to a complete defence.

We were therefore unable to uphold the conviction or, as was submitted as the proper course at the hearing of the appeal, to substitute a conviction for manslaughter.

We add that the direction given by the learned judge to the assessors and to himself that "if they believed the evidence of the accused they should acquit him" is one which should not be given, inasmuch as it fails to take into account the possibility of the accused's case giving rise to a reasonable doubt. It is, of course, not necessary that the accused's account of the affair should be found to be true.

Appeal allowed.

Appellant in person.

For the respondent:
KC Brookes (Crown Counsel, Kenya)

The Attorney-General, Kenya

Menzour Ahmed s/o Sheikh Soleh Mohamed v R
[1957] 1 EA 386 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	26 June 1957
Case Number:	24/1957
Before:	Sir Newnham Worley P, Sir Ronald Sinclair V-P and Bacon JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – O'Connor, C.J. and Rudd, J

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[1] Criminal law – Theft by agent – Cheque negotiated irregularly – Theft of money supported by theft of cheque – Penal Code, s. 5, *s.* 263 (1), (2) (*e*) *and* (3) *and s.* 278 (*c*) (*K.*) – *Advocates* (*Accounts*) *Regulations* 1952 (*K.*) – *Criminal Procedure Code, s.* 137 (*c*) (*i*) *and* (*iv*) *and s.* 137 (*f*) (*K.*).

Editor's Summary

The appellant, an advocate, had recovered a debt of Shs. 8,000/- on behalf of his client. The debtor had paid by giving two cheques payable to the appellant's order with an oral direction to the appellant that they or the money they represented be paid to the client. The appellant endorsed one cheque for Shs. 3,000/- and passed it to his own garage company to reduce his indebtedness. He was charged before a resident magistrate on two counts of theft by an agent, and was convicted but on appeal to the Supreme Court the conviction on one count was quashed. The grounds of the second appeal were that what the appellant did was not theft under the Penal Code and that the charge as laid was not proved.

Held–

(i) the cheque which the appellant received although payable to his order was received by him for and on account of his client, and he was not entitled to deal with it as his own property by using it for the purpose of reducing his indebtedness to the garage company; his intent was to use it at his own will within the meaning of s. 263 (2) (*e*) of the Penal Code and he thus fraudulently converted it to his own use;

(ii) the words, "the sum of Shs. 3,000/-" used in the Particulars of Offence sufficiently described a valid cheque for that amount.

Appeal dismissed.

Cases referred to:

(1) *R. v. Keena,* 11 Cox C.C. 123.

(2) *R. v. Gale* (1876), 2 Q.B.D. 141.

(3) *R. v. Davenport*, [1954] 1 All E.R. 602.

(4) *R. v. Hampton*, 11 Cr. App. R. 117.

(5) *Chandubhai Hathibhai Patel v. R.*, Kenya Supreme Court Criminal Appeal No. 437 of 1955 (unreported).

(6) *D'Andrea v. Woods*, [1953] 2 All E.R. 1028.

(7) *R. v. West*, [1948] 64 T.L.R. 241; [1948] 1 All E.R. 718.

Judgment

Sir Ronald Sinclair V-P: read the following judgment of the court: The appellant, an advocate practising in Eldoret, was convicted by the resident magistrate, Kitale on two counts of theft by an agent contrary to s. 278 (*c*) of the Penal Code. He appealed to the Supreme Court which set aside the conviction and sentence on count 2, but maintained the conviction on count 1, though reducing the sentence. The appellant now appeals against the conviction on count 1.

Count 1 reads:

Statement of offence.

Theft by agent, contrary to s. 278 (*c*) of the Penal Code.

Particulars of offence.

Menzour Ahmed, on or about the 25th August, 1955, at Eldoret, in Rift Valley Province, stole the sum of Shs. 3,000/- received by you for and on account of Amarchand Kora.

The material facts are as follows. The appellant took proceedings on the instructions of one Amarchand Kora to recover money owing to him by a Mr. Van der Merve. Judgment was entered for Amarchand Kora and later, in August and September, 1955, Mr. Van der Merve gave two cheques, for Shs. 3,000/- and Shs. 5,000/- respectively, to the appellant to discharge his liability under the judgment. The cheques were made payable to the appellant's order. On August 25, 1955, the appellant endorsed over the cheque for Shs. 3,000/- to Kay's Motors with whom he had two accounts. Of this Shs. 3,000/- the sum of Shs. 2,400/- was credited to the appellant's motor car hire-purchase account with Kay's Motors under which three instalments of Shs. 800/- each were then due; the remaining Shs. 600/- was credited to the appellant's petrol and oil account. The appellant had two accounts with Barclays Bank at Eldoret described as "Private No. 1 Account" and "No. 2 Account." At the close of business on August 25, 1955, his "Private No. 1 Account" was in debit to the extent of Shs. 5,664/20 and his "No. 2 Account" showed a credit of Shs. 25/34. The overall state of the two accounts at the close of business on August 25 was therefore a debit of Shs. 5,638/86. The cheque for Shs. 5,000/- was paid into the appellant's "Private No. 1 Account" with Barclays Bank at Eldoret on September 17, 1955, but the Supreme Court quashed the conviction in respect of this cheque on the ground that, although the learned magistrate was justified in finding that the appellant received it personally, there was no evidence that it was paid into the bank with his authority. On that footing the only aspect of the matter of that second cheque which remains relevant at this stage is the fact that at the close of business on September 17, 1955 (the date on which the cheque was handed to the appellant), the combined state of the appellant's bank accounts would have been a debit of Shs. 2,296/37 but for the credit of Shs. 5,000/- itself.

The appellant did not account to Mr. Kora for any moneys received from Mr. Van der Merve until October 9, 1956, when he sent a statement of account and a cheque for Shs. 3,229/75. That was over three weeks after he first appeared before the resident magistrate charged with stealing those two sums.

The learned trial magistrate found as a fact that the appellant received the cheque for Shs. 3,000/- from Mr. Van der Merve with a direction that "the money" was to go to Mr. Kora. The learned first appellate judges found that the appellant received the cheque with a direction that "it or the money it represented should be paid to A. Kora." Those findings of fact were attacked on the ground that there was no evidence to support them. In our view there was evidence to support those findings. Mr. Van der Merve died before the trial but his daughter, whose evidence was believed by the learned trial magistrate, testified that she accompanied her father to the appellant's office, saw him sign the cheque for Shs. 3,000/- in favour of the appellant and heard him tell the appellant to "pay it to A. Kora." We think it a reasonable inference from the evidence that Mr. Van der Merve's instructions to the appellant meant that the appellant was to pay either the cheque or the money it represented to Mr. Kora.

At the trial the appellant set up the defence of a bona fide claim of right to the money in that at the time when he received the cheque he honestly believed that the amount of fees due to him in respect of legal work done for Mr. Kora would exceed Shs. 3,000/- and accordingly that he was entitled to use the money for his own purposes. Both the learned trial magistrate and the learned first appellate judges rejected that defence. One of the grounds of appeal is that it was wrongly rejected, but as the question whether the appellant acted in the exercise of a bona fide claim of right is one of fact, it cannot be re-agitated on this appeal and it was not pursued by Mr. O'Brien Kelly for the appellant.

The remaining grounds of appeal were argued under two heads:

(*a*) what the appellant did was not theft under the Kenya Penal Code; and

(*b*) the charge against the appellant was not proved as laid.

Under the first head it was contended that on the evidence the appellant could not be convicted of stealing either the cheque or its proceeds. We do not think that either

of the lower courts found that the appellant stole the proceeds of the cheque. The trial magistrate found that the appellant

> "fraudulently converted the money represented by the two cheques (money includes cheques – see s. 5 Penal Code) within the definition of theft contained in s. 263 P.C."

This is not as clear as it might have been, but we think he intended to say that the appellant stole the cheques rather than the proceeds of the cheques. The learned judges of the Supreme Court, when dealing with count 1, found that the appellant fraudulently converted

> "the cheque to his own use by endorsing it over to Kay's Motors for the credit of his own accounts with that firm, thereby obtaining credit, or money's worth for Shs. 3,000/-."

In our opinion the evidence could not support a conviction for stealing the proceeds of the cheque; this was conceded by Mr. Webber for the Crown. Although the appellant received credit for the amount of the cheque, he did not convert it into money by cashing it and no money, as distinct from the cheque itself, ever came into his possession. There must be an actual receipt of money before there can be a conversion of it: *R. v. Keena* (1), 11 Cox C.C. 123.

With regard to the contention that the appellant could not be convicted of stealing the cheque, it was submitted that, as the cheque was made payable to the appellant, it was his own property to deal with as he wished and he could not, therefore, steal it. His only obligation was to pay the cheque, or a sum of money equivalent thereto, to Mr. Kora. In the normal course of business it was essential for the appellant to convert the cheque (as distinct from its proceeds) to his own use by paying it into his account at the bank. In those circumstances, it was argued, where there is no obligation to hand over the identical thing, sub-s. (2) (*e*) of s. 263 of the Penal Code has no application; it can apply only to a cheque which is never intended to be converted in any sense. That argument was not advanced before the Supreme Court. On the contrary it is stated in the judgment of the Supreme Court that

> "it is admitted that if he (the appellant) had been charged with theft of the cheque he would (apart from the questions of lien, claim of right, etc., which are separate questions) have had no answer and that if he had cashed the cheque and received the money himself, he would have had no answer."

The appellant is not, of course, bound by any admissions of law which may have been made on his behalf in the Supreme Court but, because of that admission, the Supreme Court did not deal with the point now raised.

In our opinion the argument is fallacious; it does not give full effect to the wording of s. 263. Sub-s. (1), sub-s. (2) and sub-s. (3) of that section read:

> 263. (1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, is said to steal that thing.
>
> (2) A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he does so with any of the following intents, that is to say–
>
> (*a*) an intent permanently to deprive the general or special owner of the thing of it;
>
> (*b*) an intent to use the thing as a pledge or security;
>
> (*c*) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;
>
> (*d*) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;

(*e*) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner.

The term "special owner" includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question.

(3) When a thing stolen is converted, it is immaterial whether it is taken for the purpose of conversion, or whether it is at the time of conversion in the possession of the person who converts it. It is also immaterial that the person who converts the thing in question is the holder of a power of attorney for the disposition of it, or is otherwise authorised to dispose of it.

It is clear that the appellant had authority to negotiate the cheque; he could not have complied with Mr. Van der Merve's directions unless he did negotiate it. He was therefore authorised to convert the cheque in the sense that he was entitled to pay it into his account at the bank. Under the Advocates (Accounts) Regulations, 1952, it was his duty to pay it into a client account if he did not endorse it over to Mr. Kora. But that would not have been converting the cheque to his own use or using it at his own will within the meaning of s. 263. It would have been merely a necessary negotiation of the cheque preparatory to paying an equivalent sum to Mr. Kora in accordance with the instructions of Mr. Van der Merve; in other words the appellant would have been using the cheque at the will of Mr. Van der Merve. His authority to negotiate the cheque extended only to negotiation in a regular manner. The mere fact that the cheque was payable to him did not make him the owner of the cheque so as to entitle him to deal with it as he wished. In *R. v. Gale* (2) (1876), 2 Q.B.D. 141, a clerk of an insurance company and head manager of the chief office of the company in the ordinary course of business received cheques payable to his order from the managers of branch offices. It was his duty to endorse those cheques and hand them over to the company's cashier. Instead of doing so, he endorsed the cheques and obtained money for them from friends of his own who paid the cheques into their own banks. He then took the amount so received to the cashier to go against his salary which was overdrawn, and got back from the cashier I.O.U.s which he had previously given for the amount of his overdraft. He was indicted for, and convicted of, embezzling the proceeds of the cheques. On a case stated for the consideration of the Court for Crown Cases Reserved it was held that he was rightly convicted as he received the money on account of his masters. In his judgment, with which the other members of the court concurred, Cockburn, C.J., said that the prisoner might have been convicted of embezzling the cheques. The cheques, although payable to the prisoner's order, were received by him on account of his masters and clearly did not become his property to deal with as he wished. Similarly, in the instant case the cheque which the appellant received, although payable to his order, was received by him for and on account of Mr. Kora and he was not entitled to deal with it as his own absolute property. But what he did was to use it as his own property for the purpose of reducing his indebtedness to Kay's Motors. His intent was to use it at his own will within the meaning of s. 263 (2) (*e*) and he thus fraudulently converted it to his own use. The fact that he was authorised to dispose of the cheque in another manner does not affect his guilt: s. 263 (3) of the Penal Code. It seems to us immaterial whether the cheque at the time when it was converted by the appellant is deemed to have been the property of Mr. Van der Merve under the provisions of s. 265 of the Penal Code or the property of Mr. Kora under the provisions of s. 267. Section 137 (*c*) (i) of the Criminal Procedure Code provides that in a charge it shall not be necessary to name the person to whom property belongs, except when required for the purpose of describing an offence depending on any special ownership of property. No question of special ownership arose in this case. The cheque was undoubtedly received by the appellant for and on account of Mr. Kora and the offence thus falls precisely within the scope of s. 278 (*c*) under which the appellant was charged.

We would add that in determining whether a thing has been fraudulently converted, the whole of the surrounding circumstances must be taken into consideration. In the instant case the surrounding circumstances, including in particular the state of the appellant's bank accounts, clearly indicated that he had a fraudulent intent at the time when he converted the cheque for Shs. 3,000/-.

Under his second head, namely that the charge against the appellant was not proved as laid, Mr. O'Brien Kelly submitted, as he did before the Supreme Court, that a charge of stealing "the sum of Shs. 3,000/-" cannot be supported by proof of stealing a cheque for that sum. A "sum of Shs. 3,000/-," he argued, means banknotes or coin to the value of Shs. 3,000/- and does not include a cheque for that amount. He referred us to para. (*c*) (*i*), para. (*c*) (iv) and para. (*f*) of s. 137 of the Criminal Procedure Code and to *R. v. Davenport* (3), [1954] 1 All E.R. 602, *R. v. Keena* (1), *supra* and *R. v. Hampton* (4), 11 Cr. App. R., 117, amongst other authorities. He agreed that the appellant was not prejudiced by the form of the charge, but contended that his objection, though a technical one, was entitled to succeed as a charge must be proved as laid.

It seems clear that in England proof that a cheque has been embezzled does not satisfy an allegation in an indictment that money has been embezzled. But in Kenya "money" is defined in s. 5 of the Penal Code as including, amongst other things, cheques. There is no definition of money in the Larceny Act. The learned judges of the Supreme Court, following a previous decision of that court in *Chandhubhai Hathibhai Patel v. R.* (5), Kenya Supreme Court Criminal Appeal No 437 of 1955 (unreported), held that the description "the sum of Shs. 3,000/-" was, by virtue of the definition of "money" in s. 5 of the Penal Code, a sufficient description of "a cheque for the sum of Shs. 3,000/-." Their reasoning was briefly as follows. It is permissible to look at the definition of "money" in the Penal Code for the purpose of interpreting a charge under that statute of theft of a sum of money. Although the word "money" was not used in the charge, a "sum of Shs. 3,000/-" is in fact money. The definition of "money" could therefore be imported into the charge so as to make the words "the sum of Shs. 3,000/-" embrace a cheque for the sum of Shs. 3,000/-. Accordingly, the words "the sum of Shs. 3,000/-" sufficiently described a valid cheque for that amount. The learned judges gave full and comprehensive reasons for their conclusion. We agree with them that the case of *D'Andrea v. Woods* (6), [1953] 2 All E.R. 1028, does by analogy support their view that the definition of "money" in the Penal Code could be imported into the charge although the word itself was not contained therein. The appellant must be taken to have known this definition which is part of the law of Kenya. We think therefore that the first appellate court rightly concluded that the charge was proved as laid and the appeal on this point also must fail.

It still remains for us to consider whether in the circumstances of this case the description in the charge of the property alleged to have been stolen did indicate to the appellant with reasonable clearness the property referred to (para. (*c*) (*i*) and para. (*f*) of s. 137 of the Criminal Procedure Code) or whether he was misled and embarrassed in his defence. We quote the words of the Court of Criminal Appeal in *R. v. West* (7), [1948] 64 T.L.R. 241 at p. 243:

> "It is an essential feature of the criminal law that an accused person should be able to tell from the indictment the precise nature of the charge or charges against him so as to be in a position to put forward his defence and to direct his evidence to meet them."

In some cases the description in a charge of a cheque for a sum of money merely as a sum of money might mislead the person charged and prejudice him in his defence. If prejudice in fact resulted, a conviction based on such a charge would, no doubt, be set aside on that ground. In the instant case, although the "money" which the appellant was charged with stealing would have been better described as

“a cheque

for Shs. 3,000/-," it is admitted that the appellant was not in fact prejudiced by the form of the charge.

The appeal is accordingly dismissed.

Appeal dismissed.

For the appellant:
J O'Brien Kelly and *AR Kapila*
SR Kapila & Kapila, Nairobi

For the respondent:
JP Webber (Crown Counsel, Kenya)
The Attorney-General, Kenya

Haji Yusufu Mutenda and others v Haji Zakaliya Mugnyiasoka and others
[1957] 1 EA 391 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	23 May 1957
Case Number:	339/1952
Before:	Lewis J
Sourced by:	LawAfrica

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[1] Mandamus – Alleged refusal to perform duty imposed by Trustees (*Incorporation*) *Ordinance,* 1939 (*U.*) *– Whether an action of mandamus lies in Uganda.*

Editor's Summary

The plaintiffs claimed a mandamus to command the defendants, who were the registered trustees of an association, known as the African Muslim Community (Juma Sect), to convene an extraordinary general meeting of this association. The association was granted a certificate of registration as a corporate body under the Trustees (Incorporation) Ordinance, 1939, and this Ordinance imposed a duty on the defendants to carry out the trust according to the conditions and directions inserted in the certificate of registration including compliance with the rules of the association. The defendant stated in their defence that they had complied with the rules of the association and that it was and always had been managed in compliance therewith. They further stated that as the plaintiffs had failed to avail themselves of the remedy contained in r. 22 of the association mandamus did not lie.

Held–

(i) in cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in

the fulfilment of which some other person has an interest, the court has jurisdiction to grant a mandamus to compel the fulfilment;

(ii) there had been a breach of duty giving rise to a cause of action;

(iii) since the evidence showed that it would be impossible for the plaintiffs to obtain the number of members necessary to requisition a general meeting an order of mandamus would go.

Order of mandamus granted.

Cases referred to in judgment:

(1) *R. v. Dunsheath, Ex parte Meredith*, [1950] 2 All E.R. 741; [1951] 1 K.B. 127.

Judgment

Lewis J: In 1952 the plaintiffs filed a suit claiming a mandamus to command the defendants to convene an extraordinary general meeting of an association known as the African Muslim Community (Juma Sect). The defendants, who are the registered trustees of the association, say that they have complied with the rules and that the association is and always has been managed in compliance therewith. By an amended defence they say that as that as the plaintiffs have failed to avail themselves of the remedy contained in r. 22 of the association mandamus does not lie.

So far as I could gather the history of the association appears to be this. On October 4, 1947, the second, third, fourth, fifth and sixth defendants petitioned the Governor for the grant of a certificate of incorporation in respect of the African Muslim Community (Juma Sect), Natete, Kampala. The objects of the association were declared to be:

(*a*) To protect and preserve religious, social, educational and cultural rights of the Africa Muslim Community (Juma Sect) and with a view to facilitate in so doing to build, provide, fit up and equip and maintain necessary buildings or lands for mosques, schools, libraries, hospitals and burial grounds.

(*b*) To purchase, take on lease or in gift, hire or otherwise acquire any real and personal estate and property and to erect buildings and to have the same or their income for the use of the association.

(*c*) From time to time to raise necessary funds from members of the association.

(*d*) To spread the religion of Islam throughout the world by every lawful means.

(*e*) To conduct marriages and divorces between the Muslims.

(*f*) To obtain incorporation under the Trustees (Incorporation) Ordinance, 1939.

On May 13, 1948, the Governor granted the association a certificate of registration as a corporate body under the Trustees (Incorporation) Ordinance, 1939. See Ex. 2.

The association apparently ran harmoniously until there was a difference of opinion as to which of two men should be the future leader of the association. There was also an allegation that the trustees had failed to perform their duties. In order to settle these matters a sub-committee of twenty members was appointed, and on April 27, 1952, they submitted their report to the Katikiro of Buganda. See Ex. 1. The subcommittee found (1) that the trustees had failed to show members the rules, and (2) that Sheikh Ahmed Nsambu (defendant 6) was the leader of the association. It was decided that these decisions should be conveyed to members at the annual general meeting to be held on May 18, 1952.

On May 18, 1952, the said meeting was held, but it was dissolved by the chairman (defendant 6) before the agenda could be concluded. The reasons given for dissolving the meeting were very much in dispute, but I consider that the reasons given by the plaintiffs to be a more probable one than that given by the defendants. Shortly after this the plaint in the suit was filed.

The substance of the plaintiffs' complaint is this. The defendants have collected large sums of money by way of donations and failed to tell members of the association how they have spent it; that the defendants have failed to tell members the position in regard to the four square miles of land allocated to the association by the Protectorate Government (see as to a portion of such land Ex. 3); that the defendants have failed to comply with the rules as to election of trustees, managing committees, submission of balance sheets and auditing of accounts. In particular, that the defendants failed to elect a managing committee and submit balance sheets and reports for the years 1948, 1949, 1950 and 1951. The

defendants have not by their respective defences denied this plea (see para. 8 of the plaint) with any particularity. So far as I can gather they say that the conduct of the plaintiffs at the meetings prevented this being done.

The defendants say that the plaintiffs' conduct at the meeting of May 18, 1952, caused the chairman to dissolve it and that thereafter duly convened meetings were held but the plaintiffs failed to attend.

On July 11, 1955, the trial of this action began. At the outset I took the point whether this court had jurisdiction to entertain the action. The matter was argued on the ground whether a writ of mandamus could be issued by this court in its civil jurisdiction. In the result I held that the writ could not issue, but I was over-ruled by the Court of Appeal and the suit remitted for hearing. Unfortunately the real nature of the plaintiffs' action was overlooked. The plaintiffs had filed an action of mandamus and not an application for a writ of mandamus, or, since the coming into force of the Law Reform (Miscellaneous Provisions) Ordinance, 1953, an order of mandamus.

I must now decide whether an action of mandamus lies in Uganda, and, if it does, whether on the evidence the plaintiffs can claim it. The action of mandamus was created by the Common Law Procedure Act, 1854, s. 68, s. 69, s. 70, s. 71, s. 72, s. 73 and s. 74, which provided that a writ of mandamus might be claimed in an action, and this was interpreted to mean that where a breach of duty gives rise to a right of action, the court which tries the action was to have power to do complete justice by granting the mandamus as an ancillary remedy, but if there was no right of action the remedy must still be by prerogative writ. The Common Law Procedure Act, 1854, has been repealed and O. LIII of the Rules of the Supreme Court takes its place. In my opinion the Common Law Procedure Act, 1854, was a statute of general application and so by virtue of the Uganda Order in Council, 1902, it applies to Uganda.

In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest, the court has jurisdiction to grant a mandamus to compel the fulfilment.

When the action was commenced before Ainley, J., in 1953, counsel for the defendants admitted that the association were carrying out a public trust of a charitable nature.

The Trustees (Incorporation) Ordinance, 1939, imposed a duty on the defendants of carrying out the trust according to the conditions and directions inserted in the certificate of registration, and this included compliance with the rules of the association. In my opinion, therefore, the defendants were under duties of a quasi-public and statutory nature.

I must now decide whether there has been a breach of duty giving rise to a cause of action. On this question there can be no doubt. The rules provide that at every general meeting a complete statement of the income and expenditure of the association during the preceding year and also a balance sheet covering the same period together with a report by the committee as to the progress of the association in financial matters shall be laid before the members. There is no evidence at all that the defendants have ever done this. In fact, nowhere have they denied this breach of the rules except to say that the association never had any funds. I cannot believe that this association never had any funds. I cannot believe that this association managed to exist for four years without any money whatsoever being received or spent. In any event, the association has property and that is an asset which must be shown in a balance sheet.

I must now decide the point raised by the amended defence. The courts have always, I think, refused to issue a mandamus if there is another remedy open to the party seeking it. See *R. v. Dunsheath, Ex parte Meredith* (1), [1951] 1 K.B. 127. The defendants contend that the plaintiffs have another remedy under r. 22. In my opinion, the evidence I have heard satisfies me that it would be impossible for the plaintiffs to obtain the number of members necessary to requisition a general meeting.

The result is that the plaintiffs obtain an order of mandamus on the terms following:

1. That within fourteen days from the date hereof the defendants convene an extraordinary meeting of the

association at Natete, Kampala.

2. That at such meeting trustees and office bearers shall be elected.

3. That at such meeting a complete statement of the income and expenditure of the association for the last nine years and also an audited balance sheet covering the same period together with a report by the present committee as to the state and progress of the association in financial matters shall be

circulated to all members. The statement, balance sheet and report shall be in Luganda, but copies thereof in English shall be filed in court within the said period of fourteen days.

4. That the defendants do personally pay the plaintiffs' taxed costs of this action.

5. That the plaintiffs' costs of proving documents be disallowed as there has been a failure to comply with O. 10, r. 12, r. 13, r. 14, r. 15, r. 16, r. 17, and r. 18.

Order of mandamus granted.

For the plaintiffs.
FJ Macken
FJ Macken, Kampala

The first defendant in person.

For the second, the fourth, the fifth and the sixth defendants:
KG Korde
Korde & Esmail, Kampala

For the third defendant:
ML Patel
Manubhai Patel & Son, Kampala

Naranjan Singh trading as Ramchand & Co v NJ Patel
[1957] 1 EA 394 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	28 January 1957
Case Number:	38/1953
Before:	Murphy J
Sourced by:	LawAfrica

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[1] Contract – Unqualified and unregistered person drawing building plans for profit – Use of title "architect" – Recovery of fees for work done – Architects and Quantity Surveyors Ordinance s. 2 *and s.* 18 (*K.*).

Editor's Summary

The appellant, not being a qualified architect and not being registered as such under the Architects and Quantity Surveyors Ordinance, prepared building plans for the respondent and claimed the sum of Shs. 1,000/- for his services. The respondent pleaded, *inter alia*, that the appellant was not a registered

architect and so could not claim any remuneration for services rendered as an architect. The magistrate gave judgment for the respondent on the grounds (*inter alia*) that the appellant had contravened the provisions of s. 2 of the Ordinance in practising under a name, style or title containing the word "architect" and, therefore, was not entitled to recover fees for the work done in drawing the plans referred to in the plaint and also that there was no privity of contract between the appellant and the respondent. The only use of the word "architect" which was alleged was that, in the heading of the plaint, he was described as:

"Naranjan Singh trading as Ramchand & Company, Architects and General Merchants."

The magistrate found that, because the appellant admittedly did the work of drawing architectural plans and in the plaint was described as an architect, he was practising under the style of architect and was guilty of an illegal act.

Held–

(i) because the appellant did the architectural work and in suing for the recovery of fees for that work described himself as an architect, the appellant had not practised under the title of "architect";

(ii) the holding out by the use of a description implying a professional qualification, must precede or coincide with the performance of the work;

(iii) there was insufficient evidence upon which the magistrate could reasonably hold that there was no privity of contract between the appellant and the respondent.

Appeal allowed. Order for a new trial.

Judgment

Murphy J: This is an appeal from the judgment of the resident magistrate, Nairobi, in an action in which the appellants claimed the sum of Shs. 1,000/- for services rendered by them to the respondent, in drawing and preparing building plans. In his defence the respondent, *inter alia*, pleaded that no services had been rendered to him by the appellant at his request; that he never requested the appellant to draw any plans for him and that the appellant was not a registered architect and so could not claim any remuneration for services as an architect.

The resident magistrate gave judgment for the respondent on the grounds:–

(i) that the appellant not being registered under the Architects and Quantity Surveyors Ordinance, had contravened the provisions thereof in practising under a name, title or style containing the word "architect" and therefore was not entitled to recover fees for the work done in drawing the plans referred to in the plaint; and

(ii) that there was no privity of contract between the appellant and the respondent. Section 2 of the Architects and Quantity Surveyors Ordinance provides that

"no person shall practise under any name, title or style containing the word architect unless he is . . . registered as an architect."

For the appellant it is admitted that he is not an architect and that he is not registered as such, but it is contended that the Ordinance prohibits practising under the name, title or style "architect" and does not prohibit an unqualified or unregistered person doing the work of an architect – practising as an architect – provided that he does not when doing so call himself an architect. Mr. Oulton for the appellant would indeed put the matter higher – that, provided an unregistered person did not in writing, e.g. by use of a name-plate or letter-head, call himself an architect, he could legally practise as such and verbally describe himself as such. I do not accept the proposition as put by Mr. Oulton; but in the present case there is no necessity for me to decide the point as there is no suggestion that here the appellant verbally described himself as an architect. The only use by the appellant of the word "architect" as a name, title or style which is alleged, is that in the heading to the plaint he is described as:

"Naranjan Singh trading as Ramchand & Company, Architects and General Merchants."

The resident magistrate found that because the appellant admittedly did the work of drawing architectural plans ("nearly a hundred plans a year") and in the plaint described himself as an architect he was practising "as an architect" and therefore he was guilty of an illegal act. There the magistrate is, I suggest, begging the question, because the question is whether or not the Ordinance forbids an unregistered person to practise "as an architect." In my judgment it does not do so. But, assuming that the magistrate intended to find that because the appellant did architectural work and in the plaint described himself as an architect he was practising under the name, title or style "architect," can that finding be supported?

Mr. Khanna for the respondent argued that a person practises under the title of architect if he draws building plans; that a non-registered person is prohibited by law from, as he put it, "practising the

functions of an architect." In support of that argument Mr. Khanna calls in aid the terms of the proviso to s. 2 and of s. 18 of the Ordinance. I do not consider that the former supports his contention. The proviso, in my view, means that a person may do architectural work for the Government and may, in so doing, describe himself as an architect without being registered under the Ordinance. Section 18 provides, in effect, that engineers may practise their profession (which frequently involves the drawing of building plans) provided that they do not

call themselves architects. It is therefore arguable that persons other than engineers may not do so; but I think that s. 18 was added to make it abundantly plain that the mere performance of architectural work by an unregistered person is not a breach of the law provided he does not use the title "architect."

Further, in my judgment, the finding of the magistrate that, because the appellant did architectural work and, in suing for the recovery of fees for that work, described himself as an architect, the appellant was practising under the title of architect, cannot be supported. The description applied to himself by the appellant in the plaint cannot be related back in this way to the time when he was doing the work. The holding out, by the use of a description implying a professional qualification, must, in my judgment, precede or coincide with the performance of the work.

The magistrate further held that, even though the Ordinance does not so specifically provide, "fees are not recoverable by an unregistered architect." If by that the magistrate means that where a person in breach of the Ordinance is not registered he cannot recover fees for architectural work done by him, I would agree. But only if the person contravened the Ordinance and, as I have stated, in my judgment the appellant did not do so.

The magistrate found that, apart from the questions discussed above, the appellant could not succeed because there was no privity of contract between him and the respondent. The reasons for this finding are, apparently, that the respondent in arranging for the plans to be drawn dealt only with Tarlock Singh the son of the plaintiff; that Tarlock Singh was at that time in the full time employment of the City Council; and, finally, that

> "the fact that the drawings are marked 'Ramchand & Company' does not alter the fact that the defendant (respondent) thought and was indeed dealing with Tarlock Singh."

I agree that the first two reasons point to a contract made with Tarlock Singh in his personal capacity; but there is no evidence whatsoever that the respondent "thought" he was dealing with him and it seems to me to be of vital importance that the plans – and there were three plans in evidence, one, already paid for, in respect of an earlier transaction between the same parties and two separate plans the subject matter of the present case – were all clearly marked on their face "Ramchand & Company" and signed by the respondent.

Tarlock Singh gave uncontradicted evidence that he is the manager of his father's firm, Ramchand & Company. There is, on the other hand, no evidence given by the respondent which directly negatives the existence of a contract between the appellant and himself.

In my judgment there was insufficient evidence upon which the magistrate could reasonably hold that there was no privity of contract between the appellant and the respondent.

For these reasons the appeal is allowed, the judgment is set aside and I order that a new trial be had. The costs in the appeal and in the court below shall be paid by the respondent.

Appeal allowed. Order for a new trial.

For the appellant:
HC Oulton
Gledhill & Oulton, Nairobi

For the respondent:

DN Khanna
DN & RN Khanna, Nairobi

Katumo Mulumba v R
[1957] 1 EA 397 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	5 November 1957
Case Number:	286/1957
Before:	Rudd J
Sourced by:	LawAfrica

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[1] Criminal law – Assault causing bodily harm – Construction of plea of the accused – Penal Code, s. 246 (*K.*).

Editor's Summary

The appellant appealed from his conviction and sentence for assault causing bodily harm contrary to s. 246 of the Penal Code. In answer to the charge the appellant stated "It is true I cut him with a knife" and the magistrate accepted this as a plea of guilty. The appellant lodged a memorandum of appeal which indicated that when he made the statement to the magistrate the appellant did not intend to admit the offence although he did admit the act.

Held–

(i) although the plea as it stood was capable of being construed as an unequivocal plea of guilty it was also capable of being construed as a mere admission that the appellant caused the injury stated in the charge without admitting that this was done in circumstances amounting to an offence.

(ii) in the circumstances the plea should not have been construed as being an unequivocal admission of the offence charged.

Conviction and sentence quashed. Order for a re-trial.

Judgment

Rudd J: The appellant appeals from conviction and sentence of two years' imprisonment with hard labour and eighteen strokes of a light cane for assault causing actual bodily harm contrary to s. 246 of the Penal Code.

The charge alleged that the appellant had assaulted another man by stabbing him in the chest thereby causing him actual bodily harm.

The appellant alleged pleaded "It is true I cut him with a knife" and was convicted on this plea. The prosecutor then outlined the facts from the point of view of the prosecution as follows:

> "On this night the accused entered a house where a family were sitting-he assaulted the owner for no apparent reason. Wound in the base of chest eight inches long, half inch deep. Complainant has been in hospital for three days and will be for another ten days."

The appellant then made the following statement in mitigation:

> "We were drinking beer at the house of the complainant. I cut the string of his bow and also his chest."

The learned magistrate then passed sentence on the basis of a plea of guilty.

In his petition of appeal the appellant amplified his statement in mitigation in the lower court and claimed that while he was drinking at the complainant's house the complainant abused him for no reason and threatened him with a bow and arrow whereupon the appellant picked up the knife that was lying near by and cut the string of the complainant's bow and at the same time cut the complainant unintentionally on the chest.

Although the plea as it stood was capable of being construed as an unequivocal plea of guilty it is also capable of being construed as a mere admission that he caused the injury stated in the charge without admitting that this was done in circumstances amounting to an offence.

The appellant's statement in mitigation is consistent with the latter construction and has been amplified by statements in his memorandum of appeal which if accepted or proved would be capable of establishing a good defence to the charge. It does not now appear certain that the appellant intended to plead guilty.

In the circumstances the plea should not be construed as being certainly an unequivocal admission of the offence charged.

The conviction and sentence must be set aside and there must be a retrial before another magistrate. In the event of a conviction on retrial regard should be had to the period of imprisonment already served in mitigation of sentence.

I make orders accordingly.

Conviction and sentence quashed. Order for a retrial.

The appellant did not appear and was not represented.

For the respondent:
DD Charters (Crown Counsel, Kenya)
The Attorney-General, Kenya

Suleman Kara Osman v Walji Mulji Dattani and another
[1957] 1 EA 398 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	28 March 1957
Case Number:	888/1956
Before:	Keatinge J
Sourced by:	LawAfrica

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[1] Rent restriction – Premises designed as shop in front and living quarters behind – Whether letting for combination of business and residential purposes – "Living quarters" – Legal Notices No. 120 *of* 1954 *and No.* 10 *of* 1957 (*U.*).

Editor's Summary

The plaintiff's father let to the first defendant certain premises comprising a portion of No. 34 Allidina Visram Street, Kampala. The building of which the premises formed part was designed with a view to the use of the front rooms as shops and the rooms behind as residential quarters for the shop-keepers. In 1944 the first defendant took his brother into partnership. Since then the partners had carried on business at the premises. It was not disputed that when first he became a tenant, the first defendant lived there with his family, but subsequently the premises had been wholly used for business purposes. The plaintiff became the registered owner of the whole premises in 1953. In 1956, following legislation which de-controlled certain premises in the Protectorate, the plaintiff sued the defendants claiming that, *inter alia*, since the tenants were not living upon the premises at the time the action was begun, he was entitled to possession.

Held–

(i) the premises were let as one tenancy for business purposes and living quarters and this is the test, not the use thereof when action is commenced.

(ii) the premises were not de-controlled and were still subject to the provisions of the Rent Restriction Ordinance.

Judgment for the defendants.

Cases referred to:

(1) *Kirachand Kalidas Shah v. Modern Sweet Mart,* Uganda High Court Civil Case No. 400 of 1956 (unreported).

(2) *Williams v. Perry,* [1924] 1 K.B. 936.

Judgment

Keatinge J: In this case plaintiff is suing defendants for immediate possession of that portion of the premises on Plot No. 34 Allidina Visram Street, Kampala, and mesne profits from September 1, 1956, at Shs. 1,250/- per month.

The following facts are admitted:

(1) By a written agreement Kara Osman, father of plaintiff, let the premises to Walji Mulji Dattani.

(2) On January 6, 1944, Walji Mulji Dattani took his brother into partnership and the firm was registered as Walji Mulji Dattani & Bros.

(3) Since January 6, 1944, the firm has been carrying on business on the premises in dispute.

(4) Since September 16, 1953, Suleman Kara Osman (plaintiff) has been the registered proprietor of the Plot – No. 34 Allidina Visram Street.

The real issue in this case is whether the tenancy is of premises with or without living quarters. Kara Osman (P. 3) concedes that the building of which the premises in dispute form a part was designed as many of the older buildings in Kampala with a view to letting the front rooms as shops and the rear rooms as residential quarters for the tenants or shop-keepers. The premises let to Walji Mulji were made up of a front room, a room behind, a kitchen, a bathroom and underneath, a room which could be used as a store or a servant's room. In fairness it should be said that the kitchen and bathroom contained the very minimum fittings so that they could equally well be used as offices or stores.

It is not disputed that when Walji Mulji first occupied the premises he and his family lived there but it is contended that this was only a temporary arrangement till Walji Mulji could get other living accommodation. Plaintiff (P. 1) said in evidence that he went to India in 1942 and returned in the same year. When he went away Walji Mulji was not in residence but he was living there when he came back. He remained there for three or four months and then moved to new quarters. This would mean that Walji Mulji moved out at the end of 1942 or early in 1943. In cross-examination plaintiff said Walji Mulji has been living in Market Street since he left the premises. Up to this stage plaintiff was quite an impressive witness but when pressed as to whether it was not a fact that Walji Mulji did not move out till January 1, 1946, he was very loath to reply. Eventually he said he did not know. Immediately afterwards in re-examination he said Walji Mulji was not living there in 1943, 1944 or 1945.

Kara Osman (P. 3) who originally let the premises to Walji Mulji maintained that he let them only as a shop, but he admitted that he built them as a shop and residential premises. He said that when Walji Mulji moved in he asked leave to break down the wall between the two rooms for the shop. Leave was given but the wall has not been broken down. Walji Mulji denied that he ever made such request. Kara Osman said that from the beginning of 1942 Walji Mulji lived on the premises for six or twelve months. He saw them moving out but he couldn't remember which year it was. Finally the witness admitted that the reference to six to twelve months was only a guess and that he did not know when Walji Mulji ceased to live there. Walji Mulji (D. 2) said that he rented the premises as a shop and residential quarters from Kara Osman. Plaintiff and his father were his neighbours. They knew he was living there and they never objected. He moved out to 5 Market Street on January 1, 1946. He paid the rent on these quarters to Messrs. Hunter & Greig and he produced a receipt (Ex. D) for the rent for January, February and March, 1946. He said this was the first payment he made but the receipt is of little evidential value as no witness was called from Messrs. Hunter & Greig.

The evidence for the plaintiff is extremely vague and it is urged by Mr. James for plaintiff that this is due to the lapse of time. That may be so but it may also be due to the fact that owing to the comparatively recent de-control of certain premises this matter becomes of unforeseen importance. I have little doubt that the vagueness in plaintiff's case is mainly due to the fact that at the material times Kara Osman and plaintiff were quite disinterested as to whether or not Walji Mulji and his family were

living on the premises. On the other hand Walji Mulji had to move himself and his family and it is not unreasonable to expect him to remember accurately when this event took place. In all the circumstances I accept Walji Mulji's evidence as opposed to that of plaintiff and Kara Osman. I find as facts:

(*a*) that Kara Osman let the premises to Walji Mulji as a shop and residential quarters; and

(*b*) that Walji Mulji and his family did not cease to live in the premises till January 1, 1946.

There is no evidence that when the partnership was formed and the premises taken over in January, 1944, there was any written agreement between the landlord and the new tenant or, for that matter, that there was any fresh verbal agreement. The partnership just carried on the premises and it is agreed by counsel that it became a monthly tenant. Particularly as Walji Mulji was still in residence, I consider it must be implied that the premises were let to the partnership as a shop and residential quarters.

Legal argument has been addressed to the court as to the meaning of "living quarters" as used in Legal Notice No. 120 of 1954. It appeared that neither counsel appreciated that that notice had been revoked by Legal Notice No. 10 of 1957. However, in my opinion, the new Notice makes no material difference in the instant case. I consider 3 (*a*) of the first column is applicable to the premises in question and reads

> "Premises anywhere in the Protectorate which do not include any living quarters and are not included in one tenancy agreement or lease with any living quarters."

In my view, the effect of 3 (*a*) is to extend the provisions of Legal Notice 120 of 1954 to the whole Protectorate.

It is true that nobody has lived in the premises since the end of 1945. As I understand it Mr. James argues that the test is whether persons were living in the premises at the time action is filed. In other words "living quarters" means quarters in which people are living. On the other hand, Mr. Caldwell for defendants submits that "living quarters" means quarters where people may live.

So far as I am aware the only decision on the meaning of "living quarters" is contained in my own judgment in *Kirachand Kalidas Shah v. Modern Sweet Mart Ltd*. (1), Uganda High Court Civil Case No. 400 of 1956 (unreported). In that case it was held that the term "living quarters" as used in the Notice (120 of 1954, now 3 (*a*) of 10 of 1957) means "part of a building let for human habitation as a separate dwelling." As regards the argument that the test is whether persons are living on the premises at the time action filed, the court in *Kirachand Kalidas Shah v. Modern Sweet Mart Ltd*. (1) *supra*, following *Williams v. Perry* (2), [1924] 1 K.B. 936, held that the test is what were the premises let as, i.e. were they let solely as business premises or as business premises and living quarters.

I find that the premises in dispute were let by plaintiff to defendants in one tenancy agreement as business premises and living quarters. In my judgment these premises were not de-controlled by Legal Notice No. 10 of 1957 and are still subject to the provisions of the Rent Restrictions Ordinance.

Accordingly, the plaintiff's suit is dismissed with costs.

Judgment for the defendants.

For the plaintiff:
AI James
Baerlein & James, Jinja

For the defendants:

RA Caldwell
PJ Wilkinson, Kampala

Re Ramniklal Harilal Bharadia

[1957] 1 EA 401 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	20 January 1957
Case Number:	49/1956
Before:	Bennett J
Sourced by:	LawAfrica

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[1] Mandamus – Application for order directed to principal immigration officer – Immigration (*Control*) *Ordinance, s.* 6 (*U.*) – *Immigration* (*Control*) (*Exemption and Exclusion*) *Regulations* 3 (1) *para.* (*f*) – *Immigration* (*Control*) (*Exemption*) *Regulations* 1954, 3 (1) *para.* (*c*) – *Immigration* (*Control*) (*Exemption*) (*Amendment*) *Regulations*, 1955, 2.

Editor's Summary

This was an application for an order of mandamus directing the principal immigration officer to issue the applicant with a certificate or letter of authority stating that he was exempted from the provisions of s. 6 of the Immigration (Control) Ordinance. The applicant claimed that he was entitled to exemption by virtue of being the husband of a permanent resident of the Protectorate. It was not in dispute that the applicant was a person to whom s. 6 applied. It was submitted that the applicant acquired a vested right to enter the Protectorate under the Immigration (Control) (Exemption and Exclusion) Regulations, when he married a permanent resident in 1951 or under the Regulations made in 1954 when he applied to the principal immigration officer for a letter of authority on February 19, 1955.

Held–

(i) the applicant did not acquire a right to exemption until he applied for it and until he satisfied the principal immigration officer that he came within the terms of the regulations for the time being in force which created the exemption;

(ii) the applicant had not acquired a right of exemption prior to the coming into force of Regulations made in 1955;

(iii) since reg. 2 (*c*) (ii) of the amending Regulations made in 1955 was not complied with the applicant was not entitled to exemption;

(iv) the applicant was properly refused exemption from the provisions of s. 6 of the Immigration (Control) Ordinance.

Application dismissed.

Judgment

Bennett J: This is an application for an order of mandamus directing the principal immigration officer to issue the applicant with a certificate or letter of authority stating that he is exempted from the provisions of s. 6 of the Immigration (Control) Ordinance. (Cap. 43).

The application for leave to apply for an order states that the applicant is entitled to such a letter of authority or certificate under "s. 3 (1) (*f*) of the Immigration Control Regulations."

Mr. Wilkinson, for the applicant, has pointed out that this reference to the Regulations is erroneous and that what was intended was a reference to reg. 3 (1) para. (*f*) of the Immigration (Control) (Exemption and Exclusion) Regulations, Vol. VII, p. 966 of the Laws.

The applicant claims to be entitled to exemption by virtue of being the husband of a permanent resident of the Protectorate. It is common ground that his wife is a permanent resident, having been born in the Protectorate, and that he was married to her in India in 1951. Whether or not she has ever resided in Uganda since she was an infant in arms does not emerge from the affidavits on the file.

Section 6 (1) of the Immigration (Control) Ordinance provides that no person to whom the section applies shall enter the Protectorate unless he is in possession of a

valid permit or pass entitling him to do so. It is not in dispute that the applicant is a person to whom the section applies.

The Immigration (Control) (Exemption and Exclusion) Regulations, Vol. VII, p. 966 of the Laws exempted from the provisions of s. 6 of the Ordinance *inter alia*:

> "(*f*) subject to the provisions of para. 4 of this regulation any person who is a British subject or a British protected person and who satisfies the principal immigration officer that he is the husband of a permanent resident of the Protectorate."

These regulations were revoked and replaced by the Immigration (Control) (Exemption) Regulations, 1954, published under Legal Notice No. 144 of 1954.

Regulation 3 (1) para. (*c*) of the 1954 Regulations exempted from the provisions of s. 6 of the Ordinance:

> "(*c*) subject to the provision of para. (4) of this regulation any person, being a British subject or a British protected person, who–
>
> "(i) satisfies the principal immigration officer that he is the husband of a permanent resident; and
>
> "(ii) satisfies the principal immigration officer that he was married to such permanent resident before entering the Protectorate and if he has previously entered any of the other East African territories before entering such territory."

Regulation 3 of the 1954 Regulations was amended by the Immigration (Control) (Exemption) (Amendment) Regulations 1955, published under Legal Notice No. 35 of 1955, which came into force on the date of publication in the *Gazette*, namely, February 24, 1955.

Regulation 2 of the amending Regulations substituted for para. (*c*) of reg. 3 (1) of the principal Regulations, the following:

> "(*c*) subject to the provisions of para. (4) of this regulation any person being a British subject or a British protected person who obtains the approval of the Immigration Control Board for exemption under this paragraph, either before or after his marriage, and who satisfies the principal immigration officer:
>
> "(i) that he is the husband of a permanent resident, and
>
> "(ii) that at the date of the marriage to such permanent resident his wife was not less than eighteen years of age, and
>
> "(iii) that he was married to such permanent resident before entering the Protectorate or if he had previously entered any of the other East African territories before entering such territory, and
>
> "(iv) that he was not married to the permanent resident by proxy."

Mr. Wilkinson contends that the applicant acquired a vested right to enter the Protectorate under the original regulations when he married a permanent resident in 1951, or under the 1954 Regulations when he applied to the principal immigration officer for a letter of authority on February 19, 1955. As is shown by the letter (marked A) annexed to the affidavit of the deputy principal immigration officer, application was made to the principal immigration officer by a letter dated February 19, 1955, written by the applicant's advocate, Mr. Haque.

Mr. Wilkinson also contends that there is nothing in Legal Notice No. 35 of 1955 to indicate that it was intended that the Regulations published thereunder should have retrospective effect, and that accordingly the conditions subject to which the applicant is entitled to exemption are those prescribed by reg. 3 (1) of the original Regulations, or by reg. 3 (1) of the 1954 Regulations.

I agree with Mr. Wilkinson's contention that Legal Notice No. 35 of 1955 is not retroactive and that if the applicant acquired a right to exemption from the provisions of s. 6 of the Ordinance either in 1951 or on February 19, 1955, then that right would be preserved by s. 10 (2) para. (*c*) of the Interpretation of General Clauses Ordinance, (Cap. 1).

I am, however, unable to accept the contention that the applicant acquired a right to exemption either at the date of his marriage or on February 19, 1955, when he applied to the principal immigration officer for exemption. He may, at the time of his marriage, have become a member of a class of persons who were entitled to take advantage of the Regulations, but, in my opinion, he did not acquire a right to exemption until he applied for it and until he satisfied the principal immigration officer that he came within the terms of the Regulations for the time being in force which created the exemption.

The words "who satisfies the principal immigration officer" which occur both in the original Regulations and in the 1954 Regulations seem to me to indicate that it was the intention that the right to exemption was to be dependent upon an applicant being able to satisfy the principal immigration officer that he was the husband of a permanent resident and also, after the coming into force of the 1954 Regulations, that he was married to such permanent resident before entering any of the East African territories.

There is no statement in the affidavit in support of the application as to whether or not the applicant satisfied the principal immigration officer that he came within the terms of the exemption; nor are facts stated in the affidavit from which it can properly be inferred that the applicant was entitled to exemption either under the original Regulations or under the 1954 Regulations. For instance, the affidavit does not state that the applicant is a British subject or a British protected person, nor does it state that the applicant had not entered the Protectorate or any of the other East African territories before his marriage to a permanent resident. That the applicant did not satisfy the principal immigration officer that he was entitled to exemption on February 19, 1955, is apparent from the principal immigration officer's letter to Mr. Haque of February 23, 1955, a copy of which is annexed to Mr. Burbrook's affidavit and marked B. There is, in fact, no evidence before me that the applicant satisfied the principal immigration officer, prior to February 24, 1955, that he was entitled to exemption, or that prior to that date he had furnished proof of all the facts which would have qualified him for exemption.

In all the circumstances I am satisfied that the applicant had not acquired a right to exemption prior to the coming into force of Legal Notice No. 35 of 1955 on February 24, 1955.

One of the conditions for exemption prescribed by Legal Notice No. 35 of 1955 is that the wife of an applicant for exemption was not less than eighteen years of age at the date of the marriage. It is apparent from the birth certificate of the applicant's wife that she was born in Uganda on November 21, 1938, so that at the date of her marriage in 1951 she was only thirteen years old. It follows that the applicant was not entitled to exemption under reg. 3 of the 1954 Regulations, as amended by reg. 2 of the Legal Notice No. 35 of 1955. Nor is the applicant entitled to the benefit of reg. 6 of the principal Regulations as made by reg. 2 of Legal Notice 74 of 1955 for the reasons that his application for exemption was not made prior to February 18, 1955.

In these circumstances I am of opinion that he was properly refused exemption from the provisions of s. 6 of the Ordinance.

In view of this finding it is unnecessary for me to decide the question raised by Mr. Dickie as to whether or not the principal immigration officer can be compelled by mandamus to issue a certificate of exemption, when the Regulations make no provision for the issue of such certificates.

The application is dismissed. The applicant is to pay the respondent's costs of these proceedings as taxed.

Application dismissed.

For the applicant:
PJ Wilkinson
PJ Wilkinson, Kampala

For the respondent:
JJ Dickie (Crown Counsel, Uganda) and *Sat Pal Singh*
The Attorney-General, Uganda

Lal Chand Sharma trading as Regal Provision Stores v Bush Mills

[1957] 1 EA 404 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	9 October 1957
Case Number:	160/1954
Before:	MacDuff J
Sourced by:	LawAfrica

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[1] Partnership – Pledging of credit of the firm by a managing partner – Managing partner not specifically authorised – Whether pledging of credit in the ordinary course of business – Whether firm and all the partners liable – Partnership Ordinance, s. 7 *and s.* 9 (*K.*).

Editor's Summary

The plaintiff sued the defendant firm for the recovery of the sum of Shs. 5,605/91 for goods sold and delivered and for interest on the amount claimed for goods supplied. The plaintiff alleged that the goods were supplied to the defendant firm and its employees at the request of the firm and on its undertaking to pay for the same. The plaintiff's evidence was that the managing partner of the firm approached the plaintiff and requested him to supply the goods which he agreed to do on the understanding that the managing partner and his firm would be directly responsible to the plaintiff for the payment. In pursuance to this agreement on various occasions when the lorries of the defendant were in Nairobi, either the managing partner or a driver used to call at the plaintiff's store with lists of the requirements of various partners or employees which were supplied, together with an invoice in the name of the firm and of the employee. The defence was in effect that if the managing partner had pledged the credit of the firm to the plaintiff he had no authority to do so and that the other partners in the firm and the firm itself were not bound since the managing partner was not specifically authorised by the other partners pursuant to the provisions of s. 9 of the Partnership Ordinance.

Held–

(i) the action of the managing partner in pledging the credit of the firm for the supply of provisions to the employees of the firm was in the usual course of business within s. 7 of the Partnership

Ordinance and the firm and its partners were liable for his actions.

(ii) in view of the evidence it was justifiable to conclude that the pledging of the credit of the firm by the managing partner was for a purpose apparently connected with the ordinary course of business of a saw-mill situated where the saw-mill was.

Judgment for the plaintiff.

Judgment

Miles J: read the following judgment of **MacDuff J:** The plaintiff carries on business in Nairobi as a provision merchant under the name of "Regal Provision Stores." He has claimed against the firm of Bush Mills, saw-millers, for the sum of Shs. 5,605/91 which amount is sub-divided into two parts:

(*a*) Shs. 4,806/22 for goods sold and delivered to the defendant firm at Nairobi during the year 1952, and for goods sold and delivered to the employees of the defendant firm at the request of the defendant firm and on the undertaking of the defendant firm to pay for the same;

(*b*) Shs. 799/69 for interest on the amount claimed for goods supplied at the rate of 12 per cent. per annum from October, 1952, up to the time of filing the suit.

The defendant firm is a partnership consisting of seven partners, of whom four – Malde s/o Rambhai, Harnam Singh Hira Singh, Karam Chand Chopra and Jamnadas Nathu – have entered a defence in which they deny having ordered, purchased, or been supplied with the goods alleged, or that they requested the plaintiff to deliver goods to their employees on an undertaking by the firm to pay for such goods. The

defendants go on to state that if any individual partner purchased goods for his own personal use and not for carrying on the business of the firm in the ordinary and usual way, they are not liable for the price of such goods supplied. They likewise deny liability for any undertaking in respect of goods supplied to an employee of the firm given by an individual partner. In like manner they deny having agreed to any interest whatsoever.

At the hearing the sole defence of the defendants was in effect that if the managing partner had pledged the credit of the firm to the plaintiff he had no authority so to do, and that the other partners in the firm, and the firm itself, are not bound since it was not specially authorised by the other partners pursuant to the provisions of s. 9 of the Partnership Ordinance (Cap. 284). The claim by the plaintiff is set out under seven headings, each in respect of goods supplied during the months of July to November, 1952, as follows:

	Shs.	Cts.
Bush Mills	642	00
Bush Mills and Achhar Singh	747	65
Bush Mills and Inder Singh	643	34
Bush Mills and Arsibhai	1,046	43
Bush Mills and Mohinder Singh	791	34
Bush Mills and Rattan Singh	381	16
Bush Mills and Budha Singh	772	92

There is no doubt as to the facts surrounding the supply of these goods. The plaintiff has given evidence that Achhar Singh approached him informing him that he, Achhar Singh, was running a saw-mill near Naivasha together with some partners in the name of Bush Mills; and that he had employees working at that mill for whom he wanted provisions. The plaintiff agreed to supply provisions on the understanding that Achhar Singh and his firm would be directly responsible to the plaintiff for payment, to which Achhar Singh agreed. Following that agreement, on occasions when the defendant firm's lorries were in Nairobi, either Achhar Singh or a driver called at the plaintiff's store with lists of the requirements of the various partners or employees which were supplied, together with an invoice in the name of the firm and of the employee. The plaintiff's son, who managed the store for his father, corroborates his father's evidence and went on to explain that the reason for the names of the employees being put on each separate invoice was that Achhar Singh requested that this should be done so that each employee's individual liability should be billed against him by the firm.

Some attempt was made on behalf of the defendants to challenge this evidence by drawing attention to the fact that in the books of the plaintiff the accounts were first headed in the names of the individual

employee c/o Bush Mills, and that this had been later changed to the name of the individual employee and Bush Mills. The plaintiff's son has explained this by saying that the books were kept by a part-time employee and that he himself changed the word "c/o" to "and" in conformity with the original arrangement and also to conform with the heading of his invoices. In this he is supported by the fact that right from the commencement of supply each invoice has been headed either in the name of the firm itself, in respect of goods ordered on behalf of the firm, or in the name of the individual employee in the name of: "Bush Mills per the individual employee."

For the defendants, evidence was given by one partner, Karam Chand Chopra, that Achhar Singh was the managing partner but that his powers were restricted. Clause 8 of the partnership agreement provides that Achhar Singh shall conduct and manage the partnership business and all the other partners shall not be required to devote any particular time and attention thereto, while cl. 10 provides that no partner shall, without the consent of the others, become guarantor for any person, and in particular that Achhar Singh shall not, without the consent of the other partners, pledge the credit of the partnership in a sum exceeding Shs. 500/- or otherwise in any way whatsoever. This witness went on to say that he had not given any authority

for the supply of these goods, that he had not been told by Achhar Singh that he had pledged the credit of the partnership in this manner, nor did he know that such credit had been pledged prior to the filing of this action; that none of the goods related to the ordinary business of the firm which was to saw timber and to sell it. It was obvious, however, that this partner in particular took no interest and, in effect, knew nothing about the partnership affairs. The same applied to another witness called Malde s/o Rambhai, who was also a partner. No meeting of the partnership was held until 1953, from which it would appear that Achhar Singh conducted the whole of the business of the partnership in his own way and without reference to his other partners.

From the evidence of the plaintiff and his son, I am satisfied that the goods in respect of which payment is claimed were, in fact, supplied, and were supplied in the circumstances set out in the plaintiff's evidence, that is, briefly, that Achhar Singh, the managing partner of the defendant firm, pledged the credit of the firm for the supply of certain provisions to partners and/or employees of the firm who were working at the Wanjohi Mills.

The first question then is whether such pledging of credit by Achhar Singh was such as to render the firm and the other partners therein liable to the plaintiff.

The answer to this question may be developed on two lines. Section 7 of the Partnership Ordinance reads:

> "Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership, and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member, bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner."

I am satisfied that the plaintiff did not know that Achhar Singh had no authority and that he believed him to be a partner. In the terms of s. 7 then, were Achhar Singh's actions in pledging credit of the firm for the carrying on in the usual way the business of the shareholders? For the defendants it is argued simply that the business of the partnership is that of a saw-mill, that is to saw timber and sell it, and that it is no part of the ordinary course of the business of a saw-mill to take responsibility for the debts of its partners or employees in respect of the supply of provisions to them. Lindley on Partnership (11th Edn.) at p. 185 and p. 186 makes the following observations:

> "It will be observed that what is done in carrying on the partnership business in the usual way in which businesses of a like kind are carried on, is made the test of authority where no actual authority or ratification can be proved. This probably means the same thing as saying that what is necessary to carry on the partnership business in the usual way is the test of a partner's implied authority to bind the firm."
>
> "The question whether a given act can or cannot be said to be done in carrying on a business in the way in which it is usually carried on must evidently be determined by the nature of the business, and by the practice of persons engaged in it. Evidence on both of these points is therefore necessarily admissible, and, as may readily be conceived, an act which is common in the prosecution of one kind of business in the ordinary way may not be required for carrying on another business of a different character. Consequently no answer of any value can be given to the abstract question – Can one partner bind his firm by such and such an act? unless, having regard to what is usual in business, it can be predicated of the act in question either that it is one without which no business can be carried on, or that it is one which is not necessary for carrying on any business whatever."

The facts in respect of this business are that the defendant firm's saw-mill was situate at Wanjohi, some

thirty miles towards the bush country from Naivasha, and the supplies were obtained for three partners and four Asian employees, that is the

skilled workmen in the saw-mill. It is suggested that it would be usual in the case of a saw-mill situate so far from civilisation to utilise transport delivering timber in Nairobi to pick up provisions on behalf of these workers. Also that it would be usual, as the plaintiff himself says, that he would not be prepared to give credit to individual employees and for the purpose of obtaining credit for such supplies for the firm to guarantee payment of such accounts. The son of the plaintiff has quoted instances of five other firms situate outside Nairobi who deal with the plaintiff on similar lines, the firms themselves ordering the goods on behalf of their employees, accepting responsibility for the individual accounts and, in fact, paying these accounts. In the present instance, the accounts for the first month were paid by the firm. I am of opinion that it would be quite within the usual course of the business for a firm operating a saw-mill at a distance from a provision centre to accept responsibility for the ordering of provisions, to accept responsibility of payment of the individual accounts, and probably for that purpose to deduct the amount of individual accounts from wages due to the workers at the end of each month. I can see little difference between that procedure in the case of a small number of employees and a firm running a canteen in similar circumstances from which it supplied goods to a large number of employees on credit against their monthly wages. I would therefore hold that within the provisions of s. 7 of the Ordinance, the actions of Achhar Singh in pledging the firm's credit for the supply of provisions to the firm's employees was in the usual course of business and the firm and its partners are liable for his actions.

The second answer to this question in my view would be this. Section 9 of the Ordinance reads:

> "Where one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the firm is not bound, unless such partner is in fact specially authorised by the other partners; but this section does not affect any personal liability incurred by an individual partner."

Accepting that Achhar Singh had, in fact, no authority to act for the firm in this particular matter, or to pledge the firm's credit in the amount that he did, has the plaintiff brought himself within the scope of s. 9 of the Ordinance? The facts to which I have already referred, particularly in the light of the evidence of the plaintiff's son as to other firms which incurred the same responsibility would, in my view, justify this as being a purpose apparently connected with the ordinary course of business of a saw-mill situate where this saw-mill is. For these reasons I hold the plaintiff to be entitled to claim against the firm and all partners therein for the goods he supplied on the instructions of Achhar Singh.

There is, perhaps, another matter to which I should refer. That is the allegation of the plaintiff that two of the defendants, Karam Chand Chopra and Malde s/o Rambhai, in fact accepted liability for Achhar Singh's actions in that they both told him that his claim would be met when the firm received compensation from the Government for the destruction by Mau of the firm's saw-mill. Both Karam Chand Chopra and Malde have denied this, as has Rambhai, in whose presence the promise was alleged by the plaintiff to have been made. Both Karam Chand Chopra and Rambhai admit that on a number of occasions the plaintiff did ask them when this compensation would be paid. Both witnesses were equally definite that they did not know the reason why he was asking and that they didn't enquire the reason. This I find impossible of belief. There is sufficient corroboration of that part of the plaintiff's evidence in this regard for me to accept the whole of his evidence as true as against that of the three defence witnesses. I find it as a fact that they did make the promises he alleges.

In regard to the second part of the plaintiff's claim, he bases this in his plaint as being at an agreed rate of 12 per cent. In support of that he has produced a document dated December 17, 1952, signed by Achhar Singh for and on behalf of Bush Mills in these terms:

> "Dear Sirs, Re: Bush Mills Wanjohi-Naivasha, Achhar Singh, Budha Singh, Inder Singh, Mohinder Singh, Rattan Singh and Arsibhai's Accounts.
>
> "With reference to the amounts, (totalling Shs. 5,025/91) standing against the above parties respectively, we beg to inform you that besides or notwithstanding the liability of the above parties in this matter we hereby undertake to pay the same on or before the 31st January, 1953, together with interest at 12 per cent. per annum thereon as stated in your Statements of A/C in the matter."

The plaintiff has given evidence to the effect that if his customers did not pay their monthly accounts he charged interest at 12 per cent. and that this is set out at the bottom of each statement. While no original statement has been produced in court and the copies produced do not bear the statement, there is, I think, sufficient corroboration of the plaintiff's evidence in the reference to this fact in the letter signed by Achhar Singh. I would hold, therefore, that if the defendants are liable for the goods supplied by the plaintiff they must also accept liability for the terms of such supply and are accordingly liable for the second part of the plaintiff's claim.

Judgment will be for the plaintiff against the defendant firm and the partners thereof for the amount claimed, Shs. 5,605/91 together with interest on Shs. 4,806/22 from the time of filing suit until judgment at 12 per cent. per annum, and the costs of this action. Amount of decree including costs to bear interest at the rate of 6 per cent. from the date of judgment.

Judgment for the plaintiff.

For the plaintiff:
DV Kapila
DV Kapila, Nairobi

For the defendant:
MR Pabari
Dave & Pabari, Nairobi

Kanji Purshottam Toprani v Sydney Moss
[1957] 1 EA 408 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	11 June 1957
Case Number:	22/1957
Before:	Sir Newnham Worley P, Sir Ronald Sinclair V-P and Bacon JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Connell, J

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[1] Bankruptcy – Receiving order – Agent of creditor company presenting petition – Whether agent duly

authorised by the company – Bankruptcy Ordinance s. 134 (*K.*).

Editor's Summary

The appellant appealed against the receiving order made by the Supreme Court of Kenya on a creditor's petition brought in the name of the respondent who described himself therein and in the verifying affidavit as agent in case of need for William Sandover & Company Ltd., the creditors, whose registered office was in London. Both these documents were filed in court on January 21, 1957. A cable had been sent from London to the respondent on January 21, authorising him to present the petition and this was followed by a confirmatory letter on January 23. The appellant served a notice of his intention to oppose the petition and, *inter alia*, to contend that the supporting papers and the alleged authority of the respondent were invalid in law. This objection was pursued at the hearing, but the judge disposed it in his judgment by stating that he held that the respondent had authority to present the petition.

Held – in view of the provisions of s. 134 of the Bankruptcy Ordinance the evidence before the judge failed to establish the respondent's authority to present the petition which should have been dismissed.

Appeal allowed.

Cases referred to:

(1) *Re Sanders; Ex parte Sanders* (1894), 71 L.T. 236.

(2) *Re Collier; Ex parte Dan Rylands Limited* (1891), 64 L.T. 742.

Judgment

Sir Ronald Sinclair V-P: read the following judgment of the court. This is an appeal against a receiving order made by the Supreme Court of Kenya on a creditor's petition. A number of grounds of appeal were argued before us by Mr. Mandavia on behalf of the appellant, but as we are of the opinion that the appeal must be allowed on one of those grounds only, we do not consider that any further argument or consideration of the other grounds is necessary.

The petition was brought in the name of the respondent who described himself therein, and in the verifying affidavit, as sole partner of the firm of Cecil Wilson and as agent in case of need for William Sandover & Company Ltd., Merchants, having their registered office in London. William Sandover & Company Ltd. are the creditors in this matter. These two documents were executed on January 19, 1957 and presented for filing on the 21st of that month. On January 28 the appellant served a notice of his intention to oppose the petition and, *inter alia*, to contend that the supporting papers and the alleged authority of the respondent were invalid in law. The objection was pursued at the hearing, but the learned judge disposes of it in his judgment by merely stating that he held the respondent had authority. He did not review the facts or the law relevant to the point.

Any consideration of this point must start from s. 134 of the Bankruptcy Ordinance which provides:

> "For all or any of the purposes of this Ordinance, a corporation may act by any of its officers authorized in that behalf under the seal of the corporation, a firm may act by any of its members, and a lunatic may act by his guardian or the appointed manager of his estate."

This section is, so far as relevant, identical with s. 149 of the English Bankruptcy Act, 1914. English decisions are therefore in point. Where the authority of the person presenting the petition is challenged, the onus rests on him to establish his authority, and he must be prepared at the hearing with proof of that authority: *Re Sanders; Ex parte Sanders* (1), (1894), 71 L.T. 236. In that case the court described bankruptcy proceedings as "quasi criminal matters" and, accepting that as a correct description, we think it follows that the degree of proof required is something more than the mere balance of probabilities which would suffice in ordinary civil proceedings. While we do not suggest that proof beyond reasonable doubt is the standard, we think that all matters necessary to establish the validity of the petition must be strictly proved.

It is clear from the petition and affidavit that when the respondent signed and filed them he relied solely upon what he described as his "agency in case of need." Such authority does not satisfy the provisions of s. 134 and we know of no decision, and certainly none has been cited to us, where it has been held that a person can constitute himself an agent of necessity for the purpose of presenting a bankruptcy petition.

At the hearing, however, the respondent produced as evidence of his authority, a cable and a letter from William Sandover & Company Ltd. despatched respectively on January 21 and 23, 1957. The cable which was despatched from London at 11.37 a.m. (that is to say 2.37 p.m. East African time) reads:

"Your letter 18th. We authorise you file petition bankruptcy Colonial Commercial on our behalf. Sandover"

The letter confirms the cable in the following terms:

"We have cabled you giving you official authorisation to file the petition in bankruptcy."

The original petition does not show the time at which it was presented and, even if it be assumed that the creditor company did on January 21 pass and seal a resolution authorising the respondent to commence these proceedings, it is still open to doubt whether that resolution preceded in point of time the presentation of the petition. We have no doubt that where a person who is not normally an officer of a corporation purports to act in their name, it is a condition precedent to the institution of any proceedings under the Ordinance that he should, in fact, be clothed with the prescribed authority. It is relevant, therefore, to point out that the respondent has never at any time sought to amend the description of himself or his authority in the petition or to swear a fresh affidavit. It is not altogether clear from the learned judge's note taken at the hearing whether the respondent's then advocate intended to concede that the respondent's appointment was not under seal, but it is at least clear that he was contending there was no obligation on him to produce any evidence of an appointment under seal. Presumably for this reason he did not ask for an adjournment to prove the respondent's authority: *Re Collier; Ex parte Dan Rylands Limited* (2) (1891), 64 L.T. 742. That case appears to us to support the view that we have ourselves formed that absence of proof of the requisite authority cannot be treated as a formal defect or a mere irregularity within the scope of s. 132.

We were informed by Mr. Salter at the hearing of this appeal that since the filing of the notice of appeal in this matter, the creditor company has sent to the respondent documents which purport to show that he was duly authorised by resolution under seal at some time on January 21. We do not think it would be right at this stage for us to look at those documents in order to remedy the defect in the proof supplied by the respondent at the hearing. Even were we to do so, there would still be doubt whether the resolution was effective before the presentation of the petition.

In our opinion the evidence before the learned judge in the court below failed to establish the respondent's authority and the petition should have been dismissed on that ground.

The appeal must therefore be allowed. The receiving order and the order for the costs of the petitioner to be paid out of the estate are set aside. The appellant must have his costs of the proceedings in the Supreme Court. He must also have his costs of the appeal generally, but we propose to make a special order as to the costs of preparing the record. As we pointed out at the hearing, the record certified by Mr. Mandavia as correct was not so in fact, for the petition as copied did not show an important amendment which had been made to the course of the proceedings in the Supreme Court. We have constantly drawn attention to the necessity of showing in the record all amendments of pleadings made in the court below, but advocates consistently fail to do so. The registrar is therefore directed to deduct the sum of Shs. 200/- from the costs allowed on taxation for preparation of the record.

Appeal allowed.

For the appellant:
GR Mandavia
GR Mandavia, Nairobi

For the respondent:
CW Salter, QC and *RDC Wilcock*
Archer & Wilcock, Nairobi

R v Bhagubhai Nagarbhai Patel and others

[1957] 1 EA 411 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	11 December 1957
Case Number:	261/1957
Before:	MacDuff J
Sourced by:	LawAfrica

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[1] Criminal law – Practice – First information quashed – Second information filed in respect of the same depositions – Whether Attorney-General can prefer more than one information in respect of the same depositions and file one information subsequent to another if the first has been quashed – Penal Code s. 250 (*K.*).

Editor's Summary

The four accused persons were committed for trial on a charge of conspiracy to effect an unlawful purpose contrary to s. 396 (6) of the Penal Code. At the trial the information was quashed on the grounds that it disclosed no offence. The attorney-general then filed a second information charging the accused firstly with conspiracy to effect an unlawful purpose contrary to s. 396 (6), secondly with conspiracy to commit a misdemeanour contrary to s. 395, and, thirdly, with conspiracy to defeat the course of justice contrary to s. 12 of the Penal Code. It was submitted that the court ought not to take cognisance of the second information because it was a nullity since an information had previously been drawn up in accordance with the provisions of Criminal Procedure Code and there was no power to draw up, sign or file a further information in the same matter.

Held–

(i) the attorney-general can prefer more than one information under s. 250 of the Penal Code in respect of the same depositions.

(ii) since the attorney-general is able to file more than one information in respect of the same depositions there is no reason why he should not be able to file a fresh information subsequent to the quashing of the previous one.

Objection disallowed.

Cases referred to:

(1) *R. v. Noormahomed Kanji* (1937), 4 E.A.C.A. 34.

(2) *R. v. Chairman of London County Quarter Sessions, Ex parte Downes,* [1953] 2 All E.R. 750; 37 Cr. App. R. 148.

Judgment

MacDuff J: An information is before this court charging Bhagubhai Nagarbhai Patel, Shivabhai Umedbhai Amin, Nagarbhai Ramchand Patel and Shivabhai Gordhanbhai Amin on the first count with conspiracy to effect an unlawful purpose contrary to s. 396 (6) of the Penal Code; on the second count with conspiracy to commit a misdemeanour contrary to s. 395 of the Penal Code; and on the third count with conspiracy to defeat the course of justice contrary to s. 112 of the Penal Code. It has been submitted on behalf of three of the accused, the second accused being unrepresented, that the court ought not to take cognisance of the information dated December 5, 1957, against the four accused because the said information is a nullity, an information having previously been drawn up in this matter in accordance with the provisions of the Criminal Procedure Code and duly signed

and filed, and there being no power to draw up, sign, or file a further information in the same matter.

The facts in respect of which this submission is made are that the four accused were originally charged before the resident magistrate, Nairobi, on two counts, the first that of conspiracy to defraud contrary to s. 312 of the Penal Code and the second conspiracy to effect an unlawful purpose contrary to s. 396 (6) of the Penal Code. After somewhat lengthy proceedings the four accused were committed to the Supreme Court for trial on the second of the two counts charged. The attorney-general, pursuant to the provisions of s. 250 of the Criminal Procedure Code, caused the information to be drawn up, signed it and filed it in the registry of the Supreme Court on November 14, 1954. The trial was set down under sessions holden at Nairobi on December 2, 1957. At those sessions the case came on for hearing before Templeton, J., who upheld the preliminary objections on behalf of the accused that the information in its then form disclosed no offence. On application being made under the provisions of s. 271 of the Criminal Procedure Code to amend the information Templeton, J., disallowed the application and quashed the information, directing that in so far as that information was concerned the accused be set at liberty. This order was made on December 4, 1957, and on the following day the attorney-general filed the information which is at present before the court and to which objection has been taken.

Mr. Quass, who with Mr. Mandavia has appeared for the third accused, has argued his submission on behalf of the third accused along these lines:

> there has been one preliminary inquiry and on the depositions resulting from that inquiry the attorney-general filed an information on November 14, 1956, that information having been quashed the attorney-general is given no power anywhere in the Criminal Procedure Code to file a second information based on the same depositions. He points out that the whole scope of the Criminal Procedure Code is against the filing of a second information based on the one set of depositions. His argument is to some extent assisted by the wording of s. 250 of the Code, which says:
>
> "250. (1) If, after the receipt of the authenticated copy of the depositions as aforesaid, the attorney-general shall be of the opinion that the case is one which should be tried upon information before the Supreme Court, an information shall be drawn up in accordance with the provisions of this Code, and when signed by the attorney-general shall be filed in the registry of the Supreme Court."

There is certainly nothing in that section that, *prima facie* anyway, would appear to empower the attorney-general to file a second information on the one set of depositions. Again if Mr. Quass' argument is correct one can appreciate the difficulty that has been encountered by counsel for the accused and counsel for the Crown in finding any case where it has been shown that a second information has been filed. One can also appreciate the reason for the very wide powers of amendment of informations contained in s. 271 of the Code. The arguments put forward by Mr. Quass have been adopted by counsel for the other accused.

For the Crown it has been argued that the quashing of an information on account of its defect in form has the result of the information being a nullity and therefore that it is as if it had not been filed at all. It is also argued that that result places the information that has been quashed in the same position as one in respect of which a nolle prosequi has been filed. I am not prepared to accept that argument as it stands. To my mind it ignores the essential differences between the filing of a nolle prosequi and the quashing of an information. It also ignores the fact that the legislature has seen fit to make special provision as to the effect of a nolle prosequi.

I have also been referred to a number of English cases to which I do not propose to refer individually.

I would, however, be doubtful as to the effect of those cases at the present time, particularly in view of the changes made in English Criminal Practice from the years 1848 down to 1933. Those cases were decided on the practice

and criminal trials in the early 19th century and even according to that practice are authority only from the proposition that the prosecutor can apply to have any indictment quashed for apparent defects on the terms that he has already preferred a second bill of indictment.

As I see this question it depends entirely on the interpretation of the Criminal Procedure Code and that which is to be placed in particular on s. 250 of that Code. While the wording of s. 250 would appear to restrict the attorney-general to the filing of an information, by which one would understand ordinarily one information, in respect of the copy of the depositions forwarded to him in actual fact that does not appear to be so. For example s. 82 of the Code, which empowers the attorney-general to file a nolle prosequi, provides that the accused be discharged

> "but such discharge of an accused person shall not operate as a bar to any subsequent proceedings against him on account of the same facts."

Those last words have been held to empower the attorney-general to file a fresh information without a fresh preliminary inquiry being held *R. v. Noormahomed Kanji* (1) (1937), 4 E.A.C.A. 34. That the attorney-general is not limited to one information also receives some support from the practice, where depositions disclose evidence of a capital offence and of a second offence, of filing separate informations. Again the present practice as to criminal proceedings and indictments in England is very similar to that in this colony. There again, as far as I have been able to ascertain, there is no express provision for the filing of more than one indictment yet to do so is permissible. Lord Chief Justice Goddard in *R. v. Chairman of London County Quarter Sessions, Ex parte Downes* (2), 37 Cr. App. R. 148 at p. 152 says

> "Again, if there is more than one indictment against a prisoner, it is quite common practice, after the trial of one of them, to direct that the other or others are to remain on the file and not to be prosecuted without leave."

If it is accepted that the attorney-general can prefer more than one information under s. 250 of the Code in respect of the one copy of depositions then the remaining question to be decided is whether he can file one information subsequent to another if the first information has been quashed. Here in my view the case in respect of the quashing of a previous information is even stronger than that in regard to the entering of a nolle prosequi in respect of a previous information. In the first instance the information itself is quashed, that is the original charge filed by the attorney-general in the Supreme Court. In the latter instance s. 82 of the Code refers to "proceedings," and this has been interpreted to mean "High Court proceedings" not proceedings from the commencement of the preliminary inquiry. In *R. v. Noormahomed Kanji* (1), referring to the section in the Criminal Procedure Code of Uganda which corresponds to s. 82 of the Criminal Procedure Code of Kenya it was said:

> "On a close reading of the section in question, it will be observed that the accused person is to be discharged in respect of the charge for which the nolle prosequi is entered. It seems clear that these words refer to the charge in the information as the information is 'the charge' on the trial before the high court, and the nolle prosequi is entered in the high court in respect of that information. The attorney-general states that the 'proceedings' should not continue. If, then, the information is the charge, the proceedings are the high court proceedings, and the nolle prosequi puts an end to these proceedings."

Following that reasoning it would appear that the quashing of the information filed on November 14, 1957, ended the then Supreme Court proceedings leaving in existence the depositions. Since the attorney-general is able to file more than one information in respect of the same depositions I can see no reason then why he should not be able to file a fresh information subsequent to the quashing of the

previous one.

In the result I rule that the present information is properly before this court.

Objection disallowed.

For the first accused:
DPR O'Beirne and *TR Johar*
Tilak R Johar, Nairobi

The second accused in person.

For the third accused:
Phineas Quass QC (of the English Bar) and *GR Mandavia*
GR Mandavia, Nairobi

For the fourth accused:
DN Khanna and *SC Gautama*
Shah & Gautama, Nairobi

For the Crown:
The Attorney-General, Kenya

Lambert Houareau v R
[1957] 1 EA 414 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	24 June 1957
Case Number:	69/1957
Before:	Sir Newnham Worley P, Sir Ronald Sinclair V-P and Bacon JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Seychelles – Lyon, C.J

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[1] Criminal law – Application for bail pending appeal to Court of Appeal for Eastern Africa – Sentence of fine or imprisonment in default – Discretion of judge to grant bail – Whether decision to refuse ball had in view the considerations relevant to the exercise of such discretion – Eastern African Court of Appeal Order in Council, 1950, *s.* 14 (*a*).

Editor's Summary

The applicant was convicted by the Supreme Court of Seychelles of two contraventions of Regulations

made under the Unseaworthy Vessels Ordinance (Cap. 205) and was sentenced to pay a fine of Rs. 700 in respect of each offence or in default four months' imprisonment. The applicant failed to pay the fines but filed a notice of appeal to the Court of Appeal for Eastern Africa and also made an application for bail. The chief justice refused it on the grounds that he could see no good or sufficient reason for invoking the discretion vested in him and considered that there were no exceptional circumstances. The appeal from this refusal was treated as a reference to the full court under s. 14 (*a*) of the Eastern African Court of Appeal Order in Council.

Held–

(i) where the legislature has imposed punishment by fine, with imprisonment only in default, the main relevant consideration on an application for bail pending appeal should be whether the intended appeal is frivolous or vexatious.

(ii) if not, the court should consider

(*a*) whether application for bail is made merely to delay or if the appeal has reasonable prospects;

(*b*) if the applicant is wholly unable to pay or unable to pay without suffering loss or damage (i.e. by sale of his means of his livelihood) which cannot be adequately compensated for by repayment of the fine in the event of the appeal being allowed;

(*c*) whether the applicant offers reasonably satisfactory security for the payment of the fine or the surrender of his person in default of payment should the appeal be dismissed.

(iii) the chief justice's refusal to grant bail was attributable to his failure to direct himself properly on the matters relevant to the exercise of his discretion.

Application allowed.

Cases referred to:

(1) *Habib Kara Vesta and Others v. R.* (1934), 1 E.A.C.A. 197.

(2) *R. v. Maganlal Vallabhai Patel* (1935), 16 K.L.R. 123.

(3) *R. v. A. B.* (1926), 1 T.L.R. (R.) 118.

(4) *R. v. Fraser*, 17 Cr. App. R. 182.

(5) *R. v. Greenberg*, 17 Cr. App. R. 106.

(6) *R. v. Leinster* (*Duke*), 17 Cr. App. R. 147.

Judgment

Sir Newnham Worley P: read the following judgment of the court: On May 2, 1957, the applicant was convicted by the Supreme Court of Seychelles of two contraventions of Regulations made under the Unseaworthy Vessels Ordinance (Cap. 205) and sentenced to pay a fine of Rs. 700 in respect of each offence. He was given until 4 p.m. on May 7 to pay the fines, in default to undergo four months imprisonment in each case. He gave notice of appeal to this court from these convictions and sentences on the same day that he was convicted and, on May 8, by his advocate, Mrs. Collet, he made an application "for bail" to the learned chief justice. The record before us contains no copy of this application but it appears to have been made to the supreme court under s. 276 of the Criminal Procedure Code. This, of course, was a mistake since that section applies only to appeals to the Supreme Court by persons who have been convicted by a subordinate court. The application, if made to the Supreme Court, should have been made under s. 286 of the Code. During the course of the hearing, the attorney-general appears to have referred to r. 28 of the 1954 Rules of this court, and the learned chief justice, in his ruling, refers to both s. 276 of the Code and r. 28 of the Rules. In these circumstances we decided to treat the application as one made to the chief justice as a judge of this court under r. 28 and r. 19 of the Rules of this court and referred to the full court under s. 14 (*a*) of the 1950 Order in Council.

The Crown has not opposed the application on either occasion, but the learned chief justice refused it on the ground that he could see no good or sufficient reason for invoking the discretion vested in him and, *inter alia*, considered "there were no exceptional circumstances." He added

> "If the fine is paid, it can be assumed that the Court of Appeal will order repayment if the appeal is successful . . . if the fine remains unpaid the appropriate warrant must issue."

We are aware that it has been said by several courts on several occasions that bail pending appeal should only be granted in exceptional circumstances. See, for example, *Habib Kara Vesta and Others v. R.* (1) (1934), 1 E.A.C.A. 197 (Court of Appeal); *R. v. Maganlal Vallabhai Patel* (2) (1935), 16 K.L.R. 123 (Supreme Court of Kenya); *R. v. A. B.* (3) (1926), 1 T.L.R. (R.) 118 (High Court of Tanganyika); *R. v.*

Fraser (4), 17 Cr. App. R. 182; *R. v. Greenberg* (5), 17 Cr. App. R. 106, and *R. v. Leinster* (*Duke*) (6), 17 Cr. App. R. 147 (Court of Criminal Appeal), etc. There is no need for us to consider now how far those dicta are in consonance with modern practice: they all related to cases of peremptory imprisonment. We think they have no relevance to such a case as is now before us where the legislature has imposed punishment by fine, with imprisonment only in default. In such a case we think that the main relevant considerations should be, is the intended appeal frivolous or vexatious? If not, has it a reasonable chance of success or is the application made

merely to delay? Is the applicant wholly unable to pay or unable to pay without suffering loss or damage (e.g. by sale of his means of livelihood) which cannot be adequately compensated for by repayment of the fine in the event of the appeal being allowed? Does he offer reasonably satisfactory security for the payment of the fine or the surrender of his person in default of payment in the event of the appeal being dismissed?

We think, therefore, with respect, that the learned chief justice's refusal to grant the application was attributable to his failure to direct himself properly on the matters relevant to the exercise of his discretion. We have ascertained that the appellant has been arrested and imprisoned in default of payment which suggests to us that he is unable to pay the fines either at all or without such irreparable loss as we have suggested. He offered adequate security for the payment of the fine. It has not been suggested that the appeal, whether as to conviction or sentence, is frivolous or vexatious.

We accordingly granted the application in the terms of the formal order annexed to this ruling.

Application allowed.

The applicant/appellant did not appear and was not represented.

For the applicant/appellant:
Mrs C Collet, Victoria, Seychelles

For the respondent:
DD Charters (Crown Counsel, Kenya)
The Attorney-General, Seychelles

R v Bhagubhai Nagarbhai Patel and others
[1957] 1 EA 416 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	4 December 1957
Case Number:	246/1957
Before:	Templeton J
Sourced by:	LawAfrica

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[1] Criminal law – Conspiracy – Objection to information – Insufficient particulars of offence alleged – Whether information discloses any offence known to criminal law – Penal Code s. 396 (6) (*K.*) *– Bankruptcy Ordinance s.* 139 (*K.*).

Editor's Summary

The four accused persons were charged with conspiring together and with other persons not before the court to effect an unlawful purpose, namely that the first accused being unable to pay his debts from his own monies as they became due should suffer a judicial proceeding with a view to giving the third accused, a creditor, a fraudulent preference over the other creditors of the first accused. Objection was taken to the information on the grounds that it did not disclose sufficient particulars to enable the accused to know what was alleged against them and also that the information did not disclose any offence known to the criminal law of Kenya. It was further submitted that "unlawful purpose" used in para. (6) of s. 396 of the Penal Code must connote either a crime or a tort and that for a debtor to prefer one creditor is neither a crime nor a tort and, therefore, the information did not disclose an unlawful purpose and must be quashed.

Held–

(i) the information before the court did not contain sufficient particulars to apprise the accused of the fact that the "unlawful purpose" alleged was contravention of the provisions of s. 139 of the Bankruptcy Ordinance;

(ii) the information before the court disclosed no offence.

Objection allowed.

Cases referred to:

(1) *R. v. Mulji Jamnadas and Others* (1946), 13 E.A.C.A. 147.

(2) *Mogul Steamship Co. Ltd. v. McGregor Gow & Co. Ltd.,* [1892] A.C. 25.

(3) *Heymann v. R.* (1873), L.R. 8 Q.B. 102.

(4) *R. v. Hall and Others,* 175 E.R. 613.

Judgment

Templeton J: The four accused persons are charged with conspiracy to effect an unlawful purpose contrary to s. 396 (6) of the Penal Code in that on divers days between December 1, 1952, and July 31, 1953, they conspired together and with other persons not before the court to effect an unlawful purpose, namely that Bhagubhai Nagarbhai Patel (accused No. 1) being unable to pay his debts as they became due from his own money should suffer a judicial proceeding with a view to giving a creditor, namely Nagarbhai Ramchand Patel (accused No. 3), a fraudulent preference over the other creditors of the said Bhagubhai Nagarbhai Patel.

After the information was read, and before plea, Mr. Quass who, with Mr. Mandavia, represents the third accused, objected to the information on two grounds; first, that it does not disclose sufficient particulars to enable the accused to know what is alleged against them; and secondly, that the information discloses no offence known to the criminal law of Kenya.

On his first objection Mr. Quass submitted that the words "judicial proceedings" required amplification so that the accused would know the nature of the judicial proceeding in question, and that if, as appeared likely, the framer of the information had in mind the provisions of the Bankruptcy Ordinance (Cap. 30), some reference to bankruptcy should have been made in the information. He conceded that this defect might possibly be cured by amendment of the information; he then went on to deal with his second objection which, he submits, discloses a defect in the information which is incurable.

The section under which the accused are charged is s. 396 of the Penal Code, the relevant portion of which reads as follows:

> "396. Any person who conspires with another to effect any of the purposes following, that is to say – . . .
>
> (6) to effect any unlawful purpose; or
>
> (7) to effect any unlawful purpose by any unlawful means, is guilty of a misdemeanour."

The charge in the present case is laid under para. (6), but the words used in para. (7) are identical with those in para. (7) of the former s. 380 of the Penal Code of Uganda which were the subject of a decision of the Court of Appeal for Eastern Africa in the case of *R. v. Mulji Jamnadas and Others* (1) (1946), 13 E.A.C.A. 147. In that case it was held that the term "unlawful means" includes civil wrongs as well as acts punishable criminally. On the basis of this decision Mr. Quass submits that the words "unlawful purpose" used in para. (6) of s. 396 of the Kenya Penal Code must connote either a crime or a tort, and

that the information in this case alleges neither. He has referred to the case of *Mogul Steamship Co. Ltd. v. McGregor Gow & Co. Ltd*. (2), [1892] A.C. 25 in which the meaning of the word "unlawful" was considered in connection with contracts in restraint of trade. In that case Lord Halsbury, L.C., said at p. 39:

> "There are two senses in which the word 'unlawful' is not uncommonly, though, I think, somewhat inaccurately used. There are some contracts to which the law

> will not give effect; and therefore, although the parties may enter into what, but for the element which the law condemns, would be perfect contracts, the law would not allow them to operate as contracts, notwithstanding that, in point of form, the parties have agreed. Some such contracts may be void on the ground of immorality; some on the ground that they are contrary to public policy; as, for example, in restraint of trade: and contracts so tainted the law will not lend its aid to enforce. It treats them as if they had not been made at all. But the more accurate use of the word 'unlawful' which would bring the contract within the qualification which I have quoted from the judgment of the Exchequer Chamber, namely, as contrary to law, is not applicable to such contracts."

Mr. Quass submits that the same considerations must apply to the words "be deemed fraudulent and void as against the trustees in the bankruptcy" which appear in s. 48 of the Bankruptcy Ordinance (Cap. 30). It is to be noted that identical words appear in s. 44 of the English Bankruptcy Act 1914, and in Williams on Bankruptcy, (16th Edn.) at p. 361 the learned authors, after referring to cases on the point, say

> "From the point of view of accuracy, the phrase 'voidable preference' is to be preferred."

Finally it is submitted that for a debtor to prefer one creditor to another is neither a crime not a tort and that therefore the information discloses no unlawful purpose and must be quashed.

With regard to the first objection to the information, namely, that it does not disclose sufficient particulars to enable the accused to know what is alleged against them, Mr. Brookes for the Crown, submitted that the particulars are sufficient to disclose an act which is unlawful. He referred to s. 139 of the Bankruptcy Ordinance, the relevant portion of which reads as follows:

> "139. (1) If any person who has been adjudged bankrupt or in respect of whose estate a receiving order has been made . . .
>
> (*b*) with intent to defraud his creditors or any of them, has made or caused to be made any gift or transfer of, or charge on, his property; . . .
>
> he shall be guilty of an offence.
>
> "(2) For the purposes of para. (*b*) of this section it is hereby declared that if any person who has been adjudged bankrupt, or in respect of whose estate a receiving order has been made, has with intent to defraud his creditors or any of them caused or connived at the levying of any execution against his property he shall be deemed to have made a transfer of or charge on his property."

and submitted that the words in the information

> "should suffer a judicial proceeding with a view to giving a creditor namely the said Nagarbhai Ramchand Patel a fraudulent preference over the other creditors"

indicated that the accused connived at the transfer of property in contravention of the provisions of s. 139. He indicated, however, that if the court considers the particulars are insufficient he would ask leave to amend by inserting words which would have the effect of making the particulars read as follows:

> "Bhagubhai Nagarbhai Patel, Shivabhai Umedbhai Amin, Nagarbhai Ramchand Patel and Shivabhai Gordhanbhai Amin on divers days between December 1, 1952, and July 31, 1953, in the Colony of Kenya conspired together and with other persons not before the court to effect an unlawful purpose, namely that the said Bhagubhai Nagarbhai Patel being unable to pay his debts as they became due from his own money and being in contemplation of bankruptcy should suffer a judicial proceeding and thereby effect a transfer of part of his property with intent to defraud his creditors and with a view to giving a creditor namely the said Nagarbhai Ramchand Patel a fraudulent preference over the other creditors of the said Bhagubhai Nagarbhai Patel."

It has been clearly indicated by Mr. O'Beirne for the first accused, Mr. Quass for the third accused and Mr. Khanna for the fourth accused that any such application will be strenuously opposed.

As I see it, my first duty is to decide whether the information as at present before the court contains sufficient particulars to apprise the accused of the fact that the "unlawful purpose" alleged is a contravention of the provisions of s. 139 of the Bankruptcy Ordinance. I have no hesitation in deciding that it does not. The information follows so closely the wording of s. 48 of the Bankruptcy Ordinance that the accused could not possibly know that what was alleged was a conspiracy to commit an offence under an entirely different section.

The question of amending the information is strictly not one for consideration at this stage but, as the second accused is not legally represented, I conceive it my duty to point out, subject of course to any submissions which may be made in due course, certain considerations which may affect such an application.

In so far as s. 139 of the Bankruptcy Ordinance is concerned I would require further argument to satisfy me that an offence under that section can be committed before a debtor is adjudged bankrupt. The relevant portion of the section has already been quoted, and, as I understand Mr. Brookes' submission it is that the words "has with intent to defraud his creditors" in sub-s. (2) refer back to some act committed before the person has been adjudged bankrupt. But it seems to me that these words must be governed by the preceding words "if any person who has been adjudged bankrupt." I am fortified in this view by an examination of s. 13 of the Debtors' Act 1869 and s. 156 of the Bankruptcy Act, 1914, but I find it unnecessary at this stage to decide this issue. It seems to me clear that an application for an amendment in the terms suggested by Mr. Brookes would not come within the provisions of s. 271 of the Criminal Procedure Code.

Dealing with the second objection to the information Mr. Brookes submits that if a debtor gives preference to one creditor over others his act is unlawful under s. 48 of the Bankruptcy Ordinance if done in contemplation of bankruptcy, because there is an injury to the trustee and a right of action. He has cited two cases: *Heymann v. R.* (3), (1873), L.R. 8 Q.B. 102 and *R. v. Hall & Others* (4), 175 E.R. 613. In both of these cases the object of the conspiracy was the commission of an offence punishable by law and they do not assist the court in deciding whether the right of the trustee in bankruptcy to avoid a preference amounts to a civil wrong which is actionable at law, i.e. a tort.

In a case of preference falling within the provisions of s. 48 of the Bankruptcy Ordinance what happens is that the trustee applies to the court in the particular bankruptcy cause and the transaction is set aside. Can this be said to give the trustee a right of action which amounts to a tort? In my view it cannot. I am satisfied that the section operates only to make void a transaction coming within its provisions in the event of a bankruptcy petition being presented within six months.

In the result I find that the information in its present form discloses no offence. If the Crown now wish to make an application to amend the information I shall of course give the most careful consideration to any submissions which may be made.

Objection allowed.

For the first accused:
DPR O'Beirne and *TR Johar*
Tilak R Johar, Nairobi

The second accused in person:

For the third accused:
Phineas Quass QC (of the English Bar) and *GR Mandavia*
GR Mandavia, Nairobi

For the fourth accused:
DN Khanna and *SC Gautama*
Shah & Gautama, Nairobi

For the Crown:
The Attorney-General, Kenya

Hasham Jiwa v Popatlal Premchand Vora trading as "Supreme Traders"

[1957] 1 EA 420 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	11 June 1957
Case Number:	1/1957
Before:	Sir Newnham Worley P, Bacon JA and Rudd Ag CJ (K)
Sourced by:	LawAfrica

(In the matter of an Intended Appeal to Her Majesty in Council.)

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[1] Practice – Appeal to Privy Council – Subject matter less than £500 *in value – Whether appeal lies as of right where value of subject matter is indirectly of* £500 *or over – The East African* (*Appeal to Privy Council*) *Order in Council,* 1951, *s.* 3 (*a*).

Editor's Summary

This was an application for leave to appeal to the Privy Council as of right under s. 3 (*a*) of the East African (Appeal to Privy Council) Order in Council, 1951. The value of the subject matter in dispute was Shs. 2,000/- and involved two promissory notes of Shs. 1,000/- each. This was well below the value of £500 necessary for the appeal to lie to the Privy Council as of right, but the applicant sought to bring himself within the second limb of para. (*a*) of s. 3 and alleged that the decision on this appeal would determine whether or not the applicant was liable upon a number of other promissory notes arising out of the same transaction and given at the same time, totalling Shs. 42,000/-. It was further submitted by the applicant that if the judgment stood it created a res judicata which would debar him from defending suits on the other promissory notes.

Held – while it is unusual to take into consideration the possibility of future suits, it is a relevant consideration if such suits will be affected as in this case by the doctrine of res judicata and accordingly

leave to appeal as of right would be granted.

Leave to appeal granted.

Cases referred to:

(1) *Popatlal Padamshi v. Shah Meghji Hirji* (1952), 19 E.A.C.A. 82.

(2) *Meghji Lakhamshi & Brothers v. Furniture Workshop*, [1954] 1 All E.R. 273; [1954] 2 W.L.R. 159.

Judgment

Sir Newnham Worley P: read the following judgment of the court: This is an application for leave to appeal as of right under s. 3 (*a*) of the East African (Appeal to Privy Council) Order in Council, 1951. It is conceded by the applicant that he has no grounds for asking for the grant of discretionary leave under para. (*b*) of the section.

This litigation started in the court of the resident magistrate, Nairobi, which decreed the respondent-plaintiff's suit for Shs. 2,000/- due on two promissory notes, with consequential orders for costs and interest. The applicant's appeals to the Supreme Court of Kenya and to this court were dismissed with costs and he now seeks to appeal to Her Majesty in Council. The matter in dispute on the appeal is well below the value of £500, but the applicant seeks to bring himself within the second limb of para. (*a*) and to show that the appeal involves indirectly some claim or question to or respecting some civil rights amounting to and exceeding that value. He alleges in fact that the decision on this appeal will determine whether or not he is liable upon a number of other promissory notes of a total value of Shs. 42,000/-.

Most of the relevant facts are set out in the judgment of this court dismissing the appeal. It is only necessary to add, for the sake of clarity, that all the promissory notes totalling Shs. 44,000/- were drawn by Sultan Ali in favour of the respondent

and in respect of the same transaction. They were to mature on different dates. There has not been (so far as we are aware) any assignment of any of these notes; nor has any suit been instituted in respect of any of the other notes though it would appear from the affidavit of the respondent filed in this application that it is his intention to sue on them if the intended appeal fails, and the notes are not met.

The general rules by which this court must be guided in determining whether leave should be granted under para. (*a*) were considered at length in *Popatlal Padamshi v. Shah Meghi Hirji* (1) (1952), 19 E.A.C.A. 82, and by the Judicial Committee in *Meghji Lakhamshi & Brothers v. Furniture Workshop* (2) [1954], 2 W.L.R. 159. In that case their lordships said, *inter alia*, that they did not intend to imply any doubt as to the correctness of the decision in *Popatlal Padamshi's* case. Briefly stated the rule is that the judgment is to be looked at as it affects the interests of the party who is prejudiced by it and who seeks to relieve himself from it by appeal.

The applicant says that he is affected to the extent of the whole Shs. 44,000/- if the judgment stands as it creates a res judicata which would debar him from successfully defending suits on the other promissory notes.

The sole issue on the appeal in this court was whether there was any evidence on which the trial court could have found, as it did, that Sultan Ali had express authority of the applicant to sign the notes. The issue of agency has been decided against him and could not be reagitated in any future suit on the notes by reason of s. 7 of the Civil Procedure Ordinance.

Mr. Kapila for the respondent has contended that there can be no res judicata because, in another suit, it would be open to the applicant to lead other evidence, perhaps that of Sultan Ali himself, to show that the requisite authority to sign did not exist.

We think, however, that in the circumstances of this case, the notes having been given at one and the same time and in respect of the one transaction, the applicant would be barred in limine by the plea of res judicata from calling such evidence.

It is of course unusual to take into consideration the possibility of future suits, but it is a relevant consideration if such suits will be affected by the doctrine of res judicata. As we are of opinion that such is the position in the instant case, we give leave to appeal as of right.

Under s. 7 of the Order in Council, we direct that the applicant do pay into court the decretal amount with all accrued interest thereon within ten days of this order and that the respondent shall be at liberty to withdraw the same on his giving to the registrar good and sufficient security to the satisfaction of the registrar for the due performance of such order as Her Majesty in Council shall think fit to make on this appeal.

Leave to appeal granted.

For the applicant:
JM Nazareth QC and *A Ishani*
Ishani & Ishani, Nairobi

For the respondent:
DV Kapila
DV Kapila, Nairobi

Musembi s/o Kilonzo and another v R

[1957] 1 EA 422 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	9 May 1957
Case Number:	37/1957
Before:	Sir Ronald Sinclair V-P, Briggs and Bacon JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Edmonds, J

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[1] Criminal law – Murder – Express threat to kill by deceased – Provocation – Misdirection – Whether judge would have convicted on proper direction.

Editor's Summary

The appellants were convicted of murder when attempting to arrest the deceased who had previously threatened to kill the second appellant and his wife if the former did not produce a certain scarf. The appellants who were armed respectively with a panga and an axe then advanced on the deceased with the intention of arresting him. The deceased took to his heels, pursued by the appellants and others. During the chase the deceased threw a knife at the first appellant but retained a kiboko which he used against the first appellant. The first appellant then struck the deceased at least twice with his panga inflicting the injuries which caused death. The trial judge held that the first appellant was the provoker when he advanced towards the deceased armed with a lethal weapon and with intent to arrest him. There was nowhere in the judgment a finding that the appellants in fact intended to use unreasonably violent force.

Held–

(i) the appellants were lawfully empowered to arrest the deceased and the trial judge's approach to the legal effect of the facts was erroneous at the outset and in consequence he was prevented from viewing the facts in the light of the relevant law;

(ii) this was a case where, had the trial judge viewed the facts in the light of the relevant law, it was by no means certain that he would have convicted the appellants.

Appeal allowed.

No cases referred to in judgment

Judgment

Bacon JA: read the following judgment of the court: The appellants, together with two other men who were acquitted, were jointly tried by the Supreme Court of Kenya for murder. The appellants, having

each been convicted of that offence, appealed to this court. We allowed their appeal, set aside the convictions and sentences and ordered that they be set at liberty forthwith. We now give our reasons for so doing.

The deceased died in the afternoon of August 26, 1956, by reason of cerebral contusion following wounds inflicted over his skull by the first appellant by means of a panga. The facts relating to the occurrence and to the events immediately preceding it were found by the learned trial judge as follows (the first and second appellants being the first and second accused respectively mentioned in the judgment):

> "The general facts, which are not in dispute, are that in the afternoon of this day the deceased arrived at the homestead of Nzioka s/o Nzioki, who was not called as a witness, where the four accused and others were drinking beer. The deceased thereupon demanded of Wambua, the second accused, that he produce a certain scarf and threatened to kill him and his wife if he did not do so immediately. The second accused left and returned later with an axe. He and the first accused, who was armed with a panga, then advanced upon the deceased, who threw a piece of firewood at the first accused. Second accused called upon the men present to assist him in arresting and handing over the deceased to the police. The deceased took to his heels, pursued by all four accused with the first accused in the van. During the chase the deceased, at least once, turned upon the first accused and aimed a blow at him with his kiboko. The first accused

> was then seen to strike the deceased at least twice with his panga. The deceased fell. He was at once pounced upon by the third accused who, after calling for rope, bound the deceased's hands. Soon after it was discovered that the deceased was dead. Those briefly are the undisputed facts which I accept as established . . . There is no evidence that the second accused struck any blow . . . I find as a fact that it was the first accused who caused all the cut wounds and killed the deceased . . . I am quite satisfied as to the truth of the evidence of these girls and it establishes that the first accused did leave Nzioka's house after the arrival of the deceased. I am further satisfied on all the evidence that when the deceased arrived at Nzioka's house the first accused did not have a panga, but that he went and fetched one after hearing the threatening words of the deceased. The fact that he did so, is a significant factor affecting the question of the state of the first accused's mind . . . After throwing the piece of wood and the knife, neither of which struck the first accused, the deceased ran and was pursued . . . I have no doubt that it was not the intention of either of the first two accused to kill the deceased. I believe it was their intention to arrest him, but equally do I believe that it was their intention to use force if necessary to effect their purpose . . .
>
> "As I have already said, I believe it was the intention of the first two accused to use force in effecting the arrest of the deceased and to this end and for this purpose they armed themselves with the lethal weapons. From the behaviour of the deceased, from his words 'I am not afraid' in answer to the first accused's 'wait for me there', from his act in throwing a piece of wood and a knife at the first accused, from the fact that he still retained his kiboko, and used it upon the first accused, and from his earlier threatening words, it is reasonable to infer, as I do infer, that in arming themselves those two accused realised that the arrest of the deceased could not be achieved other than by the use of force. From the fact that they retained their weapons, even after the deceased had thrown away his only lethal weapon, a knife, it may be judged that it was the intention, if force was necessary to arrest the deceased, of both accused to use their weapons."

At the trial there was an issue as to whether alleged intoxication had deprived either or both appellants of the capacity to form an intent to kill or to inflict grievous harm. The learned judge found that neither of them was influenced by drink to that extent. No question as to that finding arose on this appeal.

Another matter urged by the defence was provocation. We propose to dispose of that matter in passing, before turning to what we regard as the decisive aspect of the case. We first cite the following passage from the judgment:

> "It is suggested by the defence that the provocation was twofold, the throwing by the deceased of a piece of wood and a knife at the first accused and the two blows from the kiboko. If anyone was the provoker at this stage it was the first accused, who accompanied by the second accused, both being armed with lethal weapons, was advancing upon the deceased, intent upon arresting him."

Thereafter the learned judge proceeded to consider the first appellant's violent reaction to those assaults on him by the deceased as though this had been an ordinary case of attack and counter-attack. With respect, we think that the whole of that passage in the judgment was based on a misconception of the respective positions in law of the appellants and the deceased. The question of which it seems that the learned judge had lost sight was as to whether the appellants were lawfully entitled to arrest the deceased. To say of the first appellant that he was "the provoker at this stage" was tantamount to saying that he was acting unlawfully in advancing on the deceased at all. Having thus, as we think, built upon a false premise, the learned judge's conclusions on the issue of provocation were not in our opinion sound. Indeed the very introduction of that issue served only to obscure the true view of the case.

We next record the chain of reasoning by which the learned judge arrived at his decision to convict the appellants of murder.

Having disposed of the pleas relating to intoxication and provocation as regards the first appellant (which at a later stage he did as regards the second appellant also), the learned judge arrived at the point where (as already quoted) he said:

> "I believe it was their intention to arrest him, but equally do I believe that it was their intention to use force if necessary to effect their purpose."

He then said this:

> "A man must be taken to expect the natural consequences of his act. The natural consequences of the first accused's act in striking the deceased on the head with his panga was that it would at least cause grievous harm. At law he is guilty of murder."

The learned judge then referred to the need to consider the doctrine of common intent with regard to the case of the second appellant. He then said:

> "There may be some question as to whether the attempt to arrest the deceased was an unlawful purpose. But an intention to use force, and greater force than was reasonable in the circumstances, was certainly unlawful."

That was the only moment in the course of his judgment when the learned judge referred to the question as to whether the appellants were lawfully entitled to arrest the deceased. Without answering it, he thus passed to what, with respect, we must describe as a confusing reference to "an intention to use force, and greater force than was reasonable"; for nowhere in the judgment is there a finding that the appellants in fact intended to use unreasonably violent force. Next came the passage already quoted, commencing "As I have already said, I believe it was the intention . . ." Immediately after that came the concluding lines:

> "In other words, I find that the use by the one accused or the other, or both, of a lethal weapon upon the deceased and the natural consequence of his murder, was a probable consequence of the prosecution of their purpose to arrest the deceased forcibly. The second accused is, therefore, in common with the first accused, responsible for the killing of the deceased."

Our respectful criticism of the judgment as a whole may be summed up by saying that the learned judge's approach to the legal effect of the facts was erroneous at the outset. Having, so to speak, started along the wrong path, he was led astray into a region where obscurity prevailed: having arrived at his findings of fact (though, not entirely, we think, without inconsistency) he was thus prevented from viewing them in the light of the relevant law. In our opinion the correct approach was as follows.

Shortly before his death the deceased uttered an express threat to kill the second appellant and the latter's wife if the second appellant did not immediately produce a certain scarf.

By s. 219 of the Penal Code of Kenya (as amended) the utterance of that threat was a felony.

Sub-section (1) of s. 33 of the Criminal Procedure Code provides as follows:

> "Any private person may arrest any person who in his view commits a cognizable offence, or whom he reasonably suspects of having committed a felony."

The appellants were thereby lawfully empowered to arrest the deceased. How did the law entitle them to go about it? The answer is to be found in s. 19 of the Penal Code, which provides as follows:

> "Where any person is charged with a criminal offence arising out of the lawful arrest, or attempted arrest, by him of a person who forcibly resists such arrest or attempts to evade being arrested, the court shall, in considering whether the means used were necessary, or the degree of force used was reasonable, for the apprehension of such person, having regard to the gravity of the offence which had been or was being committed by such person and the circumstances in which such offence had been or was being committed by

such person.”

In order to apply that section we must first examine the evidence as to the gravity of the deceased's offence and the circumstances in which he committed it. The offence itself – apart altogether from the attendant circumstances – was clearly regarded by the law as very serious: it was a felony punishable by imprisonment for ten years. But it was also, to the knowledge of both appellants, not merely an offence of technical or extrinsic gravity but one which constituted an immediate menace to the very lives of the second appellant and his wife. Moreover it could only be understood by the second appellant as laying down a condition which it was impossible for him to fulfil in order to obtain a withdrawal of the threat: he was at once to hand over to the deceased a certain piece of clothing which was not his (the second appellant's) or his wife's property and of which neither of them was in possession. Again, it was clear from the appellant's extra-judicial statements and from their evidence at the trial that on the day before his death the deceased had also committed an assault, knife in hand, on the second appellant, and that, on the afternoon of his death, he was not only in a truculent and aggresive frame of mind but was armed with the knife and with a kiboko. Thus all the circumstances plainly indicated that to arrest the deceased would be a dangerous undertaking. Nevertheless, it was not only lawful but also, for personal reasons, necessary to arrest him.

Next, it was clearly justifiable for the appellants to arm themselves for that purpose. The learned trial judge said:

> "I believe it was the intention of the first two accused to use force in effecting the arrest of the deceased and to this end and for this purpose they armed themselves with lethal weapons."

We respectfully agree, but we add that they were entitled to go armed against the most probable contingency, namely that the deceased would resort to dangerous violence. According to the two female witnesses (P.W. 4 and 5), as to whose truthfulness the learned judge said he was "quite satisfied", the second appellant tried at first to obtain a knife; "he appeared apprehensive," said one witness; "he appeared to be frightened," said the other. On being told that there was no knife he found and picked up an axe. The first appellant took a panga.

In the circumstances we do not think that it could properly be inferred that the appellants, thus armed, embarked on their lawful undertaking with any unlawful intent. To infer that their intent was to cause grievous harm would be to close one's eyes to the right which the law gave them to carry lethal weapons when tackling a dangerous criminal (as they were entitled to regard him) who to their knowledge was lethally armed and likely to use his arms against them.

We now come to the culmination of the affair. We cannot say that, had the learned trial judge reached that point by way of the afore-mentioned stages, he would not have acquitted the appellants. Looking, with those considerations in mind, at what happened when the arrest was actually attempted, one sees that the deceased in fact turned on the appellants, threw his knife at one of them and lashed out with his kiboko. Both were eminently dangerous weapons in his hands. He lost his knife, it is true, but he retained the kiboko and was still calculated at least to inflict serious hurt, perhaps to maim, and possibly even to kill. It was, we think, a case in which there is considerable doubt as to what the learned trial judge's decision would have been if he had thought of the appellants, not as men dangerously armed in pursuit of another, but as men lawfully armed and engaged in the lawful business of effecting the arrest of the deceased.

Accordingly we considered that the convictions could not be upheld.

Appeal allowed.

For the appellants:
EP Nowrojee
EP Nowrojee, Nairobi

For the respondent:
KC Brookes (Crown Counsel, Kenya)
The Attorney-General, Kenya

Joseph Mbebi s/o Mati and others v R

[1957] 1 EA 426 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	11 February 1957
Case Number:	389/1956
Before:	Sir Kenneth O'Connor CJ and Rudd J
Sourced by:	LawAfrica

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[1] Criminal law – Receiving – No direction as to onus and quantum of proof – Necessity of corroboration of evidence of thief.

[2] Criminal law – Procedure – Irregularity – Prosecutor addressing court when not entitled to do so – Whether irregularity fatal – Criminal Procedure Code, s. 161 *and s.* 211 (*K.*).

Editor's Summary

The appellants were convicted in the resident magistrate's court at Nairobi on a charge of receiving stolen property contrary to s. 317 (1) of the Penal Code. The charge covered two separate transactions: in one, the first and third appellants (Joseph and Gicharu) were jointly charged with receiving ten bags of cement knowing them to have been stolen from one Nathan who was convicted and sentenced on a charge of theft of twenty-five bags of cement and in the other, Mbugwa, the second appellant was charged with receiving fifteen bags of cement under similar circumstances from the same person. In both these transactions the question whether or not the appellant concerned knew that the cement was stolen was crucial but the facts and the circumstances of each transaction were not similar. The trial magistrate made a finding in general terms in respect of all the appellants collectively. He did not consider separately the facts and circumstances of the case as they related to each of the appellants, nor did he make separate findings as regards each of them. There was no direction, except an oblique reference, to the necessity for corroboration of the evidence of the thief. The three appellants appealed to the Supreme Court and the three appeals were heard jointly. The other points argued at the appeal were that (*a*) notwithstanding that the appellants did not call any witness the prosecutor was allowed to address the court at the close of the case and (*b*) the magistrate did not direct himself as to the onus and quantum of proof.

Held–

(i) the trial was unsatisfactory in that the case against each of the appellants was not considered with sufficient care and was not sufficiently distinguished as regards the issues and the evidence admissible against him.

(ii) the prosecutor's address to the court at the close of the case notwithstanding that the defence did not call any witness was contrary to s. 161 and s. 211 of the Criminal Procedure Code, but though this was an irregularity in procedure the court would not have been prepared to allow the appeals on this ground alone.

(iii) the magistrate gave himself no direction on the question of onus and quantum of proof required. *R. v. Abramovitch,* 11 Cr. App. R. 45, and *R. v. Garth,* [1949] 1 All E.R. 773; 33 Cr. App. R. 100 applied.

Appeals allowed. Convictions quashed and sentences set aside.

Cases referred to:

(1) *R. v. Abramovitch,* 11 Cr. App. R. 45.

(2) *R. v. Garth,* [1949] 1 All E.R. 773; 33 Cr. App. R. 100.

Judgment

Sir Kenneth O'Connor CJ: read the following judgment of the court: The appellants in Criminal Appeals 389 and 392 of 1956 and Criminal Appeal 10 of 1957 all appealed from convictions in the resident magistrate's Nairobi Criminal Case 1666 of 1956 of receiving stolen property contrary to s. 317 (1) of the Penal Code. We shall refer to them as appellant No. 1, No. 2 and No. 3 respectively.

Criminal Appeals 389 and 392 of 1956 were consolidated and heard together. The appellant No. 3 was not present at that time and for this reason the hearing of his appeal could not be consolidated with the consolidated hearing of the other two, but when he ultimately appeared before this court he said that he would adopt the arguments which had been put forward on behalf of the appellants in the consolidated appeals and had nothing to add. This judgment therefore applies to all three appeals as if they had been consolidated.

Four persons appeared before the learned resident magistrate on a charge containing three counts. The first accused (Nathan) pleaded guilty on the first count of the charge to theft of twenty-five bags of cement, the property of his employers, the Mowlem Construction Company Ltd. He was convicted on his plea and sentenced, after which he gave evidence against the appellants. He has not appealed.

The first appellant (Joseph) was the third accused in the lower court. The third appellant, Gicharu, was the second accused in the court below. Gicharu and Joseph were jointly charged with receiving ten bags of cement knowing them to have been stolen.

The second appellant, Mbugwa, was the fourth accused in the court below. He was charged with receiving fifteen bags of cement knowing the same to have been stolen.

Each of the appellants pleaded not guilty to the count preferred against them.

The transactions between Nathan and the second appellant, Mbugwa, were quite separate from and unconnected with the transaction between Nathan and the first and third appellants, Joseph and Gicharu. In both the transactions the question as to whether or not the appellant concerned knew that the cement was stolen was crucial, but the facts and circumstances of each transaction were by no means exactly similar.

According to the evidence of Nathan, he took the twenty-five bags of cement which he had stolen, in his employers' lorry, to Makadara to sell them to anyone he could find who would buy them. First he asked Gicharu, the third appellant, if he wished to buy cement. He said that he did not. Nathan then went to the shop of Mbugwa. Mbugwa agreed to buy fifteen bags of cement at Shs. 7/- a bag and these were unloaded from the lorry, which was some distance away, and taken into Mbugwa's shop. Payment was to be made on the following day. There was no evidence that Mbugwa saw the lorry.

Nathan was then approached by Gicharu who had apparently found a purchaser Gicharu said that there was a man who wished to buy cement. Nathan went to a building site and saw Joseph who agreed to buy ten bags of cement for which (according to Nathan) Gicharu paid Shs. 70/-, and the cement was delivered then and there from the lorry. Nathan said that Gicharu and Joseph must have seen the lorry which was marked "Mowlem" in letters a foot long.

There was evidence that the proper price of the cement was 14/- a bag.

Gicharu, in his defence, adopted a statement which he had previously made to the police to the effect that the driver of a lorry had accosted him asking him whether he wanted to buy cement. He had said "No," but had taken the driver to where Joseph was building a house and Joseph had bought ten bags for Shs. 100/-. He (Gicharu) did not know that the cement was stolen.

Joseph said that he paid Gicharu Shs. 100/- for ten bags and Gicharu gave the money to the driver and promised to let him (Joseph) have a receipt, which he had demanded. He did not know that the cement has stolen and thought it belonged to Gicharu. He (Joseph) usually paid Shs. 12/40 a bag for cement.

Mbugwa said that he was a mason and had bought the cement at what he thought was a low price (Shs. 7/-) for his employer. He thought the usual price was Shs. 10/- a bag.

In our opinion, this was a case in which each of the accused was entitled to have the facts and circumstances of the case in so far as they concerned him, considered distinctly and separately on their own merits. Separate findings should have been made as regards each of the appellants. The learned trial magistrate did not do this.

His finding was in general terms and reads as follows:

> "I believe the evidence of the first witness (the thief) and find corroboration of it in that of the other prosecution witnesses, and in the statements of all the accused and in the evidence of the third and fourth accused.
>
> "I am quite satisfied that all the accused must have seen the distinctly marked 'Mowlem' and that added to the low price admittedly paid by them for the cement leaves me in no reasonable doubt that all the accused received the cement well knowing or having reasonable grounds of believing that it was stolen."

The reference to the distinctly marked "Mowlem" is to the lorry used by the first accused, but there was no evidence that the second appellant (Mbugwa) ever saw the lorry and no evidence that any of them could read English. No consideration was paid in the judgment to the fact that the first appellant, Joseph, claimed to have demanded and was promised a receipt. No finding was made as to the price actually paid by the first appellant. There was no direction except an oblique reference to the necessity for corroboration of the evidence of the thief. The thief said that he did not tell any of the appellants that the cement was stolen. We find the reference to corroboration too vague in the circumstances of this case.

There was an irregularity in procedure, in that the prosecutor was allowed to address the court at the close of the case, notwithstanding that the defence did not call any witnesses other than the accused persons. This was contrary to s. 211 and s. 161 of the Criminal Procedure Code. However, we would not have been prepared to allow the appeals on this ground alone.

In our opinion, the trial of this was not satisfactory. The case against each of the appellants was not considered with sufficient care and was not sufficiently distinguished as regards the issues and the evidence admissible against the several appellants.

The learned magistrate gave himself no direction on the lines of *R. v. Abramovitch* (1), 11 Cr. App. R. 45 as explained in *R. v. Garth* (2), 33 Cr. App. R. 100 and drew an erroneous inference as regards one appellant and a possibly erroneous inference as regards the others from the marking on the lorry.

In the circumstances, we think the convictions cannot stand. We allow the appeals and quash the convictions and sentences.

Appeals allowed. Convictions quashed and sentences set aside.

For the appellants:
AR Kapila and *CMG Argwings-Kodhek*
CMG Argwings-Kodhek, Nairobi

For the respondent:
GP Nazareth (Crown Counsel, Kenya)
The Attorney-General, Kenya

Isiah M'Mwendwa s/o M'amunde v R

[1957] 1 EA 429 (SCK)

Division: HM Supreme Court of Kenya at Nairobi

Date of judgment:	9 September 1957
Case Number:	158/1957
Before:	Rudd Ag CJ and Connell J
Sourced by:	LawAfrica

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[1] Criminal law – Procedure – Recording of plea in subordinate court when accused admits charge – Accused an African – Necessity of recording as nearly as possible words used – Criminal Procedure Code, s. 205 (2) (*K.*).

Editor's Summary

The appellant, an African, was convicted on his own plea by the second class magistrate at Meru of offences under s. 15 (1) of the Traffic Ordinance, 1953, and under s. 24 (*a*) of the Transport Licensing Ordinance (Cap. 237). The magistrate recorded in the single word "guilty" the plea to both counts and after convicting the appellant sentenced him to a fine of Shs. 200/- or two months' imprisonment with hard labour on each count. The appellant thereupon appealed against the convictions and sentences. The questions considered at the hearing of the appeal were that although there were two counts on the charge sheet the magistrate recorded only a single plea in the form of the word "guilty" and that the charge sheet was not properly framed so as to disclose an offence on either of the two counts charged.

Held–

(i) to record a plea in the form of the word "guilty" is improper in the case of an African in view of the wording of s. 205 (2) of the Criminal Procedure Code; there appears to be no word in a vernacular native language which is exactly the same as the word "guilty" as used in a plea in English law and it is well settled in Kenya that a plea from an African should not be recorded by the term "guilty," but that it should be recorded as nearly as possible in the words used by the accused.

(ii) the charge sheet was not properly framed so as to disclose an offence on either count, the charges were completely bad and the convictions thereon were insupportable.

Appeal allowed. Convictions quashed and sentences set aside.

No cases referred to in judgment

Judgment

Rudd Ag CJ: read the following judgment of the court: The appellant was convicted on his plea by the second class magistrate's court at Meru of an offence under s. 15 (1) of the Traffic Ordinance, 1953, on the first count and of an offence under s. 24(*a*) of the Transport Licensing Ordinance, (Cap. 237), on the second count and sentenced to a fine of Shs. 200/- or two months' imprisonment with hard labour on each count. He appealed from convictions and sentences. On August 23, 1957, we allowed the appeal and set aside the convictions and sentences stating that reasons in writing would be given for the benefit of the trial magistrate.

The charges were in the following terms:

"First count. Permitting unlicensed vehicle on the road contrary to s. 15 (1) of the Traffic Ordinance, No. 39 of 1953.

"In that Isiah M'Mwendwa s/o M'Amunde, on April 9, 1957, at about 7 p.m. at Meru Township of the Central Province, did permit your pick-up H. 7624 on the road whilst such vehicle was not road licensed.

"Second count. Using motor vehicle contrary to the conditions under which the relevant licence was issued c/s. 24 (*a*) of the Transport Licensing Ordinance, Cap. 237, Laws of Kenya, 1948.

"In that Isiah M'Mwendwa s/o M'Amunde on April 9th, 1957, at about 7 p.m., at Meru Township, of the Central Province, did use your vehicle Pick-up H. 7624 for carriage of six passengers (excluding yourself, driver and turn-boy)."

The plea to both counts is recorded in the single word "guilty." Learned Crown counsel found himself unable to support the convictions.

In the first place although there were two counts on the charge sheet the magistrate appears to have recorded only a single plea. Further, he has recorded that plea in the form of the word "guilty," which is improper in the case of an African. Section 205 (2) of the Criminal Procedure Code reads as follows:

> "If the accused admits the truth of the charge, his admission shall be recorded as nearly as possible in the words used by him, . . ."

There appears to be no word in a vernacular native language which is exactly the same as the word "guilty" as used in a plea in English law and it is well settled in Kenya that a plea from an African should not be recorded by the term "guilty," but that it should be recorded as nearly as possible in the words used by the accused; but apart from the unsatisfactory nature of the record of the plea the charge sheet is not properly framed so as to disclose an offence on either of the counts. Section 15 of the Traffic Ordinance refers to the possession or use of a motor vehicle on a road and does not refer to permitting a motor vehicle to be on a road. The first count does not even state what the accused is alleged to have permitted and is completely bad.

As regards the second count we would point out in the first place that the section should have been s. 24A not s. 24 (*a*) of the Transport Licensing Ordinance. This section reads as follows:

> "Any person who drives or uses a goods vehicle, motor vehicle or ship in contravention of any of the provisions of this Ordinance, or being the owner of such vehicle or ship permits it to be so used, and any driver or other person in charge of any vehicle or ship, in respect of which any class of licence has been granted under this Ordinance who drives or uses such vehicle or ship in contravention of such licence, or being the owner of such vehicle or ship permits it to be so used, shall be guilty of an offence against this Ordinance."

It is quite clear that the second count is not framed in terms sufficient to show an offence under that section. We are quite unable to say what were the material allegations intended to be made against the appellant in that count which does not specify what provision of the Ordinance is alleged to have been contravened. So far as this court is aware the mere carriage of six passengers and the owner, driver and turn-boy does not constitute any offence unless the carriage is for hire or reward in contravention of the terms of the licence under s. 4 (1) (*b*). The charges were completely bad and it follows that the convictions are absolutely insupportable.

For the benefit of the magistrate and police prosecutors a proper form of charge on the second count would be on these lines:

Using motor vehicle contrary to the conditions under which the relevant licence was issued contra s. 4 (1) (*b*) and s. 24A of the Transport Licensing Ordinance, (Cap. 237), Laws of Kenya, 1948:

In that Isiah M'Mwendwa s/o M'Amunde on April 9, 1957, at about 7 p.m. at Meru Township, of the Central Province, did use your vehicle Pick-up H. 7624 for carriage of six passengers for hire or reward.

Appeal allowed. Conviction quashed and sentence set aside.

The appellant did not appear and was not represented.

For the respondent:
JS Rumbold (Crown Counsel, Kenya)

The Attorney-General, Kenya

Maganbhai Manorbhai Patel v R

[1957] 1 EA 431 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	8 March 1957
Case Number:	24/1956
Before:	Sir Kenneth O'Connor CJ and Forbes J
Sourced by:	LawAfrica

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[1] Criminal law – Fraudulent false accounting – Meaning of "privy to making" – Penal Code, s. 325 (*b*) – (*K.*).

Editor's Summary

The appellant was employed at Mombasa by the East African Railways and Harbours as an acceptance clerk and part of his duties was to accept consignment notes of goods to be transported on the Railway, to make the necessary entries in each consignment note, and to pass it to an invoice clerk who prepared an invoice according to the particulars entered in the consignment note. The appellant had falsified a consignment note by altering the figure of 350 bags consigned to 200, and by altering the weight of the consignment from 78,400 lbs. to 44,800 lbs. Working on these altered figures the invoice clerk, to whom the consignment note had been passed, made out an invoice for Shs. 2,060/80 instead of Shs. 3,606/40, the intention of the appellant being that the Railway should be defrauded of the difference. The appellant was accordingly charged and convicted on two counts under para. (*a*) and para. (*b*) respectively of s. 325 of the Penal Code, namely: (1) falsifying the consignment note, and (2) being "privy to the making" of a false invoice by the invoice clerk.

The appellant was sentenced to two years' imprisonment with hard labour on each of the two counts, the sentences to run consecutively, and in the case of the first count, thirty-one previous offences were also taken into consideration. He appealed against both the convictions and sentences, but at the hearing abandoned the appeal on the first count and proceeded with the appeal on the second count. The appellant contended that: (1) he was not "privy to the making" (within s. 325 (*b*) of the Penal Code) of a false invoice by the invoice clerk and (2) that if he was, the act which he did was the same act for which he has been punished under count 1 and that he should not have been punished twice for the same act but concurrent sentences should have been imposed. The Crown in support of the conviction argued that the appellant by passing on an altered consignment note to the invoice clerk, knowing that the invoice would be prepared on the basis of the altered figures, (*a*) was "privy to the making" of a false entry in the invoice with intent to defraud; and (*b*) committed a separate act of passing on the consignment note. The Crown conceded, however, that concurrent sentences should have been passed. There was no evidence of any collusion between the appellant and the invoice clerk, nor was there anything to show that the invoice when prepared ever came back to the appellant or that he had actual knowledge that the false figures had been inserted in it.

Held–

(i) in the circumstances of the case, the appellant was not "privy to the making of a false entry" in the invoice;

(ii) a sentence of two years' imprisonment with hard labour on the first count (particularly having regard to the fact that thirty-one other offences were taken into account) was manifestly inadequate.

Appeal allowed on the first count. Sentence increased on the second count.

No cases referred to in judgment

Judgment

Sir Kenneth O'Connor CJ: read the following judgment of the court: The appellant was convicted on October 1, 1956, on two counts of fraudulent false accounting contrary to para. (*a*) and para. (*b*) respectively of s. 325 of the Penal Code. It was proved that the appellant was employed by the East African Railways and Harbours in Mombasa as an acceptance clerk. Part of the appellant's

duties was to accept consignment notes of goods to be transported on the railway, to make the necessary entries in each consignment note, and to pass it to an invoice clerk who prepared an invoice according to the particulars entered in the consignment note.

The appellant was convicted of falsifying a consignment note by altering the figure of 350 bags consigned to 200, and by altering the weight of the consignment from 78,400 lbs. to 44,800 lbs. As a result, an invoice, based on the altered figures, was made out by an invoice clerk, to whom the consignment note had been passed, for Shs. 2,060/80 instead of Shs. 3,606/40 which should have been charged, the intention of the appellant being that the railway should be defrauded of the difference. The appellant was convicted on count 1 of falsifying the consignment note and (having asked that thirty-one previous offences be taken into account) was sentenced to two years' imprisonment with hard labour on this count. The appeal against this conviction and sentence was abandoned at the hearing.

The appellant was also convicted on count 2 of being "privy to the making" of an invoice by the invoice clerk, the invoice being based upon the false figures inserted by the appellant in the consignment note. He was sentenced to a further two years' imprisonment with hard labour on count 2 and it is against this conviction and consecutive sentence that he now appeals.

Mr. O'Brien Kelly for the appellant argued:

(*a*) that the appellant was not "privy to the making" (within s. 325 (*b*) of the Penal Code) of a false invoice by the invoice clerk; and

(*b*) that if he was, the act which he did was the same act for which he has been punished under count 1 (i.e. falsifying the consignment note so as to lead to the false invoice being prepared) and that he should not have been punished twice for the same act, but concurrent sentences should have been imposed.

Mr. Webber for the Crown, argued that the appellant by passing on an altered consignment note to the invoice clerk, knowing that the invoice would be prepared on the basis of the altered figures, (*a*) was "privy to the making" of a false entry in the invoice with intent to defraud; and (*b*) committed a separate act of passing on the consignment note. He had, therefore, been rightly convicted on the second count. Mr. Webber agreed, however, that concurrent sentences should have been passed.

There was no evidence of any collusion between the appellant and the invoice clerk and nothing to show that the invoice clerk did not act innocently in working on the basis of the appellant's figures. Neither was there anything to show that the invoice when prepared ever came back to the appellant or that he had actual knowledge that the false figures had been inserted in it.

In the circumstances of this case, we are not prepared to hold that the appellant was "privy to the making of a false entry" in the invoice. No doubt, he knew that an entry, based on his false entry in the consignment note, would be made by the invoice clerk and intended that it should be made. But this is not, we think, what is meant by "privy to the making" of a false entry within s. 325 (*b*). Intention that a thing should be done is not equivalent to knowledge that it is or has been done. In our opinion, the appellant might perhaps have been charged and convicted of himself making a false entry in the invoice through the instrumentality of an innocent agent (the invoice clerk); but he could not be properly convicted of being "privy to the making" of a false entry in the invoice by the invoice clerk in the absence of any evidence that he knew that the invoice clerk had made the entry.

In fact only one act was proved against the appellant i.e. the falsification of the consignment note which he did with the fraudulent intention that the invoice should be erroneously made out by someone else.

The conviction and sentence on count 2 must be set aside.

The conviction on count 1 is maintained. We think that a sentence of two years' imprisonment with hard labour on this count (particularly having regard to the fact

that thirty-one other offences were taken into consideration) is manifestly inadequate, and we set that sentence aside and substitute for it a sentence of three years' imprisonment with hard labour.

Appeal allowed on the first count. Sentence increased on the second count.

For the appellant:
J O'Brien Kelly
J O'Brien Kelly, Nairobi

For the respondent:
JP Webber (Crown Counsel, Kenya)
The Attorney-General, Kenya

Naurang Singh s/o Hukam Singh v R
[1957] 1 EA 433 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	3 June 1957
Case Number:	122/1957
Before:	Rudd Ag CJ and Forbes J
Sourced by:	LawAfrica

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[1] Criminal law – Forgery – Whether unauthorised application of the official date stamp of a court on document alters its nature – Penal Code, s. 347 (*K.*).

[2] Criminal law – Practice – Irregularity – Matter prejudicial to accused in case file – Whether trial unsatisfactory.

Editor's Summary

The appellant was charged with forgery contrary to s. 347 of the Penal Code in that he, with intent to deceive, forged a judicial document. The appellant was the defendant in Civil Case No. 350 of 1957 of the court of the resident magistrate, Nakuru, and it appeared that the written statement of defence in the suit should have been filed by March 22, 1957, or it would have been out of time. The trial magistrate found that the defence was not in fact filed on March 22, 1957, but that the appellant took it to the general office of the court early on the morning of March 23 and then, in the absence of the clerks, stamped the document "22.3.57" with the official date stamp of the court and left the document lying on the table of a court clerk. He later informed the advocate for the plaintiff that the defence had been filed on March 22. The appellant was convicted and sentenced to three months imprisonment without hard labour. On appeal against both conviction and sentence, it was argued that there was an irregularity in the

trial in that the case file contained matter prejudicial to the appellant in connection with an application by the appellant for bail and that the trial magistrate must have seen the passage in question and may have been prejudiced by it; that the application of the date stamp did not change the nature of the document, and that it did not indicate that the document had been filed in court, as alleged in the particulars of the offence charged; and that there was no evidence on which the magistrate could reach the conclusion that the official stamp was applied with intent to deceive.

Held–

(i) this was not a case where the nature of the information in the case file was so highly prejudicial as to render the trial unsatisfactory; nor was there the slightest indication that the magistrate paid any attention whatever to the bail proceedings;

(ii) the application of the official date stamp to a written statement of defence is an alteration which, had it been authorised, would have the effect of indicating that the defence had been duly delivered at the court to a person authorised to accept it

on the date shown by the stamp; therefore, the document with the official stamp upon it was a false document as defined in s. 343 (*b*) of the Penal Code;

(iii) there was ample evidence on which the magistrate could reach the conclusion that the official stamp was applied with intent to deceive. Apart from the circumstances in which the document was stamped, there was the appellant's assertion to the plaintiff's advocate that the defence had been filed on March 22, 1957, the date shown on the stamp.

Appeal dismissed.

No cases referred to in judgment

Judgment

Rudd Ag CJ: read the following judgment of the court: The appellant was convicted at Nakuru on April 12, 1957, of the offence of forgery contrary to s. 347 of the Penal Code by the learned Resident Magistrate, Mr. H. A. Carr, and was sentenced to serve three months imprisonment without hard labour. He has appealed against the conviction and sentence.

The particulars of the offence charged were that the appellant

> "on or about March 23, 1957, at Nakuru in the Rift Valley Province, with intent to deceive forged a judicial document, to wit a written statement of defence in Nakuru Resident Magistrate Civil Case 350 of 1957, by affixing on the said document an official law court's date stamp purporting to show that the said document had been duly filed in the court of the resident magistrate, Nakuru, and stamped by an officer of the court, duly authorised in that behalf, well knowing that the said document had not been duly filed and stamped in the aforesaid manner."

The appellant was the defendant in the suit in question, and it appeared that the written statement of defence in the suit should have been filed by March 22 or it would have been out of time. The learned magistrate found that the defence was not in fact filed on March 22, but that the appellant took it to the general office of the law courts early on the morning of March 23 and there, in the absence of the clerks, stamped the document with an official law court date stamp using the date "22.3.57" and left the document lying on one of the clerk's tables; and that he later informed the advocate for the plaintiff that the defence had been filed on March 22.

The petition of appeal purports to set out five grounds of appeal, but only grounds three and four were argued at the hearing of the appeal. An additional ground of appeal was, however, added with the leave of the court, and it will be convenient to deal with this ground first.

This additional ground alleges an irregularity in the trial of the appellant in that matter prejudicial to the appellant appears on the case file in connection with an application by the appellant for bail, and that the trial magistrate must have seen the passage in question and may have been prejudiced by it.

We are not impressed with this ground. It is true that when the application for bail pending trial was heard by the Resident Magistrate, Nakuru, Mr. Goudie, it was stated and recorded on the file that there was an unsubstantiated report against the appellant and he had

> "approached junior officers of court and prepared to pay up to £100 for stamp mark";

and, further, that Mr. Goudie recorded that the appellant had approached him to discuss the case, and that

bail was refused “to ensure that there is no possibility of interference with witnesses.” It not infrequently happens, however, that a judge or magistrate must ignore some item of information regarding an accused which has come to his notice either before or in the course of a trial. Probably the commonest instance is where a “trial within a trial” is held and evidence of an alleged confession is rejected. It could, no doubt, happen that the nature of the information is so highly prejudicial as to render the trial unsatisfactory. In our opinion, however, that is not

the case here; neither is there the slightest indication that the learned trial magistrate paid any attention whatever to the proceedings for bail. The findings in the judgment are very properly based on the evidence that was given at the trial. Accordingly this ground of appeal fails.

As regards the third ground of appeal stated in the petition, Mr. O'Brien Kelly for the applicant argued that the application of the date stamp did not change the nature of the document which was a statement of defence, and that it did not indicate that the document had been filed in court, as alleged in the particulars of the offence charged.

Order 8 r. 18 of the Civil Procedure (Revised) Rules, 1948, provides that a defence is to be filed

> "by delivering the defence to the court for placing upon the record and by delivering a duplicate thereof at the address for service of the opposite party."

The words in the charge "duly filed in the court" therefore, in our opinion, must mean "duly delivered to the court for placing upon the record." The evidence before the magistrate was to the effect that the action of stamping a document by an authorised person signifies that the document was received and filed by an authorised person on the date shown – which, indeed, is what one would expect it to signify. The presence of the official date stamp on a written statement of defence accordingly indicates that the defence has been duly delivered at the court to a person authorised to accept it on the date shown by the stamp; and a statement of defence is of no effect until it has been filed. Accordingly, we are of opinion that the application of the official date stamp to a written statement of defence is an alteration which, had it been authorised, would have altered the effect of the document. We agree with the learned magistrate's finding on the point. The document with the official stamp upon it is accordingly a false document as defined in s. 343 (*b*) of the Penal Code.

As to the intent to deceive (ground four of the Petition of Appeal), we are of the opinion that there was ample evidence on which the learned magistrate could reach the conclusion that the official stamp was applied with intent to deceive. Apart from the circumstances in which the document was stamped by the appellant and the fact that the wrong date, being the last date for the due filing of the document, was used, there was the appellant's assertion to the plaintiff's advocate that the defence had been filed on March 22, the date shown on the stamp.

Accordingly, these grounds of appeal also fail.

The question of severity of sentence was not argued, and in any case we do not consider that it was unduly severe.

The appeal is dismissed.

Appeal dismissed.

For the appellant:
J O'Brien Kelly
J O'Brien Kelly, Nairobi

For the respondent:
KC Brookes (Crown Counsel, Kenya)
The Attorney-General, Kenya

Mulchand Punja Shah v R
[1957] 1 EA 436 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	30 December 1957
Case Number:	440/1957
Before:	Sir Ronald Sinclair CJ and Rudd J
Sourced by:	LawAfrica

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[1] Criminal law – Illegal transportation of sugar – Forfeiture of vehicle used in commission of offence – Evidence as to identity of such vehicle necessary to entail forfeiture – Sugar Ordinance (*Cap.* 194), *s.* 4, *s.* 10 (1), *s.* 11 *and s.* 14 (*K.*).

Editor's Summary

The appellant transported by lorry nineteen bags of sugar from Nairobi, which is outside the Central Province, to his shop at Saba Saba in the Central Province which is declared to be a prohibited area under s. 14 of the Sugar Ordinance (Cap. 194). Such transportation of sugar is illegal under s. 4 of the Ordinance. The appellant was at the time driving the lorry but the lorry was not detained by the police and there was no evidence as to its identity or ownership. The resident magistrate, Thika, convicted the appellant and sentenced him to a fine of Shs. 750/- or imprisonment without hard labour for three months in default of payment. The magistrate also found that "the vehicle was used in the offence" and ordered it to be forfeited. The appellant appealed against conviction and sentence and also against the order forfeiting the lorry.

Held–

(i) a finding whether a vehicle was used in the commission of an offence must be in respect of a particular vehicle which has been satisfactorily identified by evidence or admissions at the trial, for instance by its registration number, so that there can be no reasonable doubt as to the vehicle to which the finding relates.

(ii) a finding which is uncertain in this respect is bad and cannot be effective so as to result in the forfeiture of the vehicle.

(iii) as the finding must be made at the trial any uncertainty cannot be cured by subsequent evidence of identity.

(iv) if there is uncertainty as to the identity of the vehicle there will probably be uncertainty as to its ownership and the court would then be unable to give consideration, as it must do under s. 11 of the relevant Ordinance, to the question whether the owner consented to, or was aware of, the use of the vehicle.

(v) as the trial magistrate undoubtedly took into consideration the heavy punishment which forfeiture of the lorry entailed when sentencing the appellant, and as the order forfeiting the lorry was set

aside, the amount of the fine imposed was manifestly inadequate. Fine increased to Shs. 1,500/-.

Appeal against conviction dismissed. Appeal against order of forfeiture allowed.

No cases referred to in judgment

Judgment

Sir Ronald Sinclair CJ: read the following judgment of the court: The appellant was convicted of importing sugar into a prohibited area without a permit contrary to s. 4 of the Sugar Ordinance (Cap. 194) and was sentenced to a fine of Shs. 750/- or imprisonment without hard labour for three months in default of payment. In addition the vehicle which the trial magistrate found was used in the commission of the offence was forfeited. We dismissed the appeal against conviction, but set aside the finding as to the vehicle used in the commission of the offence and, consequently, the forfeiture of the vehicle. We increased the fine of Shs. 750/- to one of Shs. 1,500/-, but maintained the sentence of imprisonment imposed in default of payment, namely three months' imprisonment without hard labour. We now give our reasons.

As to the appeal against conviction, there was ample evidence to support the finding of the trial magistrate and we could see no good reason for interfering with it.

It was established by the evidence that the appellant transported by lorry nineteen bags of sugar from Nairobi, which is outside the Central Province, to his shop at Saba Saba in the Central Province which is declared to be a prohibited area under the provisions of s. 14 of the Sugar Ordinance. This was a contravention of s. 4 of the Ordinance. The appellant was the driver of the lorry but the lorry was not detained and there was no evidence as to its identity or ownership. At the conclusion of his judgment the learned magistrate found "the vehicle was used in the offence" and ordered it to be forfeited.

Sub-s. (1) of s. 10 of the Ordinance provides that any police officer in any area of the colony to which the section is applied may stop and inspect any vehicle and, if such vehicle contains sugar, require the person in charge of the vehicle to inform him of the destination and source of origin of the sugar. If, after enquiry, the police officer is not satisfied that there has been no contravention of s. 3, s. 4 and s. 5 of the Ordinance he may take the vehicle, together with its contents, and the person in charge thereof to the nearest police station. Section 11, which is important, reads:

> "(1) Where any person is convicted of an offence, or of an attempt to commit an offence or of counselling or procuring the commission of an offence, under the provisions of this Ordinance and the court by which such person is convicted finds that any aircraft, vessel or vehicle was used or employed by such person in the commission, or to facilitate the commission, of the offence of which he is convicted, such aircraft, vessel or vehicle shall be forfeited to Her Majesty.
>
> "(2) Where any aircraft, vessel or vehicle is detained under the provisions of sub-s. (1) of s. 10 of this Ordinance and no person is, within seven days, charged with any offence specified in sub-s. (1) of this section, a magistrate shall, upon the written application of a police officer of or above the rank of inspector, inquire into the circumstances in which such aircraft, vessel or vehicle was detained and shall determine whether or not it was used for or employed in the commission, or attempted commission, of any such offence; and, if the magistrate finds that it was so used or employed, such aircraft, vessel or vehicle shall be forfeited to Her Majesty:
>
> "Provided that no forfeiture of any such aircraft, vessel or vehicle shall take place if, on the trial of any person mentioned in sub-s. (1) of this section or in any enquiry held under the provisions of sub-s. (2) of this section, the court finds that neither such owner nor any of his agents or servants consented to the use or employment of such aircraft, vessel or vehicle or was aware that it was being so used or employed."

Forfeiture of a vehicle may, therefore, occur in two ways: where a person has been convicted of an offence under the Ordinance and the court finds that the vehicle has been used or employed in the commission of the offence, or where on an enquiry held under the provisions of s. 11 (2), a magistrate finds that the vehicle detained under the provisions of s. 10 (1) has been used or employed in the commission of an offence under s. 3, s. 4 or s. 5. In neither case, however, shall a forfeiture take place if the court finds that neither the owner of the vehicle or any of his agents nor servants consented to the use or employment of the vehicle or was aware that it was being so used or employed.

A finding under the provisions of sub-s. (1) of s. 11 that a vehicle has been used or employed by the person convicted in the commission, or to facilitate the commission, of the offence, is not restricted to a vehicle detained under the provisions of s. 10 (1), as it is under the provisions of sub-s. (2) of s. 11, and we think it may be made in respect of any vehicle which has been used or employed in the commission, or to facilitate the commission, of the offence.

We think, however, that the finding must be in respect of a particular vehicle which has been satisfactorily identified by evidence or admissions at the trial, for instance by its registration number, so that there can be no reasonable doubt as to the vehicle to which the finding relates. In our view a finding

which is uncertain in this respect is bad and cannot be effective so as to result in the forfeiture of the vehicle. As the

finding must be made at the trial we do not think that any uncertainty can be cured by subsequent evidence of identity. If there is uncertainty as to the identity of the vehicle there will probably be uncertainty as to its ownership and the court would then be unable to give consideration, as it must under the section, to the question whether the owner consented to, or was aware of, the use of the vehicle.

In the instant case there was no evidence as to the identity of the vehicle used in the commission of the offence except that it was a lorry driven by the appellant; it was not detained by the police. In our opinion, therefore, the finding was bad for uncertainty and could not be maintained.

This was a serious offence which was aggravated by the conduct of the appellant. He failed to stop when signalled to do so by the police and later disregarded the orders of the police not to unload the sugar from the lorry. In sentencing the appellant the trial magistrate undoubtedly took into consideration the heavy punishment which forfeiture of the lorry entailed. For those reasons we thought that, the forfeiture of the lorry having been set aside, the amount of the fine imposed was manifestly inadequate.

Appeal against conviction dismissed. Appeal against order of forfeiture allowed.

For the appellant:
GR Mandavia
GR Mandavia, Nairobi

For the respondent:
GP Nazareth (Crown Counsel, Kenya)
The Attorney-General, Kenya

Velji Shahmad v Shamji Bros. and Popatlal Karman & Co
[1957] 1 EA 438 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	17 May 1957
Case Number:	7/1956
Before:	Connell J
Sourced by:	LawAfrica

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[1] Practice – Appeal from Subordinate Court – Proper Registry in which to file appeal – Meaning of "may" in O. 46 *r.* 9 *– Civil Procedure Ordinance, s.* 65 (2) (*K.*) *– Civil Procedure* (*Revised*) *Rules,* 1948 *O.* 46 *r.* 9 (*K.*).

Editor's Summary

With a view to an appeal from a ruling on costs given by the resident magistrate, Nairobi, on August 8,

1955, the advocate for the appellant applied for a certified copy of the ruling on August 10 and on September 27, 1955, sent a memorandum of appeal to the District Registry, Kisumu. Correspondence was exchanged between the advocate and resident magistrate, Nairobi, who on January 17, 1956, for the second time, refused to send the record to Kisumu and suggested that the appeal should be filed at Nairobi. On July 23, 1956, the original record was sent to Eldoret, pursuant to a direction by the registrar at Nairobi, that the appeal should be heard at Eldoret. The exact date when the memorandum of appeal was sent by the District Registry, Kisumu, to Nairobi was not established but it appeared to be between March 30 and July 23, 1956.

Section 65 (2) of the Civil Procedure Ordinance reads as follows:–

"Every appeal from a subordinate court to the Supreme Court shall be filed within the period of thirty days from the date of the decree or order appealed against:

"Provided, however, that such time as the registrar shall certify as having been requisite for preparation of and delivery to the appellant of a copy of the

> decree shall be excluded from the said period; and provided also that an appeal may be admitted out of time when the appellant satisfies the court that he had good and sufficient cause for not preferring the appeal within such period."

No such certificate was obtained nor did the appellant at the hearing satisfy the court that he had "good and sufficient cause" for not preferring an appeal within 30 days. According to O. 45 r. 9

> "an appeal from a decree or order of a subordinate court . . . to the Supreme Court may be filed in the District Registry within the area of which such subordinate court is situate."

The respondents, among other preliminary objections, argued that the appeal was lodged at the District Registry, Kisumu, which had no jurisdiction to entertain it as the decision was that of the resident magistrate, Nairobi; and that the appeal was filed out of time. The appellant contended that the word "may" used in O. 45 r. 9 was permissive and therefore it was in order for him to file the appeal at Kisumu.

Held–

(i) the memorandum of appeal was lodged out of time at Kisumu without the necessary certificate as required by the proviso to s. 65 (2).

(ii) the appellant had not satisfied the court there was good and sufficient cause for not preferring the appeal in time.

(iii) the appeal should have been lodged at Nairobi as being the only registry which had jurisdiction to entertain the appeal.

(iv) if the appeal was indeed ever "lodged" or officially entered at the registry at Nairobi, it was so lodged or entered nearly seven months out of time.

Preliminary objection upheld. Appeal dismissed.

Cases referred to:

(1) *Hasham Lalji v. Kotecha* (1940), 19 K.L.R. 20.

(2) *Collins v. Paddington Vestry* (1880), 5 Q.B.D. 368.

Judgment

Connell J: Mr. Gajera for the respondents has taken several preliminary objections to the circumstances under which this memorandum of appeal came to be lodged:

1. The appeal was lodged with the District Registry in Kisumu who had no jurisdiction to entertain it as the decision was that of the resident magistrate, Nairobi.
2. appeal was filed out of time.

Mr. Gajera cites O. 46, r. 9, Civil Procedure Rules:

> "An appeal from a decree or order of a subordinate court . . . to the Supreme Court may be filed in the District Registry *within the area* of which such subordinate court is situate."

Mr. Malik argues the word "may" is permissive and there is an end of the matter.

There are a number of examples given in Maxwell on the Interpretation of Statutes (9th Edn.), pp. 246–249 where it has been held that such expressions as "may," "shall be empowered," "may be exercised," in certain circumstances are to be construed as having a compulsory or imperative force. The test is well put at p. 249:

> ". . . whether there is anything that makes it the duty on whom the power is conferred to exercise that power."

Likewise at p. 250 where a statute confers an authority to do a judicial act, in a certain sense there would be here such a right in the public as to make it the duty of the justices to exercise that power: to put it in another way where the exercise of an authority is duly applied for by a party interested and having a right to make the

application, the exercise depends upon proof of the particular case out of which the power arises.

Now to my mind the word "may" in O. 46, r. 9, must be used in exactly one of those senses indicated in the passages I have quoted from Maxwell on the Interpretation of Statutes. It means one thing and one thing only and that is that any appeal from a subordinate court outside Nairobi must be filed in the appropriate district registry. To hold otherwise would simply subvert the whole rule, for it would mean that an advocate or appellant to suit their own convenience could file an appeal in Mombasa from a subordinate court in Kisii or Nairobi: the proposition has only to be stated to show its profound absurdity.

What happened was that on August 8, 1955, Mr. Le Gallais, resident magistrate, Nairobi, delivered a ruling on costs; on August 10 Mr. Ahmed applied for a certified copy of the ruling; fees were demanded on August 24 and a reminder sent on September 9, 1955; on September 9 Mr. Ahmed asks in two passages for certified copy of the "judgment"; these were sent on September 15, and Mr. Ahmed is again asked for fees; on September 26 Mr. Ahmed is again asked for fees; on October 5 Mr. Ahmed sends the fees; on September 27 Mr. Ahmed encloses memorandum of appeal for filing at the District Registry, Kisumu. On November 3 the resident magistrate, Nairobi, refuses to send original records and copies of proceedings to Kisumu and reminds Mr. Ahmed that the appeal should have been filed in Nairobi. On January 17, 1956, the resident magistrate again refuses to send the record to Kisumu and again suggests the appeal should be filed in Nairobi. On July 23, 1956, the original records are sent to Eldoret in pursuance of a direction by the registrar of Nairobi that the appeal be heard in Eldoret.

It does not appear on what exact date the District Registry, Kisumu, sent the appeal memorandum to Nairobi; it appears to be some time between March 3, 1956 (letter from Messrs. Veljee Devshi), and July 23, 1956 (letter from District Registry, Nairobi).

According to the view I have expressed therefore

1. No memorandum of appeal ever entered the Appeal Registry at Nairobi (if indeed it was ever formally and properly entered there) until at least seven months after the date of Mr. Le Gallais' ruling;
2. As admitted by Mr. Malik there is nowhere on the record or records any certificate by the registrar certifying the time requisite for preparation of and delivery to the appellant of the certified copy of the "judgments" which were only in fact dispatched by the resident magistrate, Nairobi, on September 15, 1955;

the memorandum of appeal therefore was filed in Kisumu after the period of thirty days required by s. 65 (2) of the Civil Procedure Ordinance and without a certificate certifying time requisite for preparation of and delivery to the appellant of a copy of decree as required by the proviso to s. 65 (2) of the Civil Procedure Ordinance.

Nor has the appellant attempted to satisfy the court under the latter proviso that he had "good and sufficient cause" for not preferring an appeal within thirty days. On April 26, 1956, Messrs. Veljee Devshi wrote to the registrar, Nairobi, asking him to dismiss the appeals under O. 41, r. 31 for want of prosecution. In my view the registrar should then and there have obtained the directions of a judge under the same rule; instead of doing so he transferred "the appeal for hearing" to Eldoret.

In my view the appeal must be dismissed on the preliminary points for these reasons:

1. The memorandum was lodged out of time in Kisumu without the necessary certificate as required by the proviso to s. 65 (2);
2. The appeal should have been lodged in Nairobi as being the only registry which had jurisdiction to

entertain the appeal;

3. If the appeal was indeed ever “lodged” or officially entered into the registry at Nairobi it was so lodged or entered nearly seven months out of time;

4. The appellant has never satisfied the court there was good and sufficient cause for not preferring the appeal in time.

In so dismissing the appeal. I remark that the objections raised by Mr. Gajera are in my view not mere technicalities; a somewhat similar state of affairs, though not as unsatisfactory as the instant state of affairs, was gone into by Thacker, J., in *Hasham Lalji v. Kotecha* (1) (1940), 19 K.L.R. 20, where the learned judge at p. 22 quotes Thesiger, L.J., in *Collins v. Paddington Vestry* (2) (1880), 5 Q.B.D. 368:

> "In the interests of the public the court ought to take care that appeals are brought before it in proper time [I might add to this in the instant case 'and before the proper court or registry'] and as between the parties it has often been remarked that . . . when a judgment has been pronounced and the time for appeal has elapsed without appeal the successful party has a vested right to the judgment which ought, except under very special circumstances, to be made effectual. And I think that the legislature intended that appeals from judgments should be brought within the prescribed time and that no extension of time should be granted except under very special circumstances."

I should also state that in my view the conduct of Mr. Ahmed in filing this appeal before the wrong registry could hardly have been anything but careless in the extreme.

I do not find it necessary to deal with the other grounds of objection taken by Mr. Gajera.

The appeal is dismissed with costs.

Preliminary objection upheld. Appeal dismissed.

For the appellant:
AQ Malik
MH Malik & Co, Nairobi

For the respondents:
KR Gajera and *TG Bakrania*
Veljee Devshi & Bakrania, Nairobi

Farrab Incorporated v Brian John Robson and others
[1957] 1 EA 441 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	19 July 1957
Case Number:	725/1957
Before:	Connell J
Sourced by:	LawAfrica

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[1] Practice – Application for security for costs – Plaintiff company resident in Tanganyika – Whether summons requires affidavit in support – Civil Procedure (*Revised*) *Rules,* 1948, *O.* 25 *r.* 1 (*K.*).

[2] Practice – Security for costs – Plaintiff company resident in Tanganyika – No property in Kenya but

substantial property in Tanganyika – Civil Procedure (*Revised*) *Rules,* 1948, *O.* 25 *r.* 1 (*K.*) – *Judgments Extension Ordinance* (*Cap.* 14) – (*K.*).

Editor's Summary

The defendants to a suit filed in Kenya made an application for security for costs under O. 25 r. 1 on the ground that the plaintiff was resident abroad. There was no affidavit to the summons. The plaintiff was a corporation registered in Tangier having a place of business at Moshi, Tanganyika. The plaintiff opposed the application on the ground that it owned substantial property in Tanganyika and that in view of the Judgments Extension Ordinances of Kenya and Tanganyika the defendants would be able to proceed against the plaintiff's property in Tanganyika should this be necessary. The defendants relied on a similar but unreported application for security for costs made in the Supreme Court of Kenya in 1957 in circumstances similar to the present application where security was ordered in the sum of £500.

Held–

(i) on an application for security for costs the summons need not be supported by an affidavit where the ground for requiring security is that of the plaintiff's residence abroad;

(ii) in so far as the matter may be one of discretion this was a fit and proper case to order security for costs.

Per curiam – "there is certainly no precedent under which the courts in this colony have followed court decisions under the Judicature Act, 1873, and Judgments Extensions Act, 1868."

Order for security of costs in the sum of £500.

Cases referred to:

(1) *Re Howe Machine Co*. (1889), 41 Ch. D. 118.

(2) *Re Apollinaris Company's Trade Marks*, [1891] 1 Ch. 1.

Judgment

Connell J: This is an application for security for costs taken out by the defendants under O. 25 r. 1.

The plaintiff is a corporation registered in Tangier and has a place of business at Moshi in Tanganyika.

There is no affidavit to the summons. I don't think one is necessary in the circumstances – see p. 1507, White Book, 1957:

> "An affidavit in support is generally necessary, though not where the ground for requiring security is that the plaintiff is resident out of the jurisdiction, . . ."

Further, in the White Book Commentary to O. 65 r. 6, by which rule a wide discretion appears to be given, it is stated at p. 1501

> "The ordinary ground on which security is ordered is residence abroad, and subject to the exceptions hereinafter mentioned, the rule is inflexible."

One of the exceptions quoted is where the plaintiff resides in Scotland and Northern Ireland, for by the combined effect of the Judgments Extensions Act and Judicature Act a judgment in any division of the High Court was enforceable in Scotland or Ireland. The note goes on

> "But the procedure of enforcing judgments under Part II of the Administration of Justice Act, 1920 and the Foreign Judgments (Reciprocal Enforcements) Act, 1933, is different, and plaintiffs residing in countries to which those Acts apply must give security."

Mr. Khanna opposes the application; he quoted the Judgments Extension Ordinances in Kenya and Tanganyika and referred to the case of *Re Howe Machine Co.* (1) (1889), 41 Ch. D. 118. Mr. Harris referred to a similar application for security for costs before Macduff, J., in Civil Case No. 495 of 1957. The Advocates for plaintiffs raised no difficulties and the application for costs was not opposed in that case by Messrs. Hamilton, Harrison & Matthews; security was ordered in the sum of £500 and Messrs. Hamilton, Harrison & Matthews undertook to file the necessary Bond in seven days.

I have looked into other cases where security is not required as a matter of practice, though a plaintiff is resident or registered abroad; they are contained in the commentary in the White Book at p. 1501; the commentary states

> "Security will not be required from a person permanently residing out of the jurisdiction, if he has substantial property, whether real or personal, within it. The leading case is *Re Apollinaris Company's Trade Marks* (2),

[1891] 1 Ch. 1: Lord Halsbury there said ‘His being so resident (i.e. abroad) makes a *prima facie* case for requiring him to give security; but it is subject to a well known ordinary exception that if there are goods and chattels of his in this country, which are sufficient to answer the possible claim of the other litigant, and which would be available to execution the courts will not order him to give security for costs.’ ”

In the *Apollinaris* case (2), the French Company had £24,000 worth of stock and plant and book debts valued at £8,000 all in the U.K.

Mr. Khanna stated that there were 10,000 acres of cattle ranch in Oldeani (Tanganyika) and 45,000 acres under a government lease, and containing coffee, crops etc.: these were allegations from the bar and not stated in any affidavit; the plaint merely states "plaintiff . . . has a place of business in Moshi."

There may be all sorts of difficulties in obtaining execution in Tanganyika; one has no knowledge of what sort of transactions are being carried on in Tanganyika, who are the employees, what are the terms of the leases, whether a business or firm is registered in Moshi and if so under what name. Moreover, even if there was all that confirmation there is certainly no precedent under which the courts in this colony have followed court decisions under the Judicature Act, 1873, and Judgments Extensions Act, 1868. Furthermore, in so far as the matter may be one of discretion I think this is a fit and proper case to order security for costs.

I have perused the pleadings and I do not consider the amount of £500 unreasonable. I shall make a similar order to that made by my brother Macduff, J., in Civil Case No. 495 of 1957.

I order security for costs in the sum of £500 in favour of defendants one, two and three; security to be by bond to the satisfaction of the registrar; applicants to be given notice of the proposed security; time for filing bond twenty-one days from this day; costs reserved.

Order for security of costs in the sum of £500.

For the applicants:
JPG Harris
Robson Harris & Co, Nairobi

For the respondent:
DN Khanna
DN & RN Khanna, Nairobi

Kamrudin Mohamed v Jinja Co-Operative Society Ltd
[1957] 1 EA 443 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	27 September 1957
Case Number:	70/1957
Before:	Sir Newnham Worley P, Briggs Ag V-P and Bacon JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Uganda – Lewis, J

[1] Guarantee – Promissory notes given as collateral security – Failure to give notice of dishonour to guarantor – Whether liability of guarantor discharged – Indian Contract Act, 1872, *s.* 139 *and s.* 141 – *Bulk Sales Ordinance* (*Cap.* 251) (*U.*).

Editor's Summary

The High Court of Uganda awarded the respondent society the sum of Shs. 20,282/89 in respect of a guarantee given to the society by the appellant. This guarantee was contained in an agreement made between the respondent society, one, Khamis and his wife as purchasers and the appellant, whereby the society sold its business to the purchasers, and the appellant in consideration of the purchasers being allowed to pay the purchase price by monthly instalments guaranteed the due payment thereof. Clause 8 of the agreement specifically provided that the guarantee should not be prejudiced by any neglect to enforce the agreement against the purchasers nor by any forbearance or indulgence granted to them. In pursuance of the agreement twelve promissory notes were made out in favour of the society by the purchasers and endorsed by the appellant. All but the last two promissory notes were met and the society took no immediate action to enforce payment and did not give notice of dishonour to the appellant. Some five months after the last instalment had become payable the society

gave notice to the appellant claiming payment under the guarantee. The proceedings against the appellant were based, not on the promissory notes, but on the guarantee. It transpired that the purchasers had sold the business within a few days of the original purchase and that in effecting this sale there was no compliance with the Bulk Sales Ordinance. On appeal it was argued that (*a*) failure to give notice of dishonour to the appellant discharged him from liability both on the promissory notes and on the guarantee and (*b*) by assenting to the re-sale of the business notwithstanding non-compliance with the provisions of Bulk Sales Ordinance, the society had permitted the security of the debt to be impaired and that the appellant was discharged from his liability.

Held–

(i) the failure by the society to give notice of dishonour to the guarantor could not prejudice the latter or deprive him of any remedy against anyone, but merely deprived the society of the right to sue the appellant on the promissory notes.

(ii) the failure of the society to give notice of dishonour and to take steps for payment of the debt would normally have discharged the appellant as surety under s. 139 of the Indian Contract Act; but the parties had by the terms of their agreement contracted out of s. 139 and accordingly the society had not lost its right of action against the appellant as guarantor by reason of neglect to take action.

(iii) rights under the Bulk Sales Ordinance cannot be classed as a "security" within the meaning of s. 141 of the Indian Contract Act.

Appeal dismissed.

Cases referred to in judgment:

(1) *Peacock v. Pursell* (1863), 32 L.J.C.P. 266.

September 27. The following judgments were read:

Judgment

Forbes JA: This is an appeal from a decree of the High Court of Uganda awarding to the respondent society (the original plaintiff) the sum of Shs. 20,828/89 with interest and costs in respect of a guarantee given by the appellant.

The guarantee was contained in a written agreement dated October 26, 1953, made between the respondent society, one Kassamali Rahimtulla Khamis and his wife (whom I will refer to as the purchasers) and the appellant, whereby the respondent society sold its business to the purchasers for the sum of Shs. 102,412/08 payable by twelve equal monthly instalments of Shs. 8,534/34, and the appellant, in consideration of the purchasers being allowed to pay the purchase price by instalments, guaranteed the due payment of such instalments.

The agreement required that the purchasers and the appellant should each sign promissory notes in favour of the respondent society for each of the monthly instalments of purchase price. In fact, promissory notes in favour of the respondent society were made by the purchasers and endorsed by the appellant.

The purchasers duly met the first ten instalments of the purchase price as they fell due, but then made default in payment of the last two instalments. The respondent society took no immediate action to enforce payment and did not give the appellant notice of dishonour of the promissory notes. The final instalment had been payable on September 15, 1954, and it was not till February 11, 1955, that the respondent society gave notice to the appellant claiming payment under the guarantee. Upon failure of the appellant to meet the claim, the respondent society sued the appellant, not on the promissory notes, but on the agreement of guarantee.

It also transpired that the purchasers had resold the business within a few days of the original purchase and that in effecting this sale the provisions of the Bulk Sales Ordinance (Cap. 215 of the 1951 edition of the Laws of Uganda) were not complied with. The Bulk Sales Ordinance requires that before payment of the purchase price on any sale of stock in bulk (and it is not disputed that the sale of this business constituted

a sale of stock in bulk) a statement of the vendors' creditors, verified by statutory declaration, and showing the amount of indebtedness, shall be supplied by the vendor to the purchaser and to each of the vendor's creditors; that at the time of completion of the sale, either the claims of all the creditors shown in the statement be met in full, or that there is produced a written waiver of the provisions of the Ordinance by the creditors representing not less than 60 per cent. in number and value of the total number of claims, or that there is produced a written consent to the sale by creditors representing not less than 60 per cent. in number and value of the total number of claims; and that in the case of a written consent to the sale being given the purchase price be paid to a trustee for distribution amongst the creditors pro rata in satisfaction or part satisfaction of their claims. Under the definition of "creditor" in the Ordinance not only the respondent society but also the appellant was entitled to rank as a creditor of the original purchasers upon the re-sale by them of the business. In fact, no notice of the re-sale was ever given to the appellant, and it was only given to the respondent society in February, 1954, rather more than three months after the re-sale. On such notice the respondent society gave its assent to the sale and did not question its validity under the Bulk Sales Ordinance. The time (six months) limited under the Ordinance for the setting aside of a sale for failure to comply with its provisions has, of course, long since expired. There was no evidence of the total indebtedness of the purchasers at the time of the re-sale, so it is impossible to say whether the liability to the appellant was such a proportion (i.e. more than 40 per cent.) of the total indebtedness of the purchasers as to enable him to stop the sale had the provisions of the Ordinance been complied with.

For the appellant, relying on *Peacock v. Pursell* (1) (1863), 32 L.J.C.P. 266, and s. 139 and s. 141 of the Indian Contract Act, 1872 (which is in operation in Uganda), it is contended–

(1) that failure to give notice of dishonour to the appellant when the promissory notes fell due not only discharged the appellant from liability on the promissory notes, but also discharged him from liability under the original guarantee; and

(2) that by assenting to the re-sale of the business notwithstanding non-compliance with the provisions of the Bulk Sales Ordinance, the respondent society permitted security for the debt to be impaired and that therefore the appellant is discharged from his liability.

In *Peacock v. Pursell* (1) it was held that where a bill of exchange was held as collateral security for a debt, on failure of the holder to give notice of dishonour to the debtor (who had endorsed the bill to the holder), thus rendering the bill worthless to the debtor as against other parties whose names appeared on it, it must be treated as money in the hands of the holder, and thus operated as a discharge of the debt for which it was security.

The situation in the instant case, however, is entirely different from that which prevailed in *Peacock v. Pursell* (1). In *Peacock v. Pursell* (1) the debtor had been the holder in due course of a bill of exchange drawn, accepted and endorsed by other parties, and the debtor endorsed and delivered the bill to his creditor as collateral security for the debt owed by himself to the creditor. The bill having been dishonoured and the creditor having neglected to give notice of dishonour to the debtor, the creditor then sued on the debt. Clearly the failure of the creditor to give notice of dishonour to the debtor was gravely prejudicial as it destroyed the debtor's rights against the other parties, and it was held that in the circumstances the bill must be treated as money received by the creditor and therefore as a discharge of the debt.

In the instant case the creditor (the respondent society) was given the promissory notes by the makers of the notes (i.e. the purchasers) as collateral security for the debt owing by the makers to the creditor. A

third party (the appellant) endorsed the notes, not in consideration of the debt for which the notes are collateral security, but as guarantor under a collateral agreement, the guarantee being given in consideration of the creditor agreeing to accept payment of the debt by instalments. The failure of

the creditor to give notice of dishonour to the guarantor could not prejudice the guarantor or deprive him of any remedy against anyone, but merely deprived the creditor of the right to sue the guarantor on the notes. And the creditor is now suing, not on the debt for which the notes were given as collateral security, but on the collateral guarantee agreement entered into by the guarantor. In my view the rule in *Peacock v. Pursell* (1) can have no application to the facts of this case, where the suit is not based on the original consideration for the notes and the guarantor has not suffered and could not suffer damage by reason of not being given notice of dishonour. While I do not consider the rule in *Peacock v. Pursell* (1) applicable, yet in the absence of special provisions in the agreement, the failure of the respondent society to give notice of dishonour and to take steps to enforce payment of the debt would no doubt have discharged the appellant as surety under s. 139 of the Indian Contract Act. However, in cl. 8 of the agreement it is expressly provided that–

> ". . . this guarantee shall not be vacated or prejudiced by the society neglecting or forbearing promptly to enforce this agreement against the purchasers or giving time for payment of the said instalments or any of them when due or delaying to take any steps to enforce the performance or observance of the said agreement or conditions or granting any indulgence to the purchasers."

The respondent society has undoubtedly been guilty of neglect by delaying to take steps to enforce the performance of the agreement, but this was contemplated and provided for by the terms of the agreement. It was contended that it was not competent to include such a provision in the agreement by reason of the provisions of s. 139 of the Indian Contract Act, but the contention was abandoned. I have no doubt that it is perfectly competent for parties to define the extent of a creditor's duty to a surety in this manner and pro tanto to contract out of the provisions of the section. In the circumstances I am of opinion that the respondent society has not lost its right of action against the appellant as guarantor by reason of neglect to take action.

As regards the re-sale of the business without compliance with the provisions of the Bulk Sales Ordinance, I do not consider that rights under the Bulk Sales Ordinance can be classed as a "security" within the meaning of s. 141 of the Indian Contract Act. "Security" is not defined in the Act, and though it may not be used in a technical sense the section at least indicates a security the benefit of which can be transferred from the creditor to the surety. It does not appear to me that any right arose under the Bulk Sales Ordinance which could be so transferred. The rights of the respondent society and the appellant under the Bulk Sales Ordinance were parallel rights as co-creditors of the purchasers. I cannot see that under the Ordinance there was any duty on the respondent society to inform the appellant as co-creditor of the fact of the sale, but there could, perhaps, be said to be a duty to inform the appellant under s. 139 of the Act, were it not for the specific provisions of the agreement set out above. I am clearly of opinion that the assent to the re-sale was in the nature of an indulgence granted to the purchasers and as such does not deprive the respondent society of its rights against the guarantor. In any event it does not appear that the appellant could have stopped the re-sale, and default in the payment of instalments did not occur till months later.

For these reasons I would order that the appeal be dismissed with costs.

Sir Newnham Worley P: I agree and have nothing to add. The appeal is dismissed with costs.

Briggs Ag V-P: I also agree.

Appeal dismissed.

For the appellant:
PJ Wilkinson
PJ Wilkinson, Kampala

For the respondent:
AI James
Baerlein & James, Jinja

Josephine Arissol v R
[1957] 1 EA 447 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	24 June 1957
Case Number:	20/1957
Before:	Sir Newnham Worley P, Sir Ronald Sinclair V-P and Bacon JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Seychelles – Lyon, C.J

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[1] Criminal law – Murder – Whether judge right in substituting conviction of minor offence although accused not charged with it – Penal Code s. 224 (2) (*S.*) *– Seychelles Capital Offences Order in Council,* 1903, *s.* 96 *and s.* 97.

Editor's Summary

The appellant who had been charged with murder was acquitted by the Supreme Court of Seychelles sitting as a Court of Assize, but was convicted under s. 224 (2) of the Penal Code of unlawfully and with intent to injure or annoy, causing poison or other noxious thing to be administered to or taken by any person. The appeal was both against conviction and sentence and it was submitted that the Crown had failed to prove the necessary intention to justify the conviction under s. 224 (2) and that the Chief Justice was wrong to direct the assessors that on a charge of murder they could convict the appellant of an offence under s. 224 (2) of the Penal Code.

Held–

(i) there was abundant evidence to support the finding of the court on the issue of intention to justify conviction under s. 224 (2) of the Penal Code;

(ii) s. 96 and s. 97 of the Seychelles Capital Offences Order in Council, 1903, show that an offence includes another offence when the former consists of several particulars, a combination of some only of which constitutes the latter; and the direction of the Chief Justice was within the ambit of s. 96.

Appeal against conviction dismissed. Sentence reduced to 18 months.

Cases referred to:

(1) *Loizeau & another v. R.* (1956), 23 E.A.C.A. 417.

(2) *Robert Ndecho & another v. R.* (1951), 18 E.A.C.A. 171.

(3) *Velezi Kashizha v. R.* (1954), 21 E.A.C.A. 389.

(4) *Wachira s/o Njenga v. R.* (1954), 21 E.A.C.A. 398.

Judgment

Sir Newnham Worley P: read the following judgment of the court: The appellant was charged before the Supreme Court of Seychelles sitting as the Court of Assize with the murder of one Edwige Henriette by poisoning. She was acquitted of the charge of murder but was convicted under s. 224 (2) of the Seychelles Penal Code, which makes it a felony unlawfully and with intent to injure or annoy to cause any poison or other noxious thing to be administered to, or taken by, any person. The maximum sentence of three years' imprisonment was imposed. The appeal is against both conviction and sentence: at the conclusion of the hearing of May 31, 1957, we dismissed the appeal against conviction but stood over the appeal against sentence for further consideration.

The material facts are simple: the disputed issue at the trial was intention. Appellant and deceased were both employed as domestic servants in the same household, deceased as cook and appellant as children's nurse and general help. For some weeks prior to November 8, 1956, they had been on bad terms. On that day a plateful of fish, left over from the family lunch, was put in the oven, most probably by the deceased. That same afternoon the appellant took some rat poison from a jar in the store and put it on the plate hidden under the fish. That evening the deceased ate some of the fish, was immediately ill and subsequently died of phosphorous poisoning, attributable to the rat poison.

The Crown case was of course that the appellant acted maliciously with intent to kill or cause grievous harm to the deceased. Alternatively, that she acted with such culpable negligence as to be guilty of manslaughter. The defence was accident, the appellant's story being that she found the plate of fish in the oven and put the rat poison on it with the intention of taking it to kill rats at the house where she lived. She alleged that she did not know that the plateful of fish was the deceased's.

The functions of the judge and assessors who jointly comprise the Court of Assize were fully considered by this court in *Loizeau & another v. R.* (1) (1956), 23 E.A.C.A. 417. In the instant case the verdict was given in two stages: the court, after retirement, first found by a majority that the appellant intended to cause harm to the deceased (thus negativing accident and negligence) and then, after further directions by the learned chief justice, returned a unanimous verdict of guilty under s. 224 (2) of the Penal Code. This procedure of taking the verdict in two stages is unusual, but the appellant makes no complaint of it, and we do not wish to imply any doubt of its propriety. It may be peculiarly well suited to the rather exceptional constitution of the Court of Assize.

The appellant alleges that the Crown failed to prove the necessary intention to justify a conviction under s. 224 (2). There was however abundant evidence to support the court's finding and in particular it was shown that the deceased was, to the appellant's knowledge, in the habit of putting food in the oven to be eaten later in the day.

The appellant also complains that some exhibits containing viscera were admitted without strict proof. There is no substance in this: the factum being admitted, the case for the prosecution did not depend upon those exhibits, and, even if evidence relating to them was improperly admitted, no prejudice was caused.

The remaining ground of appeal against conviction is that the learned chief justice was wrong to direct the assessors that on a charge of murder they could convict on a charge under s. 223 or s. 224 (2) of the Code. (Section 223 is the aggravated offence of maliciously administering poison with intent to harm, or thereby endangering life). In the Written Case for the appellant it is alleged that

> "these two sections envisage offences which are completely different from that of murder and caused a serious embarrassment to the defence, who were necessarily occupied with the intention necessary to establish the charge of murder which is utterly different to the intentions necessary to prove an offence under s. 223 and s. 224 (2)."

We were unable to accept this contention.

The question as to when an accused person may be convicted of an offence other than that charged has often been considered by this court: see, for example, *Robert Ndecho and another v. R.* (2) (1951), 18 E.A.C.A. 171; *Velezi Kashizha v. R.* (3) (1954), 21 E.A.C.A. 389 and *Wachira s/o Njenga v. R.* (4) (1954), 21 E.A.C.A. p. 398. The provisions of s. 159 of the Seychelles Criminal Procedure Code in no way differ from the corresponding s. 179 of the Kenya Code or the corresponding sections of the Uganda and Tanganyika Codes. There may, however, be doubt whether that section applies to the Court of Assize and we prefer to rest our decision on s. 96 of the Seychelles Capital Offences Order in Council, 1903, which reads:

> "96. If the court consider that the prisoner has committed a less offence than a capital one, and such less offence is included in any charge laid in the information, it may find the prisoner guilty of such less offence; and thereupon the judge shall pass upon him the sentence awarded by the law for such less offence."

We also refer to the following section which reads:

> "97. Where several prisoners are jointly charged with an aggravated offence which includes one or more simple offence or offences, one or more may be convicted of the former and another or others may be convicted of the latter offence, or may be acquitted."

These two sections show clearly that an offence “includes” another offence when the former consists of several particulars, a combination of some only of which constitutes the latter; in other words, the included offence must be not only lesser than the one charged but also cognate with it. There is no substantial difference between s. 96 of the Order in Council and s. 159 (1) of the Procedure Code. In the instant case the requirements of s. 96 were exactly met: to use the language approved by this court in *Wachira’s* case (4) ((1954), 21 E.A.C.A. 398 at p. 400) notice of the major offence necessarily involved notice of all that constituted the minor offence. Once the court had determined that the appellant intended harm to the deceased, the only remaining question to be decided was a question of the degree of harm intended. Killing by poisoning necessarily involves harm and, in seeking to refute the graver charge by pleading accident, the defence was necessarily seeking to refute the lesser. There was no prejudice and the learned chief justice’s direction was within the ambit of s. 96.

We have given careful consideration to the appeal against sentence. The appellant attained the age of eighteen years in May, 1957, and was, therefore, at the time of her conviction on February 8, 1957, a young person within the meaning of the Juvenile Offenders Ordinance (Cap. 88). Complaint is made in the memorandum that s. 8 (*e*) and s. 12 (2) of that Ordinance were not complied with. There is no substance in these complaints: it is apparent from the record that the learned chief justice was informed by defending counsel of all such matters mentioned in s. 8 (*e*) as were relevant to this case. It is also clear that he carefully considered the alternatives to imprisonment and it seems probable he would have sent the appellant to a place of detention had one been provided under the Ordinance.

We ourselves have considered whether this is a fit case for putting her on probation, whether under Chapter 88 or under s. 259 of the Criminal Procedure Code as a first offender. We have however come to the conclusion that this treatment would not be appropriate to the instant case where the appellant has been found guilty of intentionally administering poison.

We have, however, come to the conclusion that the sentence of three years’ imprisonment, which is the maximum under the law for the offence of which she was convicted, is excessive. The appellant has hitherto been of excellent character, she is young and a first offender: all these are circumstances which normally are considered in mitigation of sentence. It is unusual to impose the maximum sentence on a first offender and it would be wrong to depart from that rule because, on the evidence, she might have been convicted of a graver offence. We cannot feel satisfied that these matters were sufficiently considered by the learned chief justice and have therefore decided to allow the appeal against sentence and to reduce the period of imprisonment to eighteen months. It will of course run from the date of conviction.

Appeal against conviction dismissed. Sentence reduced to 18 *months.*

The appellant did not appear and was not represented.

For the appellant:
JE Thomas, Victoria, Seychelles

For the respondent:
GP Nazareth (Crown Counsel, Kenya)
The Attorney-General, Seychelles

The Uganda Company Limited v The Commissioner of Income Tax
[1957] 1 EA 450 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	14 March 1957
Case Number:	5/1955
Before:	Bennett J
Sourced by:	LawAfrica

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[1] Income Tax – Deduction of bad debts in computing income from trade – Company ceasing to trade – Bad debts subsequently recovered – Whether assessable as income – The East African Income Tax (*Management*) *Act,* 1952, *s.* 8 (1) *and* (3) *and s.* 14 (1).

Editor's Summary

The appellant company which was incorporated in Uganda carried on business there as planters and merchants until June 30, 1951, when it ceased to trade. The company, however, continued to derive income from Uganda after that date and for the purpose of its income tax assessment for the year of income 1951 was allowed to deduct from its total income the sum of £18,526 as a reserve for bad and doubtful debts. During the year of income 1952 the company recovered £12,023 of the amount allowed as bad or doubtful debts for 1951 and during the year of income 1953 the company recovered a further £1,000. These two sums were brought to account in the company's profit and loss accounts for the years ending August 31, 1952 and 1953, and in the assessments for the years of income 1952 and 1953 were treated as income of the appellant company. By s. 8 (1) of the East African Income Tax (Management) Act, 1952,

> "Tax shall, subject to the provisions of this Act, be charged in each year of income . . . upon the income of any person accruing in, derived from or received . . . in respect of (*a*) gains or profits from any trade, business, profession or vocation, for whatever period of time such trade, business, profession or vocation, may have been carried on or exercised."

Section 14 (1) provides that

> "for the purpose of ascertaining the total income of any person there shall be deducted . . . (*d*) bad debts incurred in any trade, business, profession or vocation proved to the satisfaction of the commissioner to have become bad during the year of income, and doubtful debts to the extent that they are estimated to the satisfaction of the commissioner to have become bad . . ."

Section 8 (3) provides that where a sum, which has formerly been allowed as a deduction under s. 14, is recovered, the sum so recovered shall be chargeable with tax for the year in which it is recovered. The company having appealed against the assessments contended that whilst the effect of s. 14 (1) and s. 8 (3) is that bad debts recovered are to be treated as trading receipts, this principle did not apply where the taxpayer has ceased trading operations before the debts are recovered. The company also referred to the income tax laws of England and claimed that there the receipts would not be taxable.

Held–

(i) there was nothing in the language of s. 8 (1) of the Act to suggest that profits from a trade which has ceased to be carried on at the time the profits are received are not liable to tax.

(ii) the bad debts recovered do not change their character because the appellant company has ceased to trade.

(iii) since there is no provision in the tax legislation of England corresponding to s. 8 (3) of the East African Income Tax (Management) Act, 1952, the English tax legislation is irrelevant.

Appeal dismissed.

Judgment

Bennett J: This is an appeal against two assessments to income tax for the years of income 1952 and 1953.

In the respondent's statement of facts the point has been taken that the appeal is not properly before the court because the memorandum of appeal contains appeals against two separate assessments, whereas s. 78 (1) of the East African Income Tax (Management) Act, 1952, requires that each assessment must be the subject of a separate appeal.

Mr. Newbold for the respondent has not, however, pressed his objection, and while this case must not be regarded as a precedent, I propose to consider both appeals, which turn on the same question of principle.

The agreed facts of the case, in so far as they are material, are as follows:

The appellant company is a limited liability company registered in Kampala, which carried on business in Uganda as planters, general merchants, and retailers, up till June 30, 1951. On that date it ceased to trade, but continued to be registered in Uganda, and to receive income derived from Uganda.

For the purpose of its income tax assessment for the year of income 1951, the appellant company was allowed by the commissioner, in pursuance of s. 14 (1) (*d*) of the Act, to deduct from its total income the sum of £18,526 as a reserve for bad or doubtful debts incurred in Uganda.

During the year of income 1952 the appellant recovered £12,023 in respect of such amount allowed for bad or doubtful debts; and during the year of income 1953 the amount recovered was £1,000. These two sums were credited or written back to the company's profit and loss account for the years ending August 31, 1952, and August 31, 1953, respectively. In the assessments for the years of income 1952 and 1953 they have been included as income of the appellant, and it is against this inclusion that the appellant now appeals.

Section 14 (1) of the Act provides that

> "for the purpose of ascertaining the total income of any person there shall be deducted all outgoings and expenses wholly and exclusively incurred during the year of income by such person in the production of the income, including–
>
> (*d*) bad debts incurred in any trade, business, profession or vocation, proved to the satisfaction of the commissioner to have become bad during the year of income, and doubtful debts to the extent that they are estimated to the satisfaction of the commissioner to have become bad during the said year, notwithstanding that such bad or doubtful debts were due and payable prior to the commencement of the said year:
>
> Provided that all sums recovered during the said year on account of amounts previously written off or allowed in respect of bad or doubtful debts shall for the purpose of this Act be treated as receipts of the trade, business, profession or vocation for that year."

The proviso to paragraph (*d*) was repealed in 1954, but was in force when these assessments were made, and regard must be had to it in determining this appeal.

Section 8 (3) of the Act provides that:

> "Where a sum has formerly been allowed as a deduction under s. 14, and where in a later year the whole or

> part of the sum so allowed is recovered . . . then any sum so recovered . . . shall be chargeable with tax under the provisions of this Act for the year in which such sum is so recovered . . .”

It is said by Mr. Troughton, who appeared for the appellant, that there is no conflict between s. 8 (3) and s. 14 (1) (*d*) of the Act, and that the subject matter of these two sub-sections is bad debts incurred in a trade, business, profession or vocation. He concedes that the effect of the two sub-sections is that trade debts recovered are to be regarded as trading receipts for the year in which they are recovered, but contends that this principle can have no application where the taxpayer has ceased trading operations before the debts are recovered. On this hypothesis it is contended that

debts recovered after the taxpayer has ceased to trade must be regarded as non-taxable receipts of a capital nature.

Section 14 of the Act is designed to provide certain exemptions from the general liability to tax imposed by s. 8 of the Act. It is thus necessary to consider the extent of that liability, and whether there is anything in the language of the enactment that creates it which is consistent with the proposition that trade debts recovered after the taxpayer has ceased to trade are not taxable.

Section 8 (1) provides that

> "Tax shall, subject to the provisions of this Act, be charged in respect of each year of income at the rate imposed for that year by the appropriate Territorial Income Tax Ordinance upon the income of any person accruing in, derived from, or received in . . . in respect of–
>
> (*a*) gains or profits from any trade, business, profession or vocation, for whatever period of time such trade, business, profession or vocation may have been carried on or exercised."

I can find nothing in the language of s. 8 (1) to suggest that profits from a trade which has ceased to be carried on at the time when the profits are received are not liable to tax.

It is common ground that the receipts which it is now sought to tax are resultant upon the recovery of debts incurred at a time when the company was trading. At the time when these debts were incurred they were ordinary trade debts. In my view they do not change their character of trade debts on account of the fact that the appellant company has ceased to trade. In my judgment they are debts incurred in a trade within the meaning of s. 14 (1), para. (*d*), and the receipts resultant upon their recovery are to be treated as receipts of the trade for the year in which the money is actually received. The fact that such receipts may not be taxable in England is irrelevant since the English Acts contained no provision corresponding to s. 8 (3) of the East African Act.

I am also of the opinion that these receipts are gains or profits from a trade within the meaning of s. 8 (1), notwithstanding that at the time when the monies were received by the company the appellant company has ceased to trade.

For these reasons the appeal is dismissed.

The appellant is to pay the respondent's costs of the appeal.

Appeal dismissed.

For the appellant:
JFG Troughton
Hunter & Greig, Kampala

For the respondent:
CD Newbold QC (Legal Secretary, East African High Commission)
The Legal Secretary, East Africa High Commission

Bonifasi Wenani s/o Ndiyo v R

[1957] 1 EA 453 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	14 November 1957
Case Number:	118/1957
Before:	Briggs Ag V-P, Forbes JA and Connell J
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Rodwell, Ag. J

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[1] Criminal law – Evidence – Witness examined by reading out deposition at preliminary enquiry – Whether such procedure desirable.

Editor's Summary

Note: This case is reported only on the method adopted in examination in chief of two witnesses. The appellant had been convicted by the Supreme Court of Kenya of defilement of a girl under the age of 16 years, contrary to s. 138 (1) of the Penal Code. At the trial the prosecutor intimated that he did not propose to call the two witnesses who had given depositions at the preliminary enquiry but that such witnesses were available for the defence. Counsel for the accused decided to call these witnesses for the defence and adopted the expedient of reading to them their depositions, which they stated were the truth.

Held – This method of conducting the examination in chief of witnesses, which involves leading the witnesses through their evidence, is most undesirable.

Appeal allowed on other grounds.

No cases referred to in judgment

Judgment

Forbes JA: read the following judgment of the court: The appellant was tried by the Supreme Court of Kenya on a charge of rape. The court found the appellant not guilty of rape, but guilty of defilement of a girl under 16 years of age contrary to s. 138 (1) of the Penal Code, and sentenced him to 18 months' imprisonment with hard labour. The appellant appealed to this court against that conviction and sentence. We allowed his appeal, set aside the conviction and sentence and ordered that he be set at liberty forthwith. We now give our reasons for so doing.

The case against the appellant rested almost entirely on the evidence of five girls, of whom the complainant, Namukayi d/o Johna Waka, was one. The complainant's evidence, which was unsworn, was to the effect that the appellant, who was a teacher, had invited herself and the other girls to his house to a Christmas party and that they went there on the morning of Christmas day; that besides themselves and the appellant there were present the accused's wife, one Dominico and his wife, and three other male persons, namely Gilogori, James Baraza and Wafula; that they all danced that day and drank soda and native beer; that that night the five girls and the appellant slept together in a guest room at Dominico's; that during the night the appellant had sexual intercourse with her and with two of the other girls by force; that the party continued to December 28; that the appellant again had sexual intercourse with her

on December 26; and that Dominico had intercourse with her on December 27.

Besides the persons mentioned by the complainant it appeared from the evidence of the appellant's wife that another male person, Joseph Masibo, had also been at the party. And it was also in evidence that Gilogori and Wafula were schoolboys aged about fifteen and fourteen respectively; and that Dominico, like the appellant, was a teacher.

The evidence of the doctor who examined the complainant on January 5 confirmed that she had had sexual intercourse between two and ten days prior to the examination.

The stories told by the other four girls supported the complainant's evidence that she had been raped. But they contained serious discrepancies and contradictions. It is not necessary to go into these in detail, but they were such as to suggest that the evidence of the girls ought to be subjected to very careful scrutiny before it was accepted.

The appellant himself elected not to give evidence or make a statement from the dock, but there was in evidence his statement made to the police in which he denied having slept with the complainant. And he called, as witnesses for the defence, his wife, Selina, and Anna, the wife of Dominico. Selina stated that during the period in question the appellant had slept with her and had not left her during the night; and Anna stated that she had seen the appellant go to a room in the main hut with Selina each night.

In passing, we would remark that we do not consider that the procedure adopted by Counsel for the accused and allowed by the learned trial judge in leading the evidence of Selina and Anna was correct. These two witnesses were called for the Crown at the preliminary inquiry. At the trial Crown Counsel intimated that he did not propose to call them, but that they were available for the defence, and they were in fact called for the defence. Counsel for the accused then apparently adopted the expedient of reading out to them their depositions taken at the preliminary inquiry, upon which they stated that the depositions were the truth. In our view this method of conducting the examination in chief of a witness is most undesirable. Since, however, no objection was taken by the Crown to what was, in effect, the leading of the witnesses through the whole of their examination in chief, we now do no more than comment on the undesirability of the practice.

In the course of his judgment, after summarising the evidence given by each of the various witnesses, the learned trial judge proceeds:

> "In spite of the discrepancies and contradictions in the evidence of the witnesses for the prosecution, for which the lapse of over seven months may well account, and in the case of the five girls may be accounted for by youth and natural modesty, I do believe the evidence for the prosecution and find corroboration of the evidence of the first witness in that of the fourth, fifth, sixth and seventh witnesses. I am satisfied beyond all reasonable doubt that the accused did have sexual connection with first witness, a girl under the age of 16, on the night of December 25, 1956. I do not believe the cautioned statement of the accused or the evidence of his two witnesses.
>
> "I am not, however, satisfied that the accused had intercourse with first witness against her consent."

With the greatest respect to the learned trial judge, it appears to us that in reaching this conclusion he has failed to take into account certain relevant matters. As we have already remarked the evidence of the five girls was such as to call for close scrutiny before it could be accepted. Some of the discrepancies and contradictions in their evidence were irreconcilable and difficult to explain on a basis of either lapse of time or natural modesty. The learned trial judge has indeed taken the discrepancies into account; and as a result has, in our view very properly, rejected the evidence that the appellant had intercourse with the complainant without her consent. In the circumstances of the case it was against all the probabilities that the complainant had been the victim of a rape. But the learned trial judge does not appear to have appreciated that by rejecting this evidence he was in effect finding that the girls were deliberately giving false evidence on this point, and that this finding must taint their evidence as to the identity of the person who had intercourse with the complainant. The complainant herself named at least one other as having had intercourse with her at the material time, and, on the basis that she was a not unwilling participant in the act, she might well wish to conceal the identity of the real offender. And the same applies to the other girls who themselves had apparently had sexual intercourse during this Christmas party.

In addition, the learned judge does not appear to have given much weight to the evidence of the boy Wafula, though he does mention it in summarising the evidence of the various witnesses. Wafula's evidence concerned the making of the first complaint, if such it could be called, by the complainant. According to him the complainant told him on the morning of December 26 that the teacher Dominico

had spoilt her. This, of course, is in direct conflict with the evidence given by the complainant and the

other girls at the trial, and must throw further doubt upon their evidence as to the identity of the person who had had sexual intercourse with the complainant on the night of December 25.

These matters, in our view, amounted to such misdirection's on fact as would entitle us to re-examine the evidence to see whether it would suffice to support the conviction. And on such examination we have come to the conclusion that it would not be safe to let the conviction stand. We have indicated reasons why the girls' evidence must be treated with the greatest reserve. The appellant was not the only person who could have had intercourse with the complainant and the complainant admitted having had intercourse with at least one other person apart from the appellant. And the evidence of Selina and Anna, if believed, would clear the appellant of the charge. The learned trial judge rejected the evidence of Selina and Anna, but gave no reasons for so doing, and we can see no reason for preferring the evidence of the girls, apparently merely because they gave evidence for the prosecution. The girls have clearly lied on at least one aspect of the matter, while the evidence of Selina and Anna is supported to some extent by the evidence of the boy Gilogori. There is no doubt that someone had sexual intercourse with the complainant during the Christmas party, but we think that it is by no means established beyond reasonable doubt that that person was the appellant. It is to be noted that the assessors were apparently of the same view, as they returned opinions of "not guilty". For these reasons we allowed the appeal.

Appeal allowed.

The appellant did not appear and was not represented.

For the appellant:
MH Malik & Co, Kisumu

For the respondent:
KC Brookes (Crown Counsel, Kenya)
The Attorney-General, Kenya

Zuberi s/o Rashid v R
[1957] 1 EA 455 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	25 September 1957
Case Number:	105/1957
Before:	Sir Newnham Worley P, Briggs Ag V-P and Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Tanganyika – Crawshaw, J

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[1] Criminal law – Murder – Principal in the second degree – What amounts to presence at the

commission of the offence – What amounts to conduct "countenancing" the commission of the offence – Penal Code s. 22 (*b*) *and* (*c*) (*T.*).

Editor's Summary

The appellant was convicted by the High Court of Tanganyika sitting at Tanga of the murder of his wife. His conviction was mainly based on a statement he had made to the magistrate and this statement was neither repudiated nor retracted at the trial and was accepted by the trial judge. In this statement the appellant admitted that on two occasions previously two persons by the name of Faison Hassani and Abdi Pesema had with his acquiescence planned to poison the deceased; that these two persons had on the day of his wife's death met him and the deceased returning home from their shamba, whereupon he was told that as the attempt to poison his wife had failed they wanted now to kill her; that Faison then took the panga which the appellant had in his hand without asking the appellant and thereupon Faison and Abdi proceeded to kill the deceased; thatafter the panga had been taken from him the appellant went off as he did not want to be present at the killing, but that shortly after leaving he heard the deceased call out "mama" and that he then returned to the scene of the murder, collected his panga and returned to his house. The appellant further stated that

when he was asked by Faison and Abdi to kill the deceased with a knife on the second occasion he refused to kill her by his own hand because he was afraid of the Government. The trial judge found that on the occasion of the murder the appellant had released his panga to be used for the purpose of the murder and so actively aided the commission of the offence; that the appellant by his behaviour countenanced the commission of the offence; and that the appellant was sufficiently present at the commission of the crime for him to be a principal in the second degree "even though he may have kept a few paces away." On appeal from his conviction it was contended for the appellant that the finding that the appellant had "released" the panga was an example of a construction unfavourable to an appellant being placed on words in his statement which in any event was a translation; secondly, that the appellant's attitude throughout as disclosed in the statement was merely one of indifference and as such could not amount to "countenancing" the offence; and thirdly, that he was not present at the commission of the crime.

Held–

(i) there was no suggestion in the statement of any resistance or reluctance on the part of the appellant to part with the panga, and in view of his obvious willing acquiescence in the murder the finding that he "released" the panga was entirely reasonable;

(ii) the question whether or not the appellant's conduct amounted to "countenancing" was a question of fact: the antecedent conduct of the appellant had been such as to induce a reasonable belief in Faison and Abdi that the appellant actively desired his wife's death and was willing, short of direct participation, to encourage and assist them in her murder; it was, therefore, incumbent on the appellant actively to dissociate himself from the final plan to murder if he wished to avoid complicity and that since he did not do so, he rendered himself a party to the crime as principal in the second degree;

(iii) the words "even though he may have kept a few paces away" amounted to a misdirection on fact but the misdirection was not material;

(iv) "presence" is a relative term, and since the appellant clearly was within earshot of the murder and intended to return to the scene as soon as the murder was accomplished, he was sufficiently present at the commission of the offence for him to be a principal in the second degree.

Appeal dismissed.

Cases referred to:

(1) *R. v. Coney and Others* (1882), 8 Q.B.D. 534.

(2) *Du Cros v. Lambourne*, [1907] 1 K.B. 40.

(3) *Wilcox v. Jeffrey*, [1951] 1 All E.R. 464.

Judgment

The following judgment was read by direction of the court: The appellant was convicted by the High Court of Tanganyika sitting at Tanga of the murder of his wife, Ngodope d/o Yusufu. The appellant was not present or represented when the appeal was first listed for hearing, but we directed that counsel

should be assigned to argue the appeal on his behalf. Subsequently, after a full hearing at which the case for the appellant was very clearly presented, we dismissed the appeal. We now give our reason for so doing.

It was common ground that the case against the appellant rested almost entirely on a statement which he made to a magistrate the day after his arrest and three days after the murder.

The deceased had clearly been the victim of a savage attack in the course of which one wrist was almost severed and her head was almost severed from her body. Death was stated to have been due to shock and haemorrhage from the cut wounds she had received. She had clearly been murdered, and the only question was whether the appellant was implicated in the murder.

Apart from the statement made by the appellant, the evidence established little more than that quarrels had occurred between the appellant and the deceased, and that shortly before the time of the murder the appellant and the deceased had been seen together going in the direction of the scene of the murder. As the learned trial judge recognised, this evidence could hardly suffice to establish the guilt of the appellant.

The appellant, however, in his statement to the magistrate, told a remarkable story which reads as follows:

> "My wife, the deceased, previously lived with Faison Hassani. I stole her from him to marry her. After marrying the deceased, Ngodope binti Yusuf, a person called Abdi Pesema gave her Shs. 50/- to persuade her to run away from me. However, she refused to go off with him. Abdi Pesema was angry and referred to her as a prostitute. In front of me they discussed the prospects of poisoning her. They also suggested that I should kill her with a knife pointing out to me that she had slept with other men after she had married me and was simply a prostitute. On the second day Abdi gave Faison some poison to put in Ngodope's water. I knew what was going on. In front of me she took the water with the poison in. The others were not present. She complained that the water was bitter and shortly afterwards vomited. Faison and Abdi came to me to see if she had been killed. When I told him that she was not dead they suggested I should kill her with a knife. I refused to kill her by my own hand because I was afraid of Government. They then suggested to me that I should sleep in another house so that they could come during the night and stab her. I did this but during that night they didn't come.
>
> "The following day I went to work in the shamba with my wife. While I was returning home after work I met Faison and Abdi by a stream. They told me that since they had failed to poison her and had not been able to come the previous night to stab her they now wanted to kill her. Abdi had a knife and Faison had a panga. Faison saw that I had a panga and without asking me he took the panga from me. He gave one of the pangas to Abdi. I then went off not wanting to be present when she was killed. Shortly after leaving I heard her call out "Mama." I then returned and saw Faison and Abdi dragging my wife's body into the bushes. I took my panga back and returned to my house. Faison and Abdi said that they had their fare ready for going to Pemba.
>
> "When I returned I pretended that I didn't know anything about what had happened. I returned to the shamba to look for her. I met her uncle who said that he had not seen her but had seen blood. We investigated and found the body. We reported what we had seen to the manager who reported the matter to the police.
>
> "The police took me to police station Tanga on 8.2.57."

This statement was neither repudiated nor retracted at the trial, and the learned trial judge accepted it in the following words:

> "I believe the statement of the first accused (the present appellant) for he must have had many opportunities of killing her himself had he wished, and his story is consistent in showing that he did not avail himself of them but awaited an occasion when others could carry out the actual killing. Reading it as a whole I think the accused did not intend it to be an admission of guilt, but thought that he was carefully dissociating himself from all liability by avoiding (or so he imagined) any active participation in any of the attempts at murder."

We respectfully agree with these conclusions. The learned trial judge then proceeded to consider whether the admissions made in the appellant's statement established that he had aided the commission of the offence within the meaning of s. 22 (*b*) of the Tanganyika Penal Code, or had aided and abetted its commission within the meaning of s. 22 (*c*), and the learned judge found an affirmative answer to both questions.

It was not argued that the learned judge had misdirected himself as to the law relating to principals in the second degree, but it was contended that he had incorrectly

applied the law to the facts, and, further, that he had unfairly construed the statement against the appellant. It was submitted that since the statement is a translation and the original words used are not available the appellant should be given the benefit of any doubt as to the meaning to be read into any particular word or phrase. We entirely agree that where there is any doubt about the construction to be placed on the statement the construction most favourable to the appellant must be adopted. We consider, however, that we must accept the statement as it stands and that where the wording is clear we are not entitled to speculate on possible alternative meanings which would depend upon an assumption, unsupported by evidence, that there had been a misinterpretation of the original words used by the appellant. In this case there was no attempt to show by cross-examination that the appellant's words had been wrongly interpreted, or even that the translation gave an unfair or incorrect emphasis or shade of meaning. The trial court was therefore obliged, and we are obliged, to treat the translation as correct for all purposes. We think, however, that this case demonstrates once again the great value of the practice, which is now, subject to certain necessary exceptions, enforced by statute in Uganda, of recording the words of an extra-judicial statement in the language in which it is made, so that these, in addition to the translation, may be available to the courts, and any allegations of mistranslation can be examined at length with the assistance, if necessary, of specially skilled interpreters.

The learned judge found that the appellant's statement showed a willing acquiescence throughout by the appellant in the killing of the deceased, so long as he, that is, the appellant, was not held liable. And he found that the appellant was of the same state of mind at the time of the successful murdering of the deceased. It appears to us that this finding on the statement of the appellant was fully justified. Indeed it appeared that on the second attempt at murder the appellant was willing to go further and take the active step of removing himself from the scene in order to facilitate the commission of the murder. We are of opinion also that regard could properly be had to the mental attitude of the appellant towards the earlier attempts at murder as disclosed in his statement for the purpose of arriving at a conclusion as to his mental attitude at the time of the actual murder. On the material contained in the appellant's statement it is difficult to see how the conclusion reached by the learned judge could be avoided.

The learned judge, however, correctly directed himself that it is not sufficient to constitute a person a principal in the second degree that he should tacitly acquiesce in the crime, or that he should fail to endeavour to prevent the crime or to apprehend the offenders, but that it is essential that there should be some participation in the act, either by actual assistance or by countenance or encouragement.

The question whether or not the appellant's conduct amounted to "countenancing" the offence is a question of fact. In *R. v. Coney and Others* (1) (1882), 8 Q.B.D. 534 at p. 557 Hawkins, J., stated the position as follows:

> "In my opinion, to constitute an aider and abettor some active steps must be taken by word, or action, with the intent to instigate the principal, or principals. Encouragement does not of necessity amount to aiding and abetting, it may be intentional or unintentional, a man may unwittingly encourage another in fact by his presence, by misinterpreted words, or gestures, or by his silence, or non-interference, or he may encourage intentionally by expressions, gestures, or actions intended to signify approval. In the latter case he aids and abets, in the former he does not. It is no criminal offence to stand by, a mere passive spectator of a crime, even of a murder. Non-interference to prevent a crime is not itself a crime. But the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition to it, though he might reasonably be expected to prevent and had the power so to do, or at least to express his dissent, might under some circumstances, afford cogent evidence upon which a jury would be justified in finding that he wilfully encouraged and so

> aided and abetted. But it would be purely a question for the jury whether he did so or not."

In the instant case the learned judge found that the appellant released his panga to be used for the purpose of the murder and so actively aided the commission of the offence. He also found that the appellant by his behaviour countenanced the commission of the offence.

The finding that the appellant "released" the panga was severely attacked as being the most serious instance of a construction unfavourable to the appellant being placed on words in the statement. We cannot, however, agree that this finding was not justified. There is no suggestion in the statement of any resistance or reluctance on the part of the appellant to part with the panga, and in view of his obvious willing acquiescence in the murder, we consider that the finding that he "released" the panga was entirely reasonable.

It was argued for the appellant that his attitude throughout as disclosed in the statement was one of complete indifference and as such could not amount to "countenancing" the offence. We are, however, far from being able to say that there was nothing in the statement which could justify the conclusion reached by the learned judge. It is true that the meeting which resulted in the murder was apparently fortuitous, but it is clear from the appellant's previous conduct as described in the statement that short of taking an actual part in the murder he was prepared to take positive action to facilitate the commission of the murder. Moreover, as already stated, he surrendered his panga without resistance or expression of dissent. Since he knew the panga was to be used for the murder he might reasonably have been expected to make some resistance. For the Crown, relying on *Du Cros v. Lambourne* (2), [1907] 1 K.B. 40, it was argued that there was a duty on the appellant to prevent the use of his panga in the commission of the murder and that his failure to attempt to do so in itself constituted him a principal in the second degree. We hesitate to go as far as this, but the surrender of the panga without resistance or protest, knowing the purpose for which it was to be used, was most cogent evidence that the appellant was in fact wilfully encouraging and so aiding and abetting the commission of the murder. We cannot say that the learned judge's conclusions of fact were not weli founded.

The learned judge also found that the appellant was sufficiently present at the commission of the crime for him to be a principal in the second degree "even though he may have kept a few paces away." Those words "even though he may have kept a few paces away" in our opinion do amount to a misdirection on fact. The appellant said

> "I then went off not wanting to be present when she was killed. Shortly after leaving I heard her call out 'Mama.' I then returned . . .".

Clearly the appellant when he moved off went out of sight of the place where the killing was to take place and it is a reasonable inference that he was more than "a few paces" distant. "Presence" however is a relative term. It is clear that he remained within ear-shot of the scene of the murder with the intention of returning to the scene as soon as the murder was accomplished. In the circumstances we are satisfied that he was sufficiently present at the commission of the offence for him to be a principal in the second degree, and that the misdirection was not a material one.

We think that one further consideration supports the learned judge's conclusions. There may be cases where mere passivity will amount to abetment because special circumstances impose a duty which the law recognises actively to dissociate oneself from what is about to be done. We think this duty would arise if there had been any antecedent factor which might fairly lead the intending principals to believe that the motive for non-interference was a desire to afford encouragement. *Wilcox v. Jeffrey* (3), [1951] 1

All E.R. 464. In this case we think the antecedent conduct of the appellant had been such as to induce a reasonable belief in Abdi and Faison that the appellant actively desired his wife's death, and was willing, short of direct participation, to encourage and assist them in her murder. We think that these facts made it incumbent

on the appellant actively to dissociate himself from the final plan to murder if he wished to avoid complicity, and that since he did not do so, he rendered himself a party to the crime as principal in the second degree.

To sum up, the learned judge correctly directed himself as to the law to be applied, and we were satisfied that his conclusions of fact were properly inferred from the appellant's statement. We accordingly dismissed the appeal.

Appeal dismissed.

For the appellant:
FR Stephen
Morrison & Co, Tanga

For the respondent:
JG Samuels (Crown Counsel, Tanganyika)
The Attorney-General, Tanganyika

Farrell Lines Inc v Landing and Shipping Company of East Africa Ltd
[1957] 1 EA 460 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	23 October 1957
Case Number:	40/1957
Before:	Sir Ronald Sinclair V-P, Briggs and Bacon JJA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Tanganyika – Abernethy, J

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[1] Agent – Period of limitation – Agent for cargo handling – Delegation of duty – East African Railways and Harbours Act, s. 2 (1), *s.* 2 (3) (*e*) *and s.* 92.

Editor's Summary

The respondents were under contract with the East African Railways and Harbours Administration to perform all duties of cargo handling in the port of Dar-es-Salaam. The appellants unintentionally off-loaded at Dar-es-Salaam from one of their ships some cargo consigned to another port. The

respondents received the goods into a lighter owned by the Administration, but operated by the respondents. They then landed the goods and were subsequently unable to produce them. The appellants filed a suit in the High Court claiming from the Administration the return or the value of the goods and also from the respondents in detinue or conversion. The suit as against the Administration was dismissed on the ground that it would be barred by the provisions of s. 92 of the East African Railways and Harbours Act, since the goods, if they were ever in the possession of the Administration, must have been "accepted by the Administration for carriage or warehousing," the suit was for compensation for non-delivery thereof, no notice of claim in respect of the loss had been given to the commissioner within the required period of six months, and it was not shown to have been impracticable to give such notice. As against the respondents the High Court held that the Administration could only act through its agents and the respondents were such agents for the purpose of such acceptance and accordingly held that s. 92 applied to the respondents and dismissed the suit. On appeal it was argued that the Administration had never accepted the goods by its employees because the respondents were not employees as defined by s. 2 (1) of the Act.

Held – the respondents were not "employees" within s. 2 (1) of the East African Railways and Harbours Act and since no employee of the Administration had ever accepted the goods the provisions of s. 92 did not apply.

Appeal allowed. Case remitted to the High Court.

No cases referred to in judgment

Judgment

Briggs JA: read the following judgment of the court: This was an appeal from a decree of the High Court of Tanganyika. We allowed the appeal with costs, set aside the decree, ordered the respondent to pay the costs of trial of the issue on which the appeal turned, and remitted the suit to the High Court for further hearing. We now give our reasons.

The appellants in 1952 unintentionally offloaded at Dar-es-Salaam from one of their ships some cargo consigned to another port. The respondents are under contract with the East African Railways and Harbours Administration to perform all duties of cargo handling in the port of Dar-es-Salaam

> "from the time of receiving such cargo from the ship's labour slings . . . until the time of delivery to the consignees . . . or loading into railway trucks for despatch . . ."

These duties would otherwise be performed by the Administration under statutory powers and are delegated to the respondents as agents of the Administration under a statutory power so to delegate conferred by s. 8 (2) (*k*) (ii) of the East African Railways and Harbours Act. In their capacity as cargo-handlers the respondents received the goods in question from the ship into a lighter owned and maintained by the Administration, but operated by the respondents under the contract. They then landed the goods and are unable now to produce them. They may have stored them for a time in a warehouse, also owned by the Administration, but conducted and staffed by the respondents under the contract. There is apparently some reason to think that the goods found their way to Belbase, but this is not clear. The appellants by suit filed in 1954 claimed the return or value of the goods from the Commissioner for Transport as representing the Administration and also from the respondents in detinue or conversion. The suit as against the Administration was dismissed on the ground that however other issues might be decided, it would in any event be barred by the provisions of s. 92 of the Act, since the goods, if they were ever in the possession of the Administration, must have been "accepted by the Administration for carriage or warehousing," the suit was for compensation for non-delivery thereof, no notice of claim in respect of the loss had been given to the commissioner within the required period of six months, and it was not shown to have been impracticable to give such notice.

At the further trial of the suit as against the respondents the High Court held that the goods had been "accepted by the Administration for carriage or warehousing," since the Administration, as an impersonal body or group of bodies, could only act through its agents, and the respondents were such agents for the purpose of such acceptance. The court accordingly held that the provisions of s. 92 applied to the claim against the respondents in the same way as it did to the Administration itself, and therefore dismissed the suit.

On appeal it was submitted that the goods had never been "accepted by the Administration" within the meaning of s. 92, since that phrase must be read with the statutory definition in s. 2 (3) (*e*), which is as follows:

> " 'accepted by the Administration' means accepted by an employee for carriage or warehousing by the commissioner in accordance with the provisions of this Act;"

and the further definition of "employee" in s. 2 (1), which is:

> " 'employee' means any person in the service of the High Commission and employed in the Administration;"

The respondents are obviously not "employees" in this strict sense. The Act in many places distinguishes

between employees and other agents, and there is nothing in the context of s. 92 which would exclude the defined meaning of the words “accepted by the Administration.” Counsel for the appellants assures us that he took this point in the High Court, and though the shorthand note is somewhat obscure and obviously incomplete we accept his assurance. It seems, however, that neither the learned judge nor counsel for the respondents fully appreciated the point, for it is not referred

to in the judgment, and counsel for the respondents said it took him by surprise when raised before us. He was unable to dispute that, as a matter of construction, there must be "acceptance" by an "employee," as opposed to a mere agent, of the Administration before s. 92 can have any application, but contended that that requirement had been met in this case.

The port manager is the officer of the Administration who has general control of the operation of Dar-es-Salaam harbour on behalf of the Administration. As such, he is responsible to the Administration for the proper operation of the respondents' cargo-handling contract. Although he is not concerned with their day-to-day working, he can for certain purposes, e.g. priorities of ships for unloading, issue instructions to them. In particular, the respondents only release cargo, by delivery to consignees or on to railway trucks, in pursuance of instructions from him or from one of his subordinates in the Administration. It was contended for the respondents that these facts show that all cargo is "accepted" by the port manager, or by one of his staff, all of whom are "employees" in the required sense. We could not accept this argument. If it is based on physical acceptance by the port manager or one of his staff, it is simply at variance with the facts, for although they give directions as to disposal of goods, the goods are never in their physical custody and they never sign receipts therefor. If, however, it is contended (and we understood this to be Mr. Dodd's principal argument) that the port manager "accepts" goods through the respondents as his agents or servants for this purpose, the argument ignores the legal relationships which obtain between fellow-agents of the same principal, or senior and junior servants of the same master. It is trite law that the junior agent is not an agent of the senior agent, and the Junior servant is not a servant or agent of the senior servant, although the seniors may be entitled to give, and do give, orders to the juniors. In this case the principal of the respondents and the employer of the port manager and his staff is the Administration. The respondents are not, in respect of any of their functions under the contract, either agents or servants of the port manager, or of anyone other than the Administration itself.

We were accordingly of opinion that no employee of the Administration had ever accepted these goods, and in consequence the provisions of s. 92 did not apply. It may be remarked that it now appears that the dismissal of the suit as against the Administration turned on a finding that the goods were "accepted by the Administration," which may have been erroneous in law; but there is no appeal against it, and in any event there may have been other sufficient reasons why the suit as against the Administration could not succeed.

Appeal allowed. Case remitted to the High Court.

For the appellants:
RP Cleasby
Atkinson, Cleasby & Co, Mombasa

For the respondents:
HG Dodd
Dodd & Co, Dar-es-Salaam

The Registrar-General v Manubhai Shankerbhai Desai

[1957] 1 EA 463 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	23 October 1957
Case Number:	62/1957
Before:	Sir Newnham Worley P, Briggs and Bacon JJA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Tanganyika – Abernethy, J

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[1] Land registration – Age of majority for purpose of holding land in Tanganyika – Land Registration Ordinance (*Cap.* 334), *s.* 81 (*T.*) – *Conveyancing and Law of Property Act,* 1881, *s.* 41, *s.* 42 (5) (i) *and s.* 43 – *Land* (*Law of Property and Conveyancing*) *Ordinance* (*Cap.* 114), *s.* 2 (1), (2) *and* (3) (*T.*) – *Indian Majority Act,* 1875.

Editor's Summary

The Registrar-General refused to register the respondent as transferee of certain land on the ground that the respondent was at the time an infant. The respondent appealed to the High Court which allowed the appeal, whereupon the Registrar-General appealed. It was not in dispute that at the date of the transfer the respondent was over the age of eighteen years and under twenty-one years. For the Registrar-General it was contended that by virtue of s. 81 of the Land Registration Ordinance the tenant for life of settled land is not entitled to be registered as the owner of any estate and that since s. 41 of the Conveyancing and Law of Property Act, 1881, of England applies in the territory under the provisions of s. 2 of the Land (Law of Property and Conveyancing) Ordinance (Cap. 114) the land was settled land. Section 41 of that Act provides that

> "where a person in his own right seised of or entitled to land for any estate in fee simple . . . is an infant, the land shall be deemed to be a settled estate . . ."

Section 2 (1) of the Land (Law of Property and Conveyancing) Ordinance provides that ". . . the English law and practice of conveyancing in force in England" on the first day of January, 1922, "shall be in force in the Territory" and s. 2 (2) and (3) provides that the English law and practice should be in force "only as the circumstances of the Territory and its inhabitants" permit and when such law or practice is inconsistent with any provision in any Ordinance or other legislative Act or Indian Act for the time being in force in the Territory, the last mentioned provision should prevail. On the basis of these provisions it was contended that there was nothing in the circumstances of the Territory or its inhabitants which required a modification of the English age of infancy and, therefore, sub-s. (2) of s. 2 did not apply and as regards sub-s. (3) there was no inconsistency between the English Act and the Indian Majority Act, 1875, enabling the latter to prevail. For the respondent it was argued that the Indian Majority Act was applicable under the provisions of s. 2 of the Indian Acts (Application) Ordinance (Cap. 2) and accordingly the age of majority is eighteen years.

Held–

(i) the Conveyancing and Law of Property Act, 1881, did not prescribe twenty-one as the age of majority for the purpose of holding land as such, but merely related the provisions of the Act to the general law of England regarding the age of majority.

(ii) the provisions of the Conveyancing and Law of Property Act, 1881, must be construed, under s. 3 of the Land (Law of Property and Conveyancing) Ordinance as if "infant" referred to a person under the age of eighteen years and as if the references to the age of twenty-one years in s. 42 (5) (*i*) and s. 43 (1) of the Conveyancing and Law of Property Act, 1881, were references to the age of eighteen years.

(iii) the Indian Majority Act, 1875, is the lex loci situs in Tanganyika and "infant" in relation to a person domiciled in Tanganyika means a person under the age of eighteen years.

Appeal dismissed.

No cases referred to in judgment

Judgment

Forbes JA: read the following judgment of the court: This was an appeal from a judgment of the High Court of Tanganyika allowing an appeal to that court against a refusal by the appellant to register a transfer to the respondent of land comprised in Title No. 130523/42. After hearing argument we dismissed the appeal with costs and now give our reasons for so doing.

The registration of land in the Territory is governed by the Land Registration Ordinance (Cap. 334). Under s. 81 of that Ordinance the tenant for life of settled land is not entitled to be registered as the owner of any estate. And under s. 41 of the English Conveyancing and Law of Property Act, 1881, which applies in the Territory by virtue of s. 2 of the Land (Law of Property and Conveyancing) Ordinance (Cap. 114),

> "Where a person in his own right seized of or entitled to land for any estate in fee simple . . . is an infant, the land shall be deemed to be a settled estate within the Settled Estates Act, 1877."

The question at issue here is whether infancy, for the purposes of that section in its application to the respondent, ceases at the age of eighteen years or twenty-one years. For it is not in dispute that at the date of the transfer in question the respondent was over the age of eighteen years but under the age of twenty-one years.

In general, the age of majority of persons domiciled in Tanganyika is governed by the Indian Majority Act, 1875, which is applied to the Territory by s. 2 of the Indian Acts (Application) Ordinance (Cap. 2). Under that Act, subject to specified exceptions which are not material here, the age of majority of persons domiciled in Tanganyika is eighteen years. The appellant, however, contended that under the English Conveyancing and Law of Property Act, 1881 (which, as stated above, applies in the Territory), an "infant" is a person under the age of twenty-one years and that this must be taken to be the age of majority for the purpose of holding land in Tanganyika. Section 2 of the Land (Law of Property and Conveyancing) Ordinance reads as follows:

> "2 (1) Subject to the provisions of this Ordinance, the law relating to real and personal property, mortgagor and mortgagee, landlord and tenant, and trusts and trustees in force in England on the first day of January, 1922, shall apply to real and personal property, mortgages, leases and tenancies, and trusts and trustees in the Territory in like manner as it applies to real and personal property, mortgages, leases and tenancies, and trusts and trustees in England, and the English law and practice of conveyancing in force in England on the day aforesaid shall be in force in the Territory.
>
> "(2) Such English law and practice shall be in force so far only as the circumstances of the Territory and its inhabitants, and the limits of His Majesty's jurisdiction permit.
>
> "(3) When such English law or practice is inconsistent with any provision contained in any Ordinance or other legislative act or Indian Act for the time being in force in the Territory, such last mentioned provision shall prevail."

And s. 3 further provides:

> "For the purposes of this Ordinance, any court may construe any provision of the English law with such modification not affecting the substance as may be necessary or proper to adapt the same to the circumstances of the Territory . . ."

For the appellant it was argued that there was nothing in the "circumstances of the Territory and its inhabitants" which required a modification of the English age of infancy, and that therefore sub-s. (2) of

s. 2 did not apply. And as regards sub-s. (3) it was argued that there was no inconsistency between the provisions of the English Conveyancing and Law of Property Act, 1881, and the Indian Majority Act; that the law recognises different ages of majority for different purposes, even in the Majority Act itself; that though (assuming the respondent to be domiciled in Tanganyika) his personal law governing his capacity to contract is the Indian Majority Act, yet the

lex loci situs in relation to land is the English Conveyancing and Law of Property Act, 1881, and that there is no inconsistency between his having the capacity to contract at the age of eighteen though required to have land registered in the name of trustees until he reaches the age of twenty-one; that the legislature in enacting the Land (Law of Property and Conveyancing) Ordinance, which contains specific reference to the Conveyancing and Law of Property Act, 1881 (e.g. s. 7 (2)) must have had in view the provisions of that Act including those relating to infancy and have intended to apply those provisions to the Territory in full.

We were unable to accept these arguments. If the English Conveyancing and Law of Property Act, 1881, is read as a whole, it is clear that the Act does not prescribe twenty-one as the age of majority for the purpose of holding land as such, but merely relates the provisions of the Act to the general law of England regarding the age of majority. Section 41 refers to an infant. The term is not defined in the Act and clearly is intended to mean an infant under the general law. And it is perfectly logical that s. 42 (5) (i) (on which the appellant relied strongly) should provide "If the infant attains the age of twenty-one years . . ." since twenty-one is the age of majority in England. But in our view this amounts to no more than saying "If the infant attains the age of majority" in particular reference to the age of majority in force in England. It does not, in our opinion, seek to make special provision as to the age of majority in relation to land. It follows from this that in the application of the Act to Tanganyika under s. 2 of the Land (Law of Property and Conveyancing) Ordinance, the age of majority in force in the Territory (being different from that in force in England) is a "circumstance of the Territory and its inhabitants" to be taken into account under sub-s. (2) of that section. If, as we consider to be the case, the relevant provisions of the Conveyancing and Law of Property Act, 1881, merely seek to provide for the holding of land during "infancy" then the Act must in its application to the Territory be construed in direct relation to the period of infancy which prevails in the Territory. This being eighteen under the Indian Majority Act (which, incidentally, by virtue of its application to the Territory, is in fact the lex loci situs in Tanganyika) we are of the opinion that the provisions of the Conveyancing and Law of Property Act, 1881, must be construed, under s. 3 of the Land (Law of Property and Conveyancing) Ordinance as if "infant" referred to a person under the age of eighteen years and as if the references to the age of twenty-one years in s. 42 (5) (i) and in s. 43 (1) were references to the age of eighteen years.

While we think that this is a matter which falls directly within s. 2 (2) and s. 3 of the Land (Law of Property and Conveyancing) Ordinance, we are of the opinion that the same result must follow if the matter is considered under s. 2 (3) of that Ordinance. As we have pointed out, the Indian Majority Act is in fact the lex loci situs in Tanganyika, and "infant" in relation to a person domiciled in Tanganyika therefore means a person under the age of eighteen years. This is clearly inconsistent with the provisions of the Conveyancing and Law of Property Act, 1881, which assume that infancy extends to the age of twenty-one.

For these reasons we considered the appeal must fail. The question was raised before us that at no stage had there been any evidence that the respondent was in fact domiciled in the Territory. This is true, but the point had not been taken before, and at the earlier proceedings the respondent's Tanganyika domicile appeared to have been taken for granted. Mr. Jhaveri, who appeared for the respondent, assured us that the respondent had been born and was domiciled in Tanganyika, and undertook to have placed on the court file a joint affidavit to be sworn by the respondent and his father establishing his domicile and place of birth. Mr. Konstam for the appellant indicated that the appellant would not contest such an affidavit. We accordingly ordered that such an affidavit be placed on the file in due course and that the order dismissing the appeal should not be extracted until the affidavit was on the file.

As regards costs of the appeal, our attention was drawn to sub-s. 102 (9) of the Land Registration Ordinance which provides:

> "(9) The High Court may make such order on the appeal as the circumstances may require, including an order as to costs:
>
> "Provided that the Registrar shall not be ordered to pay any costs unless, in the opinion of the High Court, the appeal was occasioned by his wilful misconduct."

The sub-section, however, relates in terms to costs in the High Court, and we considered that it did not preclude us from awarding costs against the registrar on an unsuccessful appeal by the Registrar against a decision of the High Court.

We accordingly dismissed the appeal with costs.

Appeal dismissed.

For the appellant:
MGK Konstam (Crown Counsel, Tanganyika)
The Registrar-General, Tanganyika

For the respondent:
KL Jhaveri
Patel Desai & Jhaveri, Dar-es-Salaam

Shah Kachra Merag v Gandhi & Company
[1957] 1 EA 466 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	17 October 1957
Case Number:	10/1957
Before:	Sir Ronald Sinclair V-P, Briggs and Forbes JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Harley, Ag. J

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[1] Practice – Setting aside dismissal of a suit – Suit dismissed for non-appearance – What constitutes "appearance" – Civil Procedure (*Revised*) *Rules*, 1948, *O.* 9, *r.* 19 *and r.* 20 (*K.*).

Editor's Summary

The appellant as landlord filed two suits against his tenants claiming possession and other relief. For both cases the appellant retained the same advocate. In one suit the tenants were the respondents who defended on substantial grounds. On July 14, 1956, both cases were set down for hearing on October 15. Shortly before October 15 the appellant's advocate, who since September had been engaged in a lengthy

criminal case before a magistrate, realised that completion of this case would clash with the hearing of the appellant's two actions and he persuaded the magistrate not to sit on October 15 and 16. When the Supreme Court adjourned on October 16, the first of the appellant's two cases had been concluded and the advocate applied that the other case (in which the respondents were concerned) be adjourned generally The respondents' advocate did not oppose but the trial judge refused the application on the grounds that the advocate should have briefed someone else to hold his brief in either the criminal or the civil case and because an adjournment would disrupt the Cause List. On October 17, in the absence of his advocate, who was again before the magistrate, the appellant attended the Supreme Court and when the trial judge again refused an adjournment he declined to go on with the case adding "I elect not to appear." The respondents' advocate then applied to the judge to dismiss the suit under O. 9, r. 19, and the judge so ordered, but no formal order or decree was ever extracted. Thereafter, the appellant unsuccessfully applied under O. 9, r. 20 to set aside the dismissal and reinstate the suit. On appeal, much of the argument was concerned with the question whether the appellant had "appeared" in the suit since O. 9, r. 19 applies only in the event of non-appearance of the plaintiff.

Held–

(i) the appellant had both in fact and in law "appeared" and therefore no order could be made under O. 9, r. 20; the dismissal of the suit, though in itself regular, could not have been effected under the terms of O. 9, r. 19, since the condition precedent to its application, namely non-appearance of the plaintiff, was not satisfied.

(ii) the only operative order was that the suit be dismissed with costs, and the suit fell to be dismissed because the appellant did not prove his case.

Appeal dismissed.

Cases referred to in judgment:

(1) *Din Mahomed v. Lalji Visram & Co*. (1937), 4 E.A.C.A. 1.

October 17. The following judgment was read by direction of the court:

Judgment

This was an appeal from an order of the Supreme Court of Kenya whereby an application to set aside the dismissal of a suit under the provisions of O. 9, r. 20 was dismissed with costs. We dismissed the appeal with costs, and find it necessary to state our reasons, since we acted on grounds materially different from those on which the learned judge below relied.

In Nairobi Civil Case No. 607 of 1956, the appellant as landlord sued the respondents as his tenants, or former tenants, for possession and other relief, and the suit was defended on substantial grounds. In another suit, Civil Case No. 606 of 1956, the appellant similarly sued another of his tenants. The suits were to some extent related and might have been consolidated, but this was not done. In both suits Mr. Mandavia was retained for the appellant. On July 14, 1956, both suits were fixed by consent for hearing on October 15, 1956. At that time they were fourth and fifth in the list. During September, 1956, Mr. Mandavia was engaged in a long and difficult criminal case before the resident magistrate, Nairobi, and after an adjournment the learned magistrate, without reference to counsel as regards their future engagements, fixed the adjourned hearing for October 15 and the days following until completion. Mr. Mandavia requested the learned magistrate not to sit on October 15 and he agreed. When the list for October 15 was published the two civil cases stood first and second and it was apparently hoped to complete them in one day. Civil Case No. 606 was begun and was part heard at the end of the day. Mr. Mandavia persuaded the learned magistrate not to sit on the 16th and Civil Case No. 606 was continued and concluded at the end of that day, the court rising at about 5 p.m. Before it rose Mr. Mandavia applied that the hearing of Civil Case No. 607, instead of proceeding on October 17, should be adjourned generally. This application was refused. The learned judge said,

> "Mr. Mandavia's difficulty over appearing in two courts at once was foreseen at least ten days ago. He should get somebody else to appear for him in one court or the other.
>
> "I am not disposed to break up this list – and the application for adjournment is refused. Hearing will be resumed at 10.30 tomorrow 17/10."

It must be noted that Civil Case No. 606 had apparently lasted much longer than anyone had expected, and, although Mr. Mandavia may have realized that there was a theoretical possibility of a clash, it is by

no means certain that he should have foreseen at any time before October 16 that there would in fact be a clash. It is almost certain that after 5 p.m. on the 16th he would have found it impossible to brief another advocate to conduct Case No. 607 on the 17th, though he might have found one willing to mention it.

On the morning of the 17th Mr. Mandavia attended the adjourned hearing in the magistrate's court, having previously tried without success to obtain a further adjournment. The appellant appeared in person before the learned judge and presented to the court a letter from Mr. Mandavia which again requested an adjournment of Case No. 607. Mr. R. N. Khanna for the respondent very courteously did not oppose adjournment, but left the matter in the court's hands. It seems that the

appellant did not ask for a short adjournment to enable him to retain other counsel, and the court did not suggest this solution to him. The learned judge's note then reads,

> "Court to plaintiff: Do you wish the hearing to go on, in absence of your counsel?
>
> " 'I cannot go on without my counsel. I elect not to appear because I cannot conduct this case without my counsel.'
>
> "Khanna: We do not admit any part of the claim.
>
> "11 a.m. Suit dismissed O. 9; r. 19.
>
> "(Judgment dictated to Shorthand-writer Tilsley)."

In the judgment it appears that Mr. R. N. Khanna, apparently assuming that the appellant did not "appear," had asked the court to apply the provisions of O. 9, r. 19, and the learned judge purported to do so, and dismissed the suit with costs. The judgment states,

> "The plaintiff has stated frankly, and I am not blaming him, that he will not appear in the absence of his counsel. The position, therefore, is today that the defendant appears and the plaintiff does not appear at the time when the suit is called on for hearing. No part of the claim is admitted; counsel for the defendant asks the court to operate r. 19 of O. 9. It seems to me that I should, and in fact must, make the order in accordance with the rule and I do so order that the suit be dismissed with costs."

Thereafter the appellant applied under O. 9, r. 20 to set aside the dismissal and reinstate the suit. We were of opinion that no order could be made under that rule on the ground that the dismissal of the suit, though in itself regular, could not properly have been effected under the terms of O. 9, r. 19, since the condition precedent to its application, namely non-appearance of the plaintiff, was not satisfied. We considered that the appellant had, both in fact and in law, "appeared." We thought the law on this point was correctly stated in Mulla's Code of Civil Procedure, (12th Edn.) Vol. I, p. 643, the Indian rules being for this purpose in pari materia with the Kenya ones. The passage reads,

> "The mere presence of a party in court at the hearing is sufficient to constitute 'appearance' within the meaning of this order. It does not matter for what purpose he appears or what action he takes on the appearance. A plaintiff appearing and applying for an adjournment on the ground that his witnesses are not present will be deemed to have 'appeared'. If the application is refused, and the suit is dismissed owing to his inability to establish his case in the absence of witnesses, the dismissal is not one under r. 8, for the plaintiff did appear, and he cannot, therefore, avail himself of the provisions of this rule. Similarly, a defendant appearing and applying for an adjournment on the ground that he had no time to prepare his case, will be deemed to have 'appeared'."

Mulla proceeds to emphasize that different considerations apply where appearance is by advocate. An advocate may be briefed only to apply for an adjournment, and if he does so without success and withdraws he is not thereby deemed to have "appeared". Secus if he has been briefed generally in the case and refused to go on. *Din Mohamed v. Lalji Visram & Co.* (1) (1937), 4 E.A.C.A. 1. There are conflicting authorities on the position where the party is at first present with his advocate, and later remains in court unrepresented; but these cast no doubt on the result where the facts are as in this case.

There was no appeal from the order that the suit be dismissed, and neither that order nor a decree of dismissal has ever been extracted. The only operative order was that the suit be dismissed with costs, and the suit fell to be dismissed because the appellant did not prove his case. We could not therefore say that the dismissal as such was wrong, though it seemed clear that it was based on incorrect grounds. If an order or decree had been extracted and had stated on its face that the appellant

had not appeared and the suit was dismissed under O. 9, r. 19, the respondent might have been estopped from alleging that the appellant did appear. It might then have been the duty of the Supreme Court to act under O. 9, r. 20 on the ground that O. 9 r. 19 had been applied, and the question whether it had been correctly applied did not arise. But there could be no such estoppel in the absence of a formal decree or order, and Mr. D. N. Khanna, who appeared for the respondent on the application to reinstate, was entitled to submit, as he did, that the appellant had appeared and therefore there could be no order under O. 9, r. 20. The question was one of law, and he could retract Mr. R. N. Khanna's "admission." This is one more example of the grave results which may arise from the practice, which we have repeatedly condemned and which we had hoped was dying out, of neglecting to extract orders and decrees. It was a curious feature of the order and ruling now under appeal that the ruling does not make it clear whether the learned judge accepted Mr. D. N. Khanna's submission on r. 20 or not. He certainly did not in terms reject it, though he dealt also with the merits of the application. Since in our view the application fell to be dismissed on grounds of want of jurisdiction for the reasons set out above, and since other proceedings may follow this appeal, we think it would be undesirable to express any views on the question whether, if it had been possible in law to make an order on the application, such an order should in the circumstances have been made. We therefore confine ourselves to saying that we must not be taken to agree with the views expressed by the learned judge merely because they are not criticized in this judgment.

Appeal dismissed.

For the appellant:
HC Oulton and *BD Bhatt*
BD Bhatt, Nairobi

For the respondent:
DN Khanna
DN & RN Khanna

Shiv Kumar Sofat v R
[1957] 1 EA 469 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	4 July 1957
Case Number:	27/1957
Before:	Sir Newnham Worley P, Sir Ronald Sinclair V-P and Bacon JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Sir Kenneth O'Connor, C.J and Forbes, J

[1] Criminal law – Appeal on question of law – Merits of appeal not considered but re-trial ordered – Whether appellant entitled as of right to be heard on question of law – Principles on which re-trial should be ordered.

Editor's Summary

The appellant was convicted by the resident magistrate, Nairobi, on sixty-one counts of thefts of "cash" by a person employed in the public service. Most of the counts involved the stealing or conversion of cheques. The appellant appealed to the Supreme Court alleging that the convictions were wrong in law in that the charges were not proved as laid. On the hearing of the appeal the Supreme Court, of its own motion, took exception to the unsatisfactory nature of the trial and in particular to the number of counts laid. The Supreme Court, however, refused to consider the grounds of appeal on their merits but quashed the convictions and sentences and ordered a re-trial. The appellant appealed against this order.

Held–

(i) a re-trial should not be ordered unless the appellate court is of opinion that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result. *Pascal Clement Braganza v. R.*, [1957] E.A. 152 (C.A.), applied.

(ii) when an appellant raises a question of law which, if successful, must lead to his conviction being quashed, he is entitled, as of right, to have that question determined.

Case remitted to the Supreme Court for hearing and determination.

Cases referred to in judgment:

(1) *Pascal Clement Braganza v. R.*, [1957] E.A. 152 (C.A.).

July 4. The following judgment was read by direction of the court.

Judgment

The appellant was tried in the court of the resident magistrate, Nairobi, on sixty-one counts each alleging theft by a person employed in the public service: the particulars of each count averred the theft of "cash" of various values, the property of Her Majesty, on various dates. Having been convicted on all these counts, the appellant preferred an appeal to the Supreme Court of Kenya alleging that the convictions were wrong in law in that the charges were not proved as laid. It is common ground that, in the great majority of the instances charged, the act proved, or alleged, against the appellant was the stealing or conversion of a cheque, and the appellant's contention in his petition of appeal was that a charge of stealing "cash" could not be proved by evidence of stealing a cheque, and that he was entitled to be acquitted on all the charges.

When the appeal to the Supreme Court came on for hearing the court, of its own motion, took exception to the unsatisfactory nature of the trial and, in particular to the number of counts laid. The court refused to accede to Mr. O'Brien Kelly's request that the grounds of appeal should be considered, but quashed the convictions and sentences and ordered a re-trial for reasons which they gave as follows:

> "There is evidence on the record which might justify a conviction or convictions, but the trial has been unsatisfactory. We think that the proper order is to quash these convictions and sentences and to order a new trial before another magistrate upon a reasonable number of counts which the accused can be expected to be able to meet.
>
> "In the circumstances of this case, we do not think that the appellant will be prejudiced by such an order, as even if the appellant were to succeed in his present appeal, it would still be open to the Crown to charge him with other and different offences."

From that order an appeal was brought to this court. We were of opinion that the learned judges of the first appellate court acted upon a wrong principle in ordering the re-trial: we therefore set aside the order of the Supreme Court and remitted the matter to that court with a direction that the petition of appeal to that court be heard and determined on its merits. We now give our reasons for that decision.

In *Pascal Clement Braganza v. R.* (1), [1957] E.A. 152 (C.A.) this court accepted the principle that re-trial should not be ordered unless the appellate court is of opinion that on a proper consideration of the admissible, or potentially admissible, evidence a conviction might result. We think, with respect, that in the present case, the Supreme Court either overlooked that principle or departed from it.

The appellant's case was, and is, that as a matter of law the evidence led by the prosecution, even if accepted as wholly true, did not establish the charges laid and that he was entitled to have this point determined before being again put in peril on the same or amended charges based on the same facts. He

also contends that the question whether he may be faced with other charges for other offences is wholly irrelevant at this stage.

We thought that these arguments must succeed. We think that when an appellant raises a question of law which, if successful, must lead to his conviction being quashed, he is entitled, as of right, to have that question determined. As examples of such

questions, we would instance matters of jurisdiction, autrefois convict or acquit, that the charge as framed did not disclose any offence, or, as in the present case, that the charge was not proved as laid.

Case remitted to the Supreme Court for hearing and determination.

For the appellant:
J O'Brien Kelly and *SL Chawla*
SL Chawla, Nairobi

For the respondent:
JP Webber (Crown Counsel, Kenya)
The Attorney-General, Kenya

RR & Company Ltd v Abdul Sakur
[1957] 1 EA 471 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	27 September 1957
Case Number:	69/1957
Before:	Sir Newnham Worley P, Briggs Ag V-P and Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Uganda – Jeffreys Jones, J

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[1] Res judicata – Stay of proceedings – Arbitration clause in partnership agreement – Arbitration Ordinance s. 17 (*U.*).

Editor's Summary

The High Court of Uganda refused an application by the appellant for an order to stay proceedings in consequence of the provisions of an arbitration clause contained in an agreement of partnership. The partnership was determinable only by three months notice and the respondent immediately after filing suit for a decree of dissolution and other relief, applied for an interim injunction to restrain the appellant company from further carrying on the business. The appellant thereupon required the respondent to arbitrate in accordance with the clause in the partnership agreement and before he had entered formal appearance applied for a stay of proceedings. The High Court held that the application was premature since it was not made "at any time after appearance" as required by s. 17 of the Arbitration Ordinance and accordingly the court had no jurisdiction to entertain the application. After giving his decision the judge said he would have dismissed the application also on the ground that the arbitration clause did not require all disputes to be submitted to arbitration. The appellant subsequently filed another application

for a stay of proceedings which the judge dismissed on the ground that he had already dealt with the matters raised on the hearing of the first application. On appeal the respondent contended that where a court gives two grounds for its decision, both are binding both as authorities and for purposes of res judicata.

Held – to the rule that where a court gives two grounds for its decision both are binding, there is a clear exception where one of the grounds is want of jurisdiction, for where that is the case the decision on the other question cannot by definition be a decision of a court of a competent jurisdiction, which alone can found an allegation of res judicata.

Appeal allowed. Order for stay of proceedings.

Cases referred to in judgment:

(1) *New South Wales Taxation Commissioners v. Palmer*, [1907] A.C. 179.

Judgment

Sir Newnham Worley P: read the following judgment of the court: This was an appeal by leave from a refusal by the High Court of Uganda to stay proceedings in consequence of the provisions of an arbitration clause contained in an agreement of partnership between the parties. We allowed the appeal with costs here and below and ordered a stay. The costs in the High Court will be the full costs of the action up to the date of our judgment, and not merely of the application for stay. We now give our reasons.

The partnership was determinable only by three months' notice and the respondent sued for a decree of dissolution and the usual consequential relief of accounts, enquiries and the like. Immediately after filing suit he applied for an interim injunction to restrain the appellant company from further carrying on the partnership business. The appellant thereupon required the respondent to proceed to arbitration under cl. 23 of the partnership agreement and applied for a stay of proceedings. Counsel desired to have the application for stay heard first, so it was filed in a hurry and before he had entered formal appearance under O. 9 r. 1. Appearance was duly entered before the application for stay was heard, but it was then submitted for the respondent that the application had been premature, since it was not made "at any time after appearance," as required by s. 17 of the Arbitration Ordinance, but before appearance, and that accordingly the court had no jurisdiction to entertain the application. The learned judge accepted this submission; there was no appeal against his decision; and both parties now accept that it was correct. Unfortunately, after giving that decision the learned judge said,

> "I would have dismissed the application too on the ground that s. 23 of the agreement does not order all disputes to be submitted to arbitration"

and expressed the view that this dispute was dehors the scope of the clause. The appellant, taking the view that since the first application had been dismissed on the jurisdiction point these remarks were merely obiter, filed another application for stay. The respondent unwisely contended, not that the learned judge's previous remarks on the merits were correct, but that the application could not be heard since the question of the merits had already been decided against the appellant. The learned judge said:

> "I have already dealt with the matters raised on this application at a previous hearing. I do not think I am competent to hear this application. I therefore dismiss the application with costs."

Counsel for the respondent sought to rely on the principle laid down in *New South Wales Taxation Commissioners v. Palmer* (1), [1907] A.C. 179, that where a court gives two grounds for its decision both are binding, both as authorities and for purposes of res judicata. But there is a clear exception to this rule where one of the grounds is want of jurisdiction, for where that is the case the decision on the other question cannot by definition be a decision of a court of competent jurisdiction, which alone can found an allegation of res judicata. The learned judge had never in truth decided this matter on the merits and could never have done so. He ought therefore to have entertained the second application.

Since there had been no adjudication on the merits we might have remitted the application for hearing, but counsel asked us to decide the matter ourselves and so save costs, and since the question was purely one of construction we did so. Clause 23 of the agreement read:

> "23. If at any time any dispute or difference shall arise either before or after the expiration or determination of the partnership between the partners or those claiming under them touching or relating to the construction of these presents or to the said partnership property or effects or to any of the partnership

accounts business or transactions whatsoever, every such dispute or difference shall be referred to the arbitration of two different persons and their umpire to be chosen by the referees and this shall be deemed to be a submission under the

provisions of the Uganda Arbitration Ordinance for the time being in force in Uganda."

We thought that on the allegations in the plaint and the further matters raised in the affidavit on application for stay there were quite clearly "unhappy disputes and differences" relating to the partnership property and also to the partnership business and transactions. It is certainly possible to find arbitration clauses wider in their scope than this one, but this was quite wide enough for the appellant's purpose. The arbitrators will of course be able to award a dissolution of the partnership if they should think fit and there was no special reason for allowing the action to continue rather than relying on the forum agreed on by the parties themselves.

Appeal allowed. Order for stay of proceedings.

For the appellant:
BE D'Silva
PJ Wilkinson, Mbale

For the respondent:
YV Phadke
JS Patel, Mbale

Bampamiyki s/o Buhile v R
[1957] 1 EA 473 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	11 November 1957
Case Number:	112/1957
Before:	Sir Ronald Sinclair V-P, Briggs and Forbes JJA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Tanganyika – Harbord, J

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[1] Criminal law – Evidence – Admissibility – Admission – Statements by accused to a police officer – Whether the statements admissible in evidence – Indian Evidence Act, 1872, *s.* 25.

Editor's Summary

The appellant was convicted of the murder of a woman who was burned to death after her house had been set on fire. The principal evidence against the appellant consisted of two statements made by him to a police officer in which he had admitted setting fire to the house. It was conceded by the Crown that in the absence of these statements there was insufficient evidence to support the conviction. At the trial it was submitted that these statements amounted to confessions, not of the offence charged, but of the

offence of arson and that as such they were inadmissible against the appellant by reason of s. 25 of the Indian Evidence Act. The trial judge had held that they were admissible. On appeal it was argued on behalf of the Crown that the construction which ought to be put on s. 25 was that the word “confession” means confession to the offence charged; and that an admission of the commission of an offence other than that charged was not a “confession” in the context of the particular trial and therefore was not excluded by s. 25.

Held–

(i) the word “confession” in s. 25 of the Indian Evidence Act means a confession of any offence and should not be confined to a confession of the specific offence with which an accused may ultimately be charged.

(ii) the statements made by the appellant to the police officer were wrongly admitted in evidence.

Appeal allowed. Conviction quashed and sentence set aside.

Cases referred to:

(1) *Mann and Others v. R.*, Tanganyika High Court Criminal Appeals Nos. 11, 12 and 13 of 1957 (unreported).

(2) *Swami v. King-Emperor*, [1939] 1 All E.R. 396.

(3) *Ali Gohar Mahi Machi v. Emperor* (1941), A.I.R. Sind 134.

(4) *R. v. Knight & Thompson*, 31 Cr. App. R. 52.

Judgment

Forbes JA: read the following judgment of the court: This is an appeal from a conviction of murder by the High Court of Tanganyika.

Briefly, the facts are that on the night of January 1/2 this year a theft took place from a house, the house was burnt down, two persons, a woman and a youth, were burnt to death in the house, the householder on coming out from a neighbouring house where he had been sleeping was shot with a poisoned arrow but recovered, and a wife who was following him was also shot with a poisoned arrow and died the next day. Information's for murder were filed against the appellant and one Bukyanagandi in respect of the three deaths. The particular information on which the appellant and Bukyanagandi were tried was that in respect of the murder of the woman who was burned to death. Bukyanagandi was acquitted but the appellant was convicted of this murder.

The principal evidence against the appellant in respect of the offence of which he was convicted consisted of two statements made by him to Sub-Inspector Simfukwe, and it was conceded by Crown counsel before us that in the absence of these statements there was insufficient evidence to support the conviction. There was indeed other evidence which, if believed, could establish the guilt of the appellant in respect of other offences, and part of which could properly be treated as corroboration of the statements made by the appellant on which this conviction was founded. But that evidence, standing alone, could not suffice to establish the appellant's guilt on this particular charge. Accordingly, the question before us was whether the statements had been properly admitted.

The statements in question were verbal statements alleged to have been made to Sub-Inspector Simfukwe, and were as follows:

(1) "I burned down the house of Bichamulumila. I can show you the money, where I have hidden it."

(2) "The first accused (i.e. the appellant) said he had burnt the house because Bichamulumila had used his three goats two years previously, and that was the reason why he also stole the money."

At the trial allegations were made that these statements had been made under pressure of physical ill-treatment by the police. A "trial-within-a-trial" was duly held, and the learned trial judge rejected these allegations. We are not now concerned with this aspect of the matter. However, the further point was made that these statements amounted to confessions, not of the offence charged, it is true, but of the offence of arson, and that as such they were inadmissible in evidence against the appellant by reason of s. 25 of the Indian Evidence Act, which applies in Tanganyika.

Section 25 of the Evidence Act reads as follows:

"25. No confession made to a police officer shall be proved as against a person accused of any offence."

The attention of the learned trial judge was drawn to conflicting views expressed on the point in Woodroffe's Law of Evidence and in Sarkar on Evidence, and also to a passage in the judgment of the High Court of Tanganyika in consolidated Criminal Appeals Nos. 11, 12 and 13 of 1957, *Mann and Others v. R.* (1) (unreported) where the same point arose for consideration. The authorities cited in Woodroffe and Sarkar were not available to the learned trial judge, and no authority, local or otherwise, binding upon him was cited to him. After consideration of the conflicting

passages cited, the principles underlying s. 25 of the Evidence Act, and the judgment of Lord Atkin in *Swami v. King-Emperor* (2), [1939] 1 All E.R. 396 at p. 405, he ruled that the statements were admissible.

As regards the consolidated appeals referred to, it does not appear that the conclusion expressed in the judgment was a fully considered one since the point was not argued on appeal. In his judgment the learned chief justice stated:

> "It was conceded by the learned attorney-general, and I think rightly so, that if the statement amounted to a confession of any offence it should not have been admitted."

It is apparent that in the circumstances the learned chief justice had no occasion to give the point more than cursory consideration.

Now, however, it is argued for the attorney-general that the construction which ought to be put upon s. 25 is that the word "confession" means confession to *the* offence charged; that an admission of the commission of an offence other than that charged is not a "confession" in the context of the particular trial and therefore is not excluded by the section.

The point at issue is an important one and it does not appear that it has previously arisen before this court for consideration. We have therefore taken time to give the matter very careful consideration.

In the first place it does not appear to us that the judgment of the Privy Council in *Swami v. King-Emperor* (2) affords any guidance on the point at issue. It is true that in the course of his judgment, in the passage cited by the learned trial judge, Lord Atkin says ([1939] 1 All E.R. at p. 405):

> ". . . a confession must admit in terms either the offence, or, at any rate, substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not itself a confession . . ."

This passage, however, must be considered in the context of the case to which it referred, and there was no question of the admission which was the subject of consideration by their lordships amounting to a confession to any offence other than the one charged. In our view the issues are distinct. *Swami v. King-Emperor* (2) establishes that an admission of "a gravely incriminating fact, even a conclusively incriminating fact" is not necessarily a confession. And, of course, as in this case, an admission of the commission of an offence other than that charged may be an admission of a gravely, or even conclusively, incriminating fact in relation to the specific offence charged. But the point at issue here is not whether the admission does or does not amount to a confession of the offence charged, but whether a confession to any offence, whether that charged or not, is ever admissible against an accused under s. 25.

We accordingly turn to a consideration of the Indian authorities. The passage in Woodroffe on Evidence (9th Edn.) on which the Crown relied is at p. 288 and reads as follows:

> "An admission made by an accused person to a police officer may be proved if it does not amount to a confession; that is, if it is not a statement by him that he committed the crime with which he is charged, . . ."

We have examined such of the authorities cited in support of this passage as are available to us, and in none of them can we find express support for the words underlined. It would seem therefore that these words merely express a view of the learned authors and are not supported by judicial authority. We would remark that this edition of Woodroffe was published before the decision in *Ali Gohar v. Emperor* (3) to which we refer below. In Sarkar on Evidence (9th Edn.) at p. 238 the contrary view is expressed in the following passage:

“Confession in this section does not mean confession only of the crime under investigation. The prohibition in s. 25 is general. Confession in s. 25 is not limited only to confessions of offences with which the accused is charged.”

And authorities are cited which support this statement. In particular we have had regard to the case cited of *Ali Gohar Mahi Machi v. Emperor* (3) (1941), A.I.R. Sind 134, which is subsequent to *Swami v. King-Emperor* (2). This was a decision of the High Court of Sind where this identical question was fully considered. In the course of his judgment in that case Davis, C.J., said:

> "It might now be argued that as the statement made by the appellant was not a confession of murder at all but a confession of a lesser offence, that is, of culpable homicide not amounting to murder, it did not come within the prohibition contained in s. 25, Evidence Act, which is in general words. This is:
>
> > '25. No confession made to a police officer shall be proved as against a person accused of an offence.'
>
> The offence of which the appellant is accused, for which he has been tried, and of which he has been convicted, is the offence of murder and it may be argued that according to the judgment of the Privy Council a confession, to be within the meaning of those sections of the Evidence Act which relate to confessions, must be a full and complete confession to the offence alleged against the accused, that is to say, where an accused is accused of murder, a statement by him which amounts to something less than a full confession of the offence of murder, is not a confession within the meaning of s. 25, Evidence Act, at all; for instance, their lordships say (in *Swami's* case (1)):
>
> > 'In view of their lordships' decision that the alleged statement was inadmissible by reason of s. 162, the appellant's contention that it was inadmissible as a confession under s. 25, Evidence Act, becomes unnecessary. As the point was argued, however, and as there seems to have been some discussion in the Indian courts on the matter, it may be useful to state that in their lordships' view no statement that contains self-exculpatory matter can amount to a confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. Moreover a confession must either admit in terms the offence, or at any rate, substantially all the facts which constitute the offence.'
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> "But we think that the statement of their lordships must be limited to the facts of the particular case before them where, though the accused made an incriminating statement from which an inference of guilt might be drawn, he did not in that statement confess to any offence of any kind at all. But here the appellant did in his statement confess to an offence. It is true he did not confess to murder, but he confessed to culpable homicide not amounting to murder, an offence under s. 304, Penal Code. We cannot believe that the admissibility of a confession depends upon the offence which the accused is charged with at his trial, that for instance, if in this case the appellant had been charged with and tried for culpable homicide not amounting to murder, his statement to the police as a confession to that offence would be inadmissible under s. 25, Evidence Act; but that if the accused were charged with and tried for an offence under s. 302, Penal Code, the confession would be admissible, though at the same time the accused could be convicted of an offence of culpable homicide not amounting to murder.
>
> "We think that the prohibition contained in s. 25, Evidence Act, is of a general nature. It forbids the proof at a trial of a criminal offence of any admission of an offence made by the accused to a police officer, and it appears to us that it makes no difference whether the offence is one of which the accused could have been convicted at the trial, in which it was sought to prove the confession made to a police officer. This interpretation of the section in no way affects the judgment of their lordships of the Privy Council. That judgment refers not to confession of offences but to confessions of incriminating facts, from which inferences of guilt can be drawn. Reference to the facts of the case before their lordships will show that the accused there did not confess to any offence; he

> confessed only to certain incriminating facts from which inferences of his guilt might be drawn . . .
>
> "We hold therefore that the first information lodged by the appellant with the police is inadmissible in evidence, as being a confession to an offence within the meaning of s. 25, Evidence Act."

And Tyabji, J., the second judge of the court, added the following comments:

> "Now, so far as this question is concerned, the Privy Council decision relied upon does no more than provide a definition of the term confession, applicable wherever that term is used in the Evidence Act. It decides that a confession is a statement which either admits in terms the offence alleged to be confessed or at any rate admits substantially all the facts which constitute that offence. It lays down that a statement by an accused person which merely suggested an inference that he had committed a crime, or a statement which contained admissions of gravely incriminating facts, even admissions of facts which in the particular circumstances of the case were admissions of conclusively incriminating facts, was not, merely on that account, a confession. The statement of their lordships that
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> > 'no statement that contains self-exculpatory matter can amount to a confession if the exculpatory statement is of some facts which if true would negative the offence alleged to be confessed'
>
> necessarily follows from and is an application of the definition. We are not in the present instance concerned with any statement of facts which merely suggested inferences . . . The fact that the appellant was being tried for murder while the statement was a confession not of murder but only of culpable homicide does not affect the applicability of s. 25 to the statement. The terms of s. 25,
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> > 'No confession made to a police officer shall be proved as against a person accused of an offence'
>
> do not limit its applicability only to confessions of offences with which the accused was charged. In this particular case it might even be said that the accused was charged with culpable homicide, as the greater includes the less. But apart from that, all that is necessary in order that a statement made to the police should be excluded is that it should be a statement which, having regard to the circumstances of the case, the court ought in reason and substantially to regard as a confession, and that the proof of the statement would be proof as against the accused. It is clear that not all statements containing admissions of facts which, adopting the Privy Council definition, amount to confessions of some offence or the other, could in reason and substantially be regarded as confessions operating against the accused by a court trying a case. For instance, there might be a statement made to the police by a person being tried for murder which though otherwise relevant and a valuable piece of evidence, incidentally contained such statements as for instance, that the accused had driven in a case leaving his licence behind, or that he had used highly defamatory words to somebody, or had insulted and pushed somebody. The fact that each of these incidental statements would technically amount to confessions of certain trivial offences would not prevent a court from dealing with such a statement as one which on the whole and substantially was not in the circumstances of the case to be regarded as a confession."

We are in respectful agreement with the reasoning contained in the passages set out above and can see no reason to differ from the conclusion reached. It is true that the instant case differs in that here the offence confessed to is not a minor and cognate offence to that charged as was the case in *Ali Gohar v. Emperor* (3). The learned judges, however, did not base their decision on that fact, but on the principle that the prohibition contained in s. 25 of the Evidence Act is a general one. We agree with that view. The object of s. 25 was to guard against the danger of the police employing coercion or inducement, in order to extract a confession. The section is

in wide terms, and we can see no ground for concluding that the legislature meant that the term "confession" should be confined to a confession to the specific offence with which an accused may ultimately be charged. It may not be apparent at the time of the making of a confession what the case against the accused may ultimately be. And so long as the confession which it is sought to put in is a confession of an offence involving facts which are substantially in issue, as in this case the question of arson was a substantial issue on the count of murder, we consider that the prohibition in s. 25 must apply. We agree with the view expressed by Tyabji, J., that

> "all that is necessary in order that a statement made to the police should be excluded is that it should be a statement which, having regard to the circumstances of the case, the court ought in reason and substantially to regard as a confession, and that the proof of the statement would be proof as against the accused."

And we further agree that not every admission of an offence must necessarily be treated as a confession operating against the accused. Where a statement which it is sought to put in evidence contains an admission of an offence which, in itself, is not material evidence against the accused but is merely incidental to the narrative of the statement, such admission, though technically amounting to a "confession," should not

> "prevent a court from dealing with such statement as one which on the whole and substantially was not in the circumstances of the case to be regarded as a confession."

By this we are not to be taken to approve the introduction in evidence of confessions to offences other than those charged which may be damaging to the character of the accused. *R. v. Knight & Thompson* (4), 31 Cr. App. R. 52.

Of course, the prohibition in s. 25 does not exclude a confession which the defence seeks to introduce in evidence in favour of the accused. Although at first sight it might seem that in *Ali Gohar v. Emperor* (3) a confession was excluded which it was sought to introduce in favour of the accused, a careful study of the judgments will show that this was not in fact the case, since no application to admit that portion of the statement which amounted to a confession appears to have been made on behalf of the accused at the trial.

For the reasons stated we are of the opinion that the statements made by the appellant to Sub-Inspector Simfukwe were wrongly admitted in evidence in this case. As we have already stated, it was conceded by Crown counsel that in the absence of these statements the conviction could not stand. We accordingly quash the conviction of murder and set aside the sentence of death passed on the appellant.

Appeal allowed. Conviction quashed and sentence set aside.

The appellant did not appear and was not represented.

For the appellant:
Patel & Mann, Mwanza

For the respondent:
WN Dennison (Crown Counsel, Tanganyika)
The Attorney-General, Tanganyika

Abdul Aziz v Pioneer Agencies Ltd
[1957] 1 EA 479 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	27 September 1957
Case Number:	45/1957
Before:	Sir Newnham Worley P, Briggs Ag V-P and Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Uganda – Keatinge, J

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[1] Bill of exchange – Promissory notes – Whether notice of dishonour given to endorser or waived – Whether endorser absolved from liability – Bills of Exchange Ordinance, s. 50 (2) (*d*) (*ii*) (*U.*).

Editor's Summary

The High Court of Uganda awarded the respondent the sum of Shs. 4,000/- in respect of two promissory notes of which the appellant was the endorser. The issue at the trial was whether the appellant was absolved from liability by reason of want of due notice of dishonour to him. The judge found that on the due dates the respondent presented the notes to the maker for payment who dishonoured them by non-payment and that later on the same days the respondent presented them to the appellant who also failed to pay them. There was no express finding whether notice of dishonour was given to the appellant, since the trial judge held that it was unnecessary in law to give notice by reason of the provisions of s. 50 (2) (*d*) (ii) of the Bills of Exchange Ordinance, which dispenses with notice to an endorser "where the endorser is a person to whom the bill is presented for payment."

Held–

(i) the finding of the judge that the notes had been "presented for payment" to the appellant and that therefore notice of dishonour was not necessary was erroneous.

(ii) on the evidence and on the inferences which could be properly drawn therefrom, it was established as more probable than not that notice of dishonour was either given or waived.

Appeal dismissed.

Cases referred to in judgment:

(1) *Caunt v. Thompson* (1849), 18 L.J.C.P. 125.

Judgment

Briggs Ag V-P: read the following judgment of the court: This was an appeal from a decree of the High Court of Uganda awarding to the respondent the sum of Shs. 4,000/-, interest and costs in respect of two

promissory notes of which the appellant was the endorser. We dismissed the appeal with costs and now give our reasons.

The only issue at the trial was whether the appellant was absolved from liability by reason of want of due notice of dishonour. The maker of the notes was the appellant's sister-in-law, who was sued jointly with him and has not appealed against the judgment given against her. All the parties lived in Kampala. The learned trial judge found that on the due dates the respondent presented the notes to the maker for payment and she dishonoured them by non-payment, and that later on the same days the respondent presented them to the appellant who also failed to pay them. This is not disputed now. There was no express finding on the question whether notice of dishonour was given to the appellant, since the learned judge held that it was unnecessary in law to give such notice by reason of the provisions of s. 50 (2) (*d*) (ii) of the Bills of Exchange Ordinance, which dispenses with notice to an endorser "where the endorser is the person to whom the bill is presented for payment." The learned judge considered that the notes had been "presented for payment" to the appellant and that therefore notice of dishonour was not necessary. We thought that

this was erroneous. Chalmers on The Bills of Exchange Act, 1882 (12th Edn.), 158, by the illustration given to this part of the English s. 50, which is in pari materia, and the reference to *Caunt v. Thompson* (1) (1849), 18 L.J.C.P. 125, makes it clear that the words "presented for payment" are here used in their technical sense and refer in the case of a promissory note to the original presentation to the maker. The provision refers only to the special case where the maker and endorser are in fact, or are properly represented by, the same person, e.g. when the endorser has become the maker's executor. We were unable, therefore, to agree with the learned judge's reasoning, but we thought that his decision was correct on other grounds.

It was necessary to consider whether notice of dishonour was either given or waived. The necessary elements of a notice are clearly stated in *Caunt v. Thompson* (1). It must be given by a person entitled to call for payment and must convey to the recipient that the note has been dishonoured and that he will be held responsible. See also s. 49 (5). The evidence in this case was very scanty. The appellant's evidence was that the respondent had never come to see him at all on the relevant dates. This the learned judge for sufficient reasons disbelieved. The only evidence of what took place at the interview was the respondent's. He said in examination in chief:

> "When the first note fell due Esmail came to my office and said there was no money to meet it. I went to second defendant. I had actually presented the note to Esmail. When payment was refused I went to second defendant – on the same day – 5.7.56 – at his office in City Restaurant. I presented the notes to him. He said he would tell Esmail to pay. The second defendant refused to pay."

Esmail was the husband and attorney of the maker of the notes and brother of the appellant. As regards the second note the respondent said:

> "I presented it for payment to Esmail on Monday, 6.8.56. I met him on my way to his office at City Bar. I showed him the note. He said he had no money and refused to meet it. Then I went to second defendant at his office in City Bar. Esmail and second defendant are brothers. There I presented the note to second defendant. He did not pay."

In cross-examination he said:

> "On both occasions when I met Esmail I actually produced the notes. I knew it was necessary to produce them to him. I did not know that I had to give notice of dishonour to the endorser. I did demand payment from second defendant.
>
> "When I went to him on 6.7.56 he said he would tell Esmail to pay."

The appellant in cross-examination made one important admission. He said:

> "I don't know that if the note was not presented to me on due date I am not liable. I know that I was liable as endorser."

The only difficulty about the appeal was the question what inferences could properly be drawn from this evidence. It should be remembered that the appellant's position was that of a surety. We thought certain points at least were obvious. The respondent, though he did not know of the necessity for notice of dishonour, may well have given it, like M. Jourdain, "sans le savoir." He was the proper person to give it. He made it perfectly clear to the appellant that the maker had not paid the first note. He also made it clear that he held the appellant liable to pay it. It is less certain that he explained that he had duly demanded payment from the maker. It is, however, apparent that the respondent did not purport in his evidence to give an exhaustive account of all that had passed at the interview relating to the first promissory note. We think that, unless he first actually explained to the appellant that he had made due demand of the maker

and payment was refused, the appellant must almost inevitably have said, “Why apply to me, the surety? Go to the principal debtor,” or words to that effect. If he did so, it is quite inevitable that he must have received an answer which would be a sufficient notice of dishonour. It is also to be noted that appellant was under no liability until the note had been dishonoured and notice of

dishonour had been either given or waived, but he said he knew he was liable. The matter may perhaps be put in another way. When the appellant said he would tell Esmail to pay he may have intended the respondent to understand that he knew all about the maker's default. We felt that it was highly probable that he did know all about it. If that was his meaning, his words would amount to a waiver of notice of dishonour. The foregoing remarks apply, mutatis mutandis, to the second note also.

We were satisfied that on the evidence which could be regarded as credible, and on the inferences which could properly be drawn therefrom, it was established as more probable than not that notice of dishonour was either given or waived, and that the learned trial judge should so have found. We accordingly considered that judgment was rightly given for the respondent.

Appeal dismissed.

For the appellant:
ML Patel
Manubhai Patel & Sons, Kampala

For the respondent:
YV Phadke
AC Patel & Daphtary, Kampala

City Council of Nairobi v Maharaj Krishan Bhandari
[1957] 1 EA 481 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	12 September 1957
Case Number:	53/1957
Before:	Sir Newnham Worley P, Briggs Ag V-P and Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Edmonds, J

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[1] Public authority – Statutory powers – Streets – Whether public or private – Municipalities and Townships (*Private Streets*) *Ordinance*, 1951 (*K.*), *s.* 2 *and s.* 7 *– Municipalities and Townships* (*Private Streets*) (*Amendment*) *Ordinance*, 1952 (*K.*).

Editor's Summary

The appellant council having classified the street adjoining the respondent's residence as a private street within the meaning of the Municipalities and Townships (Private Streets) Ordinance, the respondent obtained a declaration from the Supreme Court that the street in question was public. The council's

principal ground of appeal against the decision was that as the street had not been made good in a permanent manner it could not be a public street within the meaning of s. 7 (2) of the Ordinance.

Held – having regard to the purpose and frequency of the council's maintenance of the street and to the limited funds available, the street could be said to have been made good in a permanent manner according to prevailing Kenya standards, and therefore the street was a public street within the meaning of the Ordinance.

Appeal dismissed.

No cases referred to in judgment

September 12. The following judgments were read.

Judgment

Briggs Ag V-P: The respondent as plaintiff sued the appellant council in the Supreme Court of Kenya for a declaration that Ainsworth Street in Section VII, Eastleigh, Nairobi, is a public street within the meaning of the Municipalities and

Townships (Private Streets) Ordinance, 1951, which I will call "the Principal Ordinance," and obtained a declaration accordingly in respect of part of Ainsworth Street, namely the part stretching from the intersection with Juja Road, passing the plot, No. 250, which belongs to the respondent and on which he resides, and ending at plot No. 251, the next plot. The appellant council appeals, contending that the whole of Ainsworth Street, and in particular the part of it comprised in the declaration, is a private street within the meaning of the principal Ordinance. The matter is one of substantial and financial importance to the parties, since the declaration relieves the respondent of liability for road charges and imposes on the appellants the duty of maintaining the public portion of the street at its own expense. The trial was lengthy and covered many matters with which we are not concerned. Before us it was conceded that immediately after the coming into force of the principal Ordinance on April 7, 1951, the part of Ainsworth Street subject to the declaration was a public street. The reasons for this are not now material, but I have no doubt that it is correct and that the point was properly conceded.

The appellants contend that by reason of the provisions of the Municipalities and Townships (Private Streets) (Amendment) Ordinance, 1952, which amends s. 2 and s. 7 of the principal Ordinance, and came into force on November 5, 1952, the part of Ainsworth Street which was previously a public street became once more a private street within the meaning of the principal Ordinance, and the respondent became liable for road charges accordingly. They also contend that the 1952 Ordinance has complete retrospective effect, so that it must now be deemed to be the case that Ainsworth Street was always a private street and the respondent was always liable for road charges. I think it is unnecessary to consider this point, but even if it is correct I do not think it makes the first submission any less surprising. It is, however, in my opinion clear beyond argument from the terms of proviso (ii) to the amended definition of "public street" introduced by the 1952 Ordinance that the legislature contemplated that certain streets which had immediately before November 5, 1952, been public might lose that status and become private, and that a heavy fiscal burden might thereby be imposed on plot-owners. I think this obliges us to construe the Ordinance with the same strictness as should be applied to any taxing statute. We have at least to be reasonably sure that the wording has the effect of imposing the burden alleged, and if the wording is such that no clear meaning emerges, the alleged victim should have the benefit of the doubt.

Under the amended definition of "public street" a street may be public for several reasons, but the one with which we are now concerned is that

> ". . . it is, by virtue of the provisions of this Ordinance, deemed to have been declared by the local authority, under the provisions of this Ordinance . . ., to be a public street . . ."

These words refer directly to s. 7 (2) of the principal Ordinance, as substituted by the 1952 Ordinance. Sub-section (2) is as follows:–

> "(2) Where prior to the commencement of the Municipalities and Townships (Private Streets) (Amendment) Ordinance, 1952, any private street or part thereof had been levelled, paved or metalled, kerbed, channelled, lighted, severed and drained or otherwise made good in a permanent manner by or to the satisfaction of the local authority, the local authority shall be deemed to have thereupon declared the same to be a public street and such street or part thereof shall for the purposes of this Ordinance, be deemed to be a public street."

The question for our decision is the true meaning of this sub-section and its relation to the facts of this case. It is not, I think, now disputed that the words "levelled, paved or metalled, kerbed, channelled, lighted, severed and drained" should be read together and refer to the state of affairs where a first-class urban road has been constructed and equipped. It is clear that by no means all of this work has been

carried out in Ainsworth Street, and the collective requirement is not met. The problem turns on the meaning of the words “otherwise made good in a permanent manner

by . . . the local authority." I would say in passing that the words "to the satisfaction of the local authority" caused much discussion in the court below, but it is now common ground that they are not relevant in this case. Whatever work was done here was done by the authority. It was either sufficient or not sufficient to satisfy the words "made good in a permanent manner," and the question whether the authority was satisfied does not arise.

The evidence showed that up to 1946 this "street" existed only as lines on a plan. The respondent had lived there since about 1944. He always contended that for certain reasons it was the duty of the appellants to construct and thereafter maintain the road as a public street at their own expense, and as early as 1941 the appellants had accepted this view in principle. About the end of 1946, in response to requests by the respondent, the appellants levelled the ground for a road and laid down a murram surface which may have been three to four inches thick on the part of Ainsworth Street comprised in the declaration. The original work was probably done less well than was then usual for murram road, but thereafter and until 1954 the appellants maintained that part of the road at their own expense in a manner neither better nor worse than they maintained other murram public streets in Nairobi. Some time before 1952 street lighting was installed. In 1951 a sewer was laid, which served the houses on the street, though not constructed for that specific purpose. At that time the road surface was said to be "about fifteen feet wide, full of potholes, and composed only of murram and magadi." Now, however, it is said by an expert witness, whose evidence was apparently accepted, that the surface is murram, but there is hard core underneath, and that roads of this type are regarded as permanent roads and often in fact carry very heavy traffic. There is some doubt when the hard core was put down, and it may have been done in connection with the laying of the sewer. It should be noted that the appellants were under no obligation to maintain this road unless it was a public street. Indeed they had no power to do so at their own expense, unless for some special authorised purpose, e.g. to facilitate building operations of their own. Nothing of that kind arose here. It may therefore be said that at any time after November 5, 1952, their acts in maintaining the road at their own expense amounted to admissions that it was still a public street. Furthermore, on January 23, 1953, the appellants expressly stated in writing to the respondent that Ainsworth Street from Juja Road to plot 251 was then a public street, and in December, 1953, they repeated this allegation in a letter to the Nairobi Ratepayers' Association, which was put in evidence. Apart from any question of estoppel, I think the court below was entitled, and we are entitled, to attach some weight to these admissions.

In November, 1954, the appellants formed the view that this was a private street, and so should not be maintained any longer by them. Some work has been done since on a "without prejudice" basis, but the road is now in bad condition, and has often been very bad. The respondent constantly complained of it and the appellants rely on his complaints, which were sometimes strongly worded. No one, I think, would suggest that this was ever a good road. The question is, was it good enough to satisfy the words of s. 7 (2)?

The words of the sub-section make it clear that "made good in a permanent manner" may refer to something less than the high standard indicated by the preceding words, but are of no further assistance. One therefore enquires into the practice of the appellants, and various important facts emerge. First, they have never themselves laid down standards of road-making by which this road could be judged. Their practice in 1946 and later, when they themselves constructed a road intended to be a permanent public street, was to adjust the specification to the actual needs. Many public streets in Nairobi were in 1946 no more than murram tracks. This road, as originally laid, was probably below the average standard of such murram streets, but on the other hand it carried for some years a minimum of traffic, so this was only to

be expected. Where there are widely different types of murram permanent public streets, some will be better than others, and it is quite illogical to argue that the worst, because they are below the average standard, are not permanent public streets at all.

In favour of the appellants I think two things should be said. In England to-day it would, I think, be impossible to argue that this road, if within the boundaries of a large town, had been "made good in a permanent manner." It would be an unsatisfactory temporary makeshift. Again, it is clear that the appellants would not now accept a road of this kind as "made good in a permanent manner" if the work was to be done at the expense of plot-owners through road charges. In such a case they rightly insist now a high standard, and they may have done so even in 1946. But I do not think either of these arguments really assists them. In this country, where the general standard of roads is so low that even the Nairobi-Mombasa road, the most important main road in the country, has, over the greater part of its length, a surface at its best no better than a farm track in England, and at its worst often wholly impassable, analogies from England, or from any other country with a fully-developed road system, can only be misleading. And the funds available to the appellants for construction of new roads are so small that it is quite reasonable that they should apply different standards, according as a new road is to be paid for by plot-owners or by themselves.

The words "in a permanent manner" clearly do not mean that the road is to be made so well that it will last for ever. I do not think they mean that the original construction is to last for a very long time. It is notorious that no murram road can survive prolonged rain without requiring resurfacing or other repairs, and prolonged rain occurs at least annually. In view of the factual situation in Nairobi from 1946 to 1952 I entirely decline to accept that no murram road could in 1952 be said to have been "made good in a permanent manner" for the purposes of the principal Ordinance, and counsel for the appellants very properly did not so contend. He applied that argument only to very inferior murram roads; but the good are hardly less impermanent than the bad. If no objective standard of durability can be extracted from the words "in a permanent manner," I think it is fair to consider them subjectively from the appellants' point of view, and if this is done a reasonable meaning and a standard emerges. Cases where their intention was to make a road which was to be in law and in fact a permanent public street must, I think, be distinguished from cases where that intention was absent – where, for example, it was intended only to make a temporary track for a temporary purpose along the line of a private street. I think that for the purposes of the principal Ordinance the same amount of work done by the appellants might in the one class of cases justify the conclusion that the private street had been "made good in a permanent manner," and in the other the conclusion that it had not.

The words "made good" have not in this section the technical sense of "repair damage done" or "tidy up." I was at first inclined to the view that they referred only to the original construction of a road, or to a single operation of improvement of what might have been considered a road. But I think now that this is not the case. I think the phrase refers to any operation, or series of operations, prior to the coming into force of the 1952 Ordinance, which resulted in the road becoming sufficiently "good." I think it is clear from the final passage of his judgment that the learned trial judge took the same view, for he bases his finding of fact that this street was "made good in a permanent manner . . . by the local authority" not only on the work of construction done in 1946 or early 1947, but also on the maintenance work done thereafter.

The process of levelling virgin earth and spreading on it a little murram, with intent to make a road, and in confidence that repeated repairs and reinforcements will gradually produce something better, which may in due course properly be called a road, is in this country common form. I think something of that sort took place in Ainsworth Street. And, surprisingly, a reasonable road may sometimes in this way be produced.

There is no doubt that at all material times prior to November, 1954, the appellants considered that the material part of Ainsworth Street had to be made good and maintained by them as a permanent public street at their own expense. They performed that duty, as they thought, in a proper manner, having regard to financial stringency

and competing demands. I should be the last to dispute that. On the other hand, I am now asked to say that, because they did not do very much, they must be taken to have done nothing-to have failed completely to do what they believed to be their duty, and what they believed they had done. I should be very reluctant to accede to this request, and I think it unnecessary to do so. Having regard to the work done by the appellants prior to November 5, 1952, and to the intention with which it was done, I am satisfied that there was evidence on which the learned trial judge was entitled to find as he did. I am of opinion that there was no material misdirection in his judgment, and furthermore I should still consider his findings to be correct if it were necessary to consider the question as res integra.

I must record that counsel for the appellants submitted that the findings of the court below went outside the scope of the plaintiff's pleading. I reject this submission. I think the learned trial judge was entitled to arrive at the conclusion that this was a public street, which was pleaded, although he may have done so on grounds slightly different from those which he was invited to rely on.

I must also record that the respondent, who appeared in person, desired to argue that the conclusions of the learned trial judge, even if his reasons were not correct, could be supported on many other grounds. We found it unnecessary to hear argument on any of these points, and they remain open.

I am of opinion that this appeal should be dismissed. As regards costs, it is a pleasure to record that in the court below, which had to decide a number of points of law which were of general application and relevant to several pending cases, the parties agreed that there should be no order as to costs, and that on this appeal, which has dealt with matters of less general interest, they have agreed that costs should follow the event, but should be assessed at the low, though not nominal, figure of £50. This court entirely approves of such arrangements. I accordingly propose that the appeal be dismissed with costs assessed at Shs. 1,000/-.

Sir Newnham Worley P: The findings of the learned trial judge in this matter which we are asked to set aside are contained in the following passage at the conclusion of his judgment:

> "From the foregoing evidence I think that the following conclusions must irresistibly emerge, namely, that Ainsworth Street was originally constructed by the municipality (now the council), that it was maintained by it, that the standard of the road was not worse or only a little worse than the standard of other murram public streets in Nairobi, that until 1954 it was regarded by the town clerk and by Mr. Smith and was maintained even though to a low standard as a public street, and that it was only as a result of Mr. Roberts' opinion that it was no longer so regarded or maintained. Needless to say the court is quite indifferent to the views of Mr. Roberts so far as this action is concerned. The sole question for decision is whether from 1946 when the street was first constructed by the municipality until 1954, when Mr. Roberts issued his orders regarding the cessation of maintenance, it can be said that, in terms of s. 7 (2) the street was 'otherwise made good in a permanent manner by or to the satisfaction of the local authority.' The evidence, in my opinion, clearly establishes that this street was, in 1946 and for some years thereafter, constructed to a standard which the local authority of the time considered to be a standard of sufficient permanence and that the local authority regarded and treated the portion of the road which is the subject of this action as a public street. The answer to the question, in my view, must, on the evidence, be undoubtedly 'Yes.' In other words, in my judgment the evidence supports the conclusion that that part of Ainsworth Street from its intersection with Juja Street to plot 251 must, by virtue of the provisions of Ordinance 17 of 1951, as amended, be deemed to have been declared by the local authority to be a public street. The plaintiff therefore succeeds on the final issue and it is declared that that portion of Ainsworth Street is a public street."

In my opinion there was ample evidence to support those findings and I agree with them for the reasons and on the grounds so clearly set out in the judgment which has just been read. Like Briggs, J.A., I was at first disposed to think that the expression "made good in a permanent manner" related only to the original construction of a street or to some major operation of improvement of an existing way. I now think, however, that that is a mistaken view and that the making good may be, as it appears to have been in this case, the result of a continuing process of maintenance.

The appeal is dismissed with costs assessed at Shs. 1,000/-.

Forbes JA: I agree

Appeal dismissed.

For the appellant:
JA Mackie Robertson
Kaplan & Stratton, Nairobi

The respondent in person.

For the respondent:
Bhandari & Bhandari, Nairobi

Omar Bin Mohamed Al Hatim v Mohsin Bin Saleh Alkhlagy Legal Representative of Swaleh Bin Mohussein through his Attorney Mohamed Yahya Bin Shamut

[1957] 1 EA 486 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	11 November 1957
Case Number:	69/1956
Before:	Sir Ronald Sinclair V-P, Briggs and Forbes JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Corrie, J

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[1] Landlord and tenant – Recovery of possession – Agreement constituting a licence or lease – Prima facie evidence.

Editor's Summary

The respondent had obtained a judgment and decree in the Supreme Court whereby the appellant was

ordered to deliver up to the respondent possession of an eating house, to pay damages in respect of the appellant's occupancy of the premises after termination of their agreement, and to repay a debt admitted by the appellant to be owing to the respondent. The principal grounds of appeal were that, contrary to the findings of the Supreme Court the agreement between the parties created not a licence but a lease under which the appellant would be entitled to the protection of the Rent Restriction Ordinance and that the respondent had not established that the debt admitted to be due by the appellant arose, as had been pleaded by the respondent, out of the transaction relative to the premises.

Held–

(i) the essential features of a tenancy were present in the agreement and the judge had misdirected himself in not considering that *prima facie* a tenancy had been created; and there being no evidence to rebut that conclusion the appellant was entitled to the protection of the Ordinance.

(ii) the respondent having failed to show that the debt owed to him arose, as pleaded, from the premises with which the suit was concerned judgment should not have been given for the amount of the debt.

Appeal allowed. Suit to stand dismissed with costs in the court below.

Cases referred to:

(1) *Errington v. Errington*, [1952] 1 All E.R. 149.

(2) *Cobb v. Lane*, [1952] 1 All E.R. 1199.

(3) *Clore v. Theatrical Properties Ltd.*, [1936] 3 All E.R. 483.

November 11. The following judgments were read.

Judgment

Forbes JA: This is an appeal from a judgment and decree of the Supreme Court of Kenya whereby the appellant, the original defendant, was ordered to deliver up to the respondent possession of an eating house situated in house No. 133, Pumwani, Nairobi, together with certain furniture, fittings and cooking utensils; to pay damages with interest thereon amounting to Shs. 25,359.98; and to pay the costs of the suit. The suit was originally commenced by Swaleh bin Mohussein through his attorney, Mohamed Yahya bin Shamut. Swaleh bin Mohussein, however, died before judgment, and his legal personal representative was accordingly made a party to the suit in his stead.

The original plaintiff was the tenant of house No. 133, Pumwani, in which was situated the eating house which was the subject of the suit. In the plaint it was alleged that under written agreement the plaintiff had given on licence and the defendant had taken on licence the eating house in question together with the use of the furniture, fittings and cooking utensils therein for a period which expired on May 15, 1954, but that when the period expired the defendant declined to hand over possession of the eating house premises and furniture, etc., to the plaintiff. And the plaintiff claimed possession of the eating house, furniture, etc., together with damages for the alleged unlawful withholding of possession, and a further sum of Shs. 2,600/- alleged to be still owing in respect of the original licence fee.

It was not disputed that the defendant had gone into possession of the eating house in pursuance of the written agreement and had continued in possession since the expiry of the period provided for in that agreement. The defendant, however, claimed that the agreement created the relationship of tenant and sub-tenant between the plaintiff and himself; and that as he held the premises in question not as licensee but as sub-tenant, he was protected by the provisions of the Rent Restriction Ordinance, which at that time applied to business premises. As regards the Shs. 2,600/- the defendant denied in his defence that any such sum was owing in respect of the suit premises. In evidence he admitted owing the plaintiff such a sum but alleged that it arose out of an entirely different transaction unrelated to the suit premises.

The learned trial judge held that the intention of the parties had been to create a licence and not a lease of the premises, and he accordingly made an order for recovery of possession of the premises and furniture, etc., together with damages at the rate of Shs. 700/- per month from May 17, 1954, up to the date of judgment. He declined to hold that the sum of Shs. 2,600/- was owing in respect of the licence fee, but nevertheless gave judgment for the plaintiff for that sum, presumably because the defendant admitted that such a sum was owing to the plaintiff, though in respect of a different transaction.

The principal issue argued on appeal was whether the agreement between the parties created a licence or a tenancy. It was argued for the appellant that the learned trial judge had approached the matter from

the wrong angle; that he should have directed himself that *prima facie* a tenancy had been created between the parties in respect of the suit premises, and should then have considered whether there were any exceptional circumstances present which would suffice to negative the presumption that the intent had been to create a tenancy. And it was submitted that if this approach had been adopted the finding must have been in favour of the appellant since no exceptional circumstances were apparent in this case which would suffice to negative the intention to create a tenancy.

It seems clear, as argued for the appellant, that the essential features of a tenancy were present in this case. The property in question, described in the agreement as "a hotel, called 'Riadha' No. 133" was certainly sufficiently defined to be the subject of a tenancy. The term of occupation was for a definite period which was to expire on May 16, 1954. A fixed monthly payment was to be made in respect of occupation of the property. And it appears that exclusive possession of the suit premises was given to the appellant. The learned trial judge's finding on this latter point is not, it is true, entirely clear. He first says in his judgment:

> "It is in evidence that the plaintiff's attorney, Mohamed Yahya, carries on the business of a shop in the same plot as the eating house and has his office there. It is thus not clear whether or not the defendant has the exclusive occupation of the portion of the premises in which he carries on the business of an eating house."

Later, however, the learned judge says:

> "Thus, while the conditions contained in exhibit 3 speak of the defendant taking over the ownership of the hotel, I hold that this does not mean more than that he obtained exclusive possession of it for the period stated in the agreement."

The learned judge's final conclusion on this point therefore appears to be that the appellant did have exclusive possession of the suit premises, and I am in agreement with this conclusion on the evidence. The only passage in the evidence which might indicate the contrary is that referred to in the first passage from the judgment which I have cited where Mohamed Yahya is recorded as saying:

> "The eating house is in Pumwani, plot 133. I carry on business of a shop in the same plot, and my office is there."

With respect, it does not seem to me that any inference can be drawn from these words that Mohamed Yahya's shop and office comprise a part of the suit premises. Although situate on the same plot, the witness does not appear to suggest that the shop and office form part of the eating house. Rather the contrary. And there is nothing else in the evidence that suggests that the appellant did not have exclusive possession of the eating house.

In the circumstances I am in agreement with the submission that the learned trial judge should have considered that *prima facie* a tenancy had been created. It is true that the exclusive possession of premises does not negative the possibility of the occupier being a licensee. It does, however, provide a strong indication as to the nature of the transaction. In *Errington v. Errington* (1), [1952] 1 All E.R. 149 at p. 155, Denning, L.J., after considering the history of the distinction between a lease and a licence, proceeded as follows:

> "The result of all these cases is that, although a person who is let into exclusive possession is, *prima facie*, to be considered to be a tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy. Words alone may not suffice. Parties cannot turn a tenancy into a licence merely by calling it one. But if the circumstances and the conduct of the parties show that all that was intended was that the occupier should be granted a personal privilege with no interest in the land, he will be held only to be a licensee."

The learned trial judge gave no reasons in his judgment for holding that the intention of the parties had been to create a licence and not a lease, but it is apparent that he did not approach the matter on the basis that *prima facie* the appellant was tenant of the premises. He relied on *Cobb v. Lane* (2), [1952] 1 All E.R. 1199, for the proposition that it was immaterial whether or not the appellant had had exclusive possession of the suit premises. *Cobb v. Lane* (2) may be distinguished from the instant case in that in *Cobb v. Lane* (2) the transaction was a family arrangement, the occupation of the property was for an

indefinite period and the occupier said nothing for the use and occupation of the property; but, apart from that, I can find nothing in *Cobb v. Lane* (2) to detract from the proposition that exclusive possession is *prima facie* evidence of the existence of a tenancy. Indeed in the course of his judgment in *Cobb v. Lane* (2) Somervell, L.J., says:

> "Counsel for the defendant submitted that, notwithstanding certain modern authorities, where there is exclusive occupation for an indefinite period a tenancy at will must be implied unless there is something in the facts to prevent that conclusion. I do not know that I very much quarrel with that."

The learned trial judge also referred to *Clore v. Theatrical Properties Ltd*. (3), [1936] 3 All E.R. 483, though it would seem that he only relied upon that case to support his refusal to give a technical meaning to words used in the agreement between the parties. It is not contended that any such words should be given a technical meaning; and in so far as the case might be regarded as an authority in support of the conclusion that the agreement in this case only amounted to a licence, I accept the contention of counsel for the appellant that *Clore v. Theatrical Properties Ltd*. (3) and other similar cases relating to "front of the house rights" in a theatre are clearly distinguishable from the instant case. *Clore v. Theatrical Properties Ltd*. (3) and other cases of the same class are concerned with arrangements between the proprietor or lessee of theatrical premises and a contractor for the supply of refreshment to invitees to the theatre, and the whole circumstances and nature of the contract in those cases differ from those in the instant case. I do not find that the "front of the house rights" cases provide any guide in the instant case.

It follows from what I have said that, with the greatest respect to the learned trial judge, I have come to the conclusion that he failed to appreciate the significance of the question of exclusive possession of the suit premises, and therefore misdirected himself as to his proper approach to the problem. I have accordingly reconsidered the evidence with a view to ascertaining whether any circumstances existed which would negative an intention to create a tenancy.

I can find little in the terms of the agreement itself. There were, in fact, two agreements in evidence. The first agreement dated January 16, 1953, admitted the appellant to the suit premises for a period of seven months; and the second, dated August 29, 1953, continued the appellant in occupation of the suit premises for a further period of eight months and was expressed

> "to commence when the first agreement expired . . . according to the conditions of the first agreement without omitting a single condition."

In each agreement it is expressed that Mohamed bin Yahya, as attorney for the original plaintiff, had agreed "to give a hotel, called 'Riadha' No. 133" to the appellant "to sell and buy therein." And in the first agreement it is expressed that the appellant is to "take over the ownership of the hotel." The agreements in evidence were in fact agreed translations. As the learned trial judge remarked, they had not been drawn up by a member of the legal profession and it would be misleading to give a technical meaning to the words used. The learned trial judge proceeded to hold that the reference to the taking over of the ownership of the hotel did not mean more than that the appellant obtained exclusive possession of the hotel for the period stated in the agreement. I respectfully agree with this conclusion, but nevertheless the expressions used appear to me to be more consistent with an intention to create a tenancy than to give a mere licence. At the least I can see nothing in these expressions tending to negative an intention to create a tenancy.

The only passage in the agreements that I can find that might possibly indicate a contrary intention is the provision that the appellant is to pay to the respondent "every month shillings seven hundred being the profit of the Hotel." Counsel for the respondent argued that this showed a clear intent that the business of the hotel was to be run by the licensee and the profits should go to the owner. I am unable to accept this argument. The passage is obscure but it certainly could not mean that Shs. 700/-permonth was intended to represent the whole profit to be made out of the hotel by the appellant. Nor does it appear that it was intended that the Shs. 700/- should be paid only out of profits. The amount for the whole term the

appellant was to be in occupation was paid in advance and there is no suggestion that there should be a refund if the hotel failed to realise such an amount of profit. It may be that something has been lost in the translation, but I am inclined to the view that the phrase “being profit of the

hotel" is used in the sense "being profit of the hotel to the respondent"; that is, in effect, rent to the lessor. It is true that the word "rent" is not used, as might perhaps have been expected, but, as previously remarked, the documents were not drawn up by a legal practitioner and I find it difficult to give much weight either to the use or absence of particular terms. At the least, the payment reserved appears as consistent with its being rent as with its being a licence fee, and I cannot draw any inference from the particular words used to indicate that the intention was to create a licence only.

Apart from the terms of the agreements, the circumstances of the transaction upon which counsel for the respondent relied to indicate an intent to create a licence and not a tenancy were the facts that the municipal hotel licence and the hotel sugar quota remained in the name of the respondent. I do not consider, however, that this is sufficient to negative the *prima facie* presumption arising from exclusive possession. There are various reasons not inconsistent with an intention to create a tenancy which could account for the non-transfer of the hotel licence and sugar quota to the name of the respondent. A desire to avoid possible objection to such a transfer for the comparatively short term of eight months would suffice to account for it.

As it is, therefore, neither in the agreement itself nor in the surrounding circumstances can I find anything to negative the *prima facie* conclusion to be drawn from the fact that the respondent was let into exclusive possession of the suit premises. In fact the whole tenor of the agreement appears to me to be more consistent with an intention of the parties to create a tenancy than to create a licence. I am therefore of the opinion that the true contractual relationship between the parties was that of landlord and tenant, and that accordingly this appeal should be allowed.

While this finding would dispose of the appeal, I would also express the opinion that in any case upon his findings the learned trial judge ought not to have given judgment for the sum of Shs. 2,600/-, as the respondent had failed to establish that it arose, as pleaded, out of the transaction relating to the suit premises.

A cross-appeal was filed, but it is unnecessary to deal with this in view of my finding on the appeal itself.

In the result I would allow this appeal with costs and would order that the suit do stand dismissed with costs in the court below.

Sir Ronald Sinclair V-P: I agree and have nothing to add. An order will be made in the terms suggested by the learned justice of appeal.

Briggs JA: I also agree.

Appeal allowed. Suit to stand dismissed with costs in the court below.

For the appellant:
B O'Donovan and *A Jamidar*
Arvind Jamidar, Nairobi

For the respondent:
DV Kapila
DV Kapila, Nairobi

M Suleman Versi Limited (in liquidation) v IH Lakhani & Co (EA) Ltd
[1957] 1 EA 491 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	22 July 1957
Case Number:	71/1956
Before:	Sir Newnham Worley P, Sir Ronald Sinclair V-P, and Bacon JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Tanganyika – Abernethy, J

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[1] Arbitration – Provisions embodied in contract – Validity of non-observance without objection from parties – Jurisdiction of court to set aside award – Arbitration Ordinance (*Cap.* 15) *Part II s.* 3 *and s.* 23 (*T.*) *– Indian Code of Civil Procedure, Schedule II, paras.* 17 *to* 21 *and para.* 23.

Editor's Summary

The appellants and respondents were parties to three contracts, two by their terms being subject to the Arbitration Rules of the Mombasa Produce Exchange and the third to the Rules of the Dar-es-Salaam Produce Exchange. Subsequently a dispute common to all three contracts was referred to arbitration at Dar-es-Salaam by consent of the parties, the Mombasa Rules not being observed. The award was subsequently filed in the High Court of Tanganyika whereupon the respondents applied to set it aside mainly on the grounds that the High Court of Tanganyika had no jurisdiction in respect of the award so far as it related to the two Mombasa contracts and there had also been a breach of the Mombasa Arbitration Rules. The High Court ordered that the award be set aside and directed that the dispute be re-submitted to arbitration in accordance with the terms of the contracts. On appeal it was conceded that the parties had agreed to the arbitration in respect of all three contracts being conducted by the arbitrators at Dar-es-Salaam, but it was contended that s. 3 (which is in Part II) of the Arbitration Ordinance provided that Part II only applied to a dispute which, if it formed the subject matter of a suit, the High Court would be competent to try, and since the Mombasa contracts were made out of the jurisdiction of the High Court, *prima facie* the High Court would have no jurisdiction to entertain a suit for breach of these contracts.

Held–

(i) as the respondents were aware during the arbitration that the Mombasa Rules were not being observed, and made no protest, they had waived any irregularity and it was too late for them to object on that ground to the award;

(ii) although the High Court would have had no jurisdiction in respect to the Mombasa contracts had the dispute formed the subject matter of a suit that limitation did not restrict the competence of the court to enforce or set aside an arbitration award made within the jurisdiction.

Appeal allowed with costs. The High Court order to be set aside and the application to set aside the

award to be dismissed with costs.

Cases referred to in judgment:

(1) *Naamlooze Vennootschap "Vulcaan" v. A/S Mowinckels*, [1938] 2 All E.R. 152.

July 22. The following judgments were read.

Judgment

Sir Ronald Sinclair V-P: This is an appeal from an order of the High Court of Tanganyika setting aside an arbitrators' award and directing that the dispute between the parties be re-submitted to arbitration in accordance with the conditions of the contracts.

On September 17, 1955, the respondents, I. H. Lakhani & Company (East Africa) Limited of Mombasa, entered into three contracts with the appellants, M. Suleman

Versi Limited of Dar-es-Salaam, under which the respondents agreed to sell to the appellants certain quantities of castor seeds.

Two of the contracts were made at Mombasa and are contained in the standard contract "A" form used by the Mombasa Produce Exchange of the East African Grain and General Produce Association. It is a term of each of these two contracts that any dispute shall be referred to arbitration in accordance with the Arbitration Rules of the East African Grain and General Produce Association, which I shall refer to as the Mombasa Arbitration Rules. The third contract was made at Dar-es-Salaam and is contained in the standard form used by members of the Dar-es-Salaam Produce Exchange for such contracts. It is a term of this contract that any dispute between the buyer and seller arising out of the contract shall be referred to arbitration in accordance with the Arbitration Rules of the Dar-es-Salaam Produce Exchange.

A dispute on a point common to all three contracts arose between the parties and on January 6, 1956, the appellants wrote to the respondents stating that the matter must be referred to arbitration and asking if the respondents had any objection to Mr. C. E. Colinvaux being appointed sole arbitrator. The respondents did not agree to the appointment of Mr. Colinvaux as sole arbitrator and notified the appellants by telegram accordingly. In reply to that telegram the appellants in a letter of January 10, 1956 said:

> "In view of this may we please request you to appoint your Arbitrator as early as possible advising the Dar-es-Salaam Produce Exchange accordingly.
>
> "We propose to appoint Mr. Colinvaux and if he agrees we will advise you."

The appellants wrote again to the respondents on January 13, as follows:

> "Contract 5076, 2234 and 4556
>
> "Further to our letter No. P/32/56 of 10th instant please note that we have appointed Mr. C. M. Colinvaux to act as our Arbitrator in the dispute under the above contracts.
>
> "You are hereby requested to appoint your Arbitrator within 7 days from date hereof.
>
> "The Secretaries of Dar-es-Salaam Produce Exchange are hereby requested to note by copy of this letter together with our cheque of Shs. 120/- being deposit."

To this letter the respondents replied:

> "Re. Castor seed Contract 5076
>
> 2234 and 4156 (sic).
>
> "We are in receipt of your letter of the 10th from which we note that you have nominated Mr. Colinvaux to act as your Arbitrator, and you want us to nominate one from our side.
>
> "As required by you, we nominate Mr. G. Drysdale of Messrs. Liverpool Uganda Co. (T.) Ltd., to act on our behalf which please note."

A copy of this letter was sent to the Dar-es-Salaam Produce Exchange.

The arbitration took place in Dar-es-Salaam. The award, which is dated February 11, 1956, was filed in the High Court of Tanganyika under the provisions of s. 11 (2) of the Arbitration Ordinance (Cap. 15) and on April 26, 1956, this application to set aside the award was filed. The grounds on which the application was made are in substance as follows:

(1) That the High Court of Tanganyika has no jurisdiction in respect of the award so far as it relates to the two Mombasa contracts.

(2) That in so far as the submission to arbitration contained in the two Mombasa contracts is concerned, there was a breach of r. 4 and r. 5 of the Mombasa Arbitration Rules.

(3) That, in as much as the arbitrators made a lump sum award, without severing the Dar-es-Salaam contract from the Mombasa contracts, or apportioning the amounts due in respect of each, and in as much as the High Court of Tanganyika has no jurisdiction to enforce the award in

> respect of the Mombasa contracts, it equally cannot enforce the award in respect of the Dar-es-Salaam contract.

The learned judge came to the conclusion that, although the parties agreed that the arbitration was to take place in Dar-es-Salaam and that the arbitrators were to arbitrate on all three contracts, the correspondence did not show that the parties agreed that the arbitration was to be conducted without reference to the Mombasa Arbitration Rules or in accordance with the Dar-es-Salaam Arbitration Rules. Accordingly, as r. 4 and r. 5 of the Mombasa Arbitration Rules had not been complied with, he set aside the award and directed that the dispute between the parties be resubmitted to arbitration in accordance with the conditions of the contracts. He did not deal with the objection that the High Court of Tanganyika had no jurisdiction in respect of the award so far as it relates to the Mombasa contracts, no doubt because, as appears from his note of the argument, the respondents' then advocate conceded that, if it was agreed that the three contracts were to be arbitrated together, the award could be filed in the High Court and enforced in Tanganyika.

It is not now disputed that the parties agreed that the arbitration in respect of the three contracts should be conducted at Dar-es-Salaam by the two arbitrators, Mr. Colinvaux and Mr. Drysdale. It is also clear that there was no express agreement that the Dar-es-Salaam Arbitration Rules were to apply to the arbitration and that the Mombasa Arbitration Rules were not to be observed. Rule 4 and r. 5 of the Mombasa Arbitration Rules which the respondents complain were not observed read:

> "4. A party claiming Arbitration shall send to the Secretary of the Exchange, notice in writing setting out concisely the matter or matters in dispute, and a copy of this shall be sent by such party to the other party.
>
> "5. If the Chairman is satisfied that an Arbitration is validly claimed, he shall direct the Secretary to deliver to the parties at least fifteen days before such hearing, unless the nature of the dispute, at the discretion of the Chairman, warrants or necessitates shorter notice, a notice in writing setting out the date and place of hearing. Within seven days of the receipt of such notice, each or either party may deliver to the other of them and to the Secretary, a full and particular account in writing of his claim. Either party may within seven days of the receipt of such particulars deliver to the other party and to the Secretary a written statement by way of reply or by way of defence."

It is common ground that r. 4 was not complied with and that the secretary of the Mombasa Produce Exchange did not give notice in writing of the date and place of hearing to the parties as required by r. 5.

In my view by agreeing to submit their disputes arising out of all three contracts to the arbitration of two Dar-es-Salaam arbitrators at Dar-es-Salaam, the parties substituted an entirely new agreement for the submission to arbitration incorporated in the two Mombasa contracts. It is obvious that the Mombasa Arbitration Rules could have no application to an arbitration conducted by Dar-es-Salaam arbitrators at Dar-es-Salaam, especially when the Dar-es-Salaam Arbitration Rules applied to the Dar-es-Salaam contract. In those circumstances I think the parties must be presumed to have intended that the whole arbitration would be governed by the Dar-es-Salaam Rules to the exclusion of the Mombasa Arbitration Rules.

If it cannot be implied that the Mombasa Arbitration Rules were to be wholly excluded, the failure to comply with r. 4 and r. 5 of those Rules was, in my opinion, a mere irregularity. It was not argued, and I do not think it could be argued, that such failure resulted in a denial of justice; it was not suggested that the respondents were not fully cognisant of the matters in dispute or that they were not notified of the date and place of hearing.

It is a well established principle that irregularities in the mode of conducting an arbitration are waived by the party continuing the proceedings with full knowledge and without protest and that a party will not be permitted to lie by or act in an

indecisive manner, so as to obtain the benefit of an award if it is in his favour and endeavour to set it aside if it is not: see Russell on Arbitration (15th Edn.) p. 150. In the present case the respondents must have known that r. 4 and r. 5 of the Mombasa Arbitration Rules had not been complied with, and with that knowledge they, nevertheless, allowed the arbitration proceedings to continue without protest. In those circumstances, I think that the respondents waived any irregularity and it is now too late for them to object to the award on that ground.

I turn now to the objection that the High Court of Tanganyika had no jurisdiction in respect of the award so far as it relates to the Mombasa contracts. The objection is founded on s. 3 of the Arbitration Ordinance which reads:

> "3. This Part of this Ordinance shall apply only to disputes which, if the matter submitted to arbitration formed the subject of a suit, the High Court only would be competent to try:
>
> "Provided that in regard to disputes which, if they formed the subject of a suit would be triable otherwise than by the High Court, the Governor may with the concurrence of the Chief Justice confer the powers vested in the court by this Part either upon all subordinate courts or any particular subordinate court or class of court."

This section appears in Part II which relates to arbitration by consent out of court. It was under the provisions of Part II that the award was filed in the High Court and the application to set aside the award made. Mr. Master contended that the meaning of s. 3 is that Part II has no application to a dispute which, if it formed the subject-matter of a suit, the High Court would have no jurisdiction to try. In the instant case, he said, the Mombasa contracts were made out of the jurisdiction of the High Court and, *prima facie*, the High Court would have no jurisdiction to entertain a suit for breach of the contracts.

I am unable to accept the construction which Mr. Master seeks to put on s. 3. In England the court has jurisdiction to enforce or set aside an award made in England notwithstanding the fact that, if the dispute referred to arbitration had formed the subject-matter of a suit, the court would have had no jurisdiction to try it because the cause of action arose out of the jurisdiction; see, for instance, *Naamlooze Vennootschap "Vulcaan" v. A/S Mowinckels* (1), [1938] 2 All E.R. 152. I do not think it was the intention of the legislature to restrict the application of Part II in the manner suggested by Mr. Master; if that had been the intention different words would have been used. The words "disputes which . . . the High Court only would be competent to try" must be read in contra-distinction to the words in the proviso "disputes which . . . would be triable otherwise than by the High Court." When that is done, it becomes clear that the object of the section is to limit the application of Part II to disputes which, if they formed the subject-matter of a suit, would be beyond the competence of a subordinate court to try unless under the proviso the Governor confers on a subordinate court jurisdiction in respect of disputes which, if they formed the subject-matter of a suit, would be triable by that subordinate court. I think that in their context the words "High Court only would be competent to try" relate only to the exclusive jurisdiction exercised by the High Court by reason of the value or nature of the subject matter of the suit. A submission or arbitration by consent out of court which does not fall within Part II is governed by paras. 17 to 21 and para. 23 of the Second Schedule to the Indian Code of Civil Procedure which are expressly excluded by s. 23 of the Ordinance when Part II applies. The reason for this is obscure, but if Mr. Master's contention were correct it would lead to a result which I do not think the legislature could have intended. There is no provision in the Second Schedule to the Code similar to s. 3 of the Ordinance and paras. 17 to 21 and para. 23 of that Schedule are not restricted to disputes which, if they formed the subject matter of a suit, would be within the jurisdiction of the court to try.

I would therefore allow the appeal, set aside the order of the High Court and order that the application to set aside the award be dismissed with costs. The appellants should have the costs of the appeal.

Sir Newnham Worley P: I agree. The appeal is allowed with costs.

Bacon JA: I also agree.

Appeal allowed with costs. The High Court Order to be set aside and the application to set aside the award to be dismissed with costs.

For the appellant:
WD Fraser Murray
Fraser Murray, Thornton & Co, Dar-es-Salaam

For the respondent:
KA Master
WJ Lockhart Smith, Dar-es-Salaam

Misaki Choda v R
[1957] 1 EA 495 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	9 December 1957
Case Number:	298/1957
Before:	Bennett J
Sourced by:	LawAfrica

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[1] Criminal law – Corruption – Evidence of police trap – Whether police counselled an offence to secure evidence.

Editor's Summary

The appellant was charged with agreeing to permit his conduct as a Mulaka Chief to be influenced by the gift of Shs. 20/-. The case for the prosecution was that the appellant whilst acting Gombolola Chief caused one J. to be arrested for non-payment of poll tax, and whilst J. was in custody the appellant counselled him to escape and said that for Shs. 20/- he would find means of saving J. Subsequently J. escaped, went to the police and reported the appellant. J. was given a marked Shs. 20/- note which he handed to the appellant while two plain clothes policemen looked on. The appellant then said "Thank you – come to my house tomorrow and I will tell you what I am going to do" and put the note in his pocket. He then went to his office at the Lukiko hall. The detectives followed, explained to the appellant their suspicions and asked to be allowed to search him. The appellant refused and went to another office, followed by one detective, where he was seen to put a note in his mouth. He was later seen to take a note out of his mouth and throw it out of a window where the other detective was waiting. It proved to be the

marked note. The appellant's defence was that the case was a fabrication and he denied all the allegations in the evidence against him. In his judgment the trial magistrate treated J's evidence with great caution, alluded to discrepancies between that evidence and the evidence of the detectives but he accepted the evidence of the prosecution witnesses and convicted the appellant who appealed. The argument advanced against the conviction was substantially that the police in setting a trap were on the evidence counselling and procuring J. to commit an offence, that the appellant had been persuaded to accept the gift and in any event the detectives had not arrested the appellant immediately he was said to have received the Shs. 20/- note.

Held – the appellant was not persuaded by J. or by the police to commit an offence since he had himself already solicited the gift.

R. v. Hasham Jiwa (1949), 16 E.A.C.A. 90, and *Wanjiko w/o Mukiri v. R.* (1954), 21 E.A.C.A., 386 followed.

Appeal dismissed.

Cases referred to:

(1) *Brannan v. Peek*, [1947] 2 All E.R. 572; [1948] 1 K.B. 68.

(2) *R. v. Hasham Jiwa* (1949), 16 E.A.C.A. 90.

(3) *Habib Kara Vesta and Others v. R.* (1934), 1 E.A.C.A. 191.

(4) *Wanjiko w/o Mukiri v. R.* (1954), 21 E.A.C.A. 386.

Judgment

Bennett J: The appellant was convicted of agreeing to permit his conduct in his employment as a Muluka Chief to be influenced by the gift of Shs. 20/- from one Jackson Mulyampiti, contrary to s. 78 (1) of the Penal Code, and sentenced to twelve months' imprisonment with hard labour.

At the time of the alleged offence, the appellant was acting Gombolola Chief. The case against him was that he caused Jackson to be arrested for non-payment of poll tax, and that while Jackson was in custody at the Gombolola Headquarters, he said to Jackson "If you get me Shs. 20/-, I will find other ways of saving you."

According to Jackson the appellant had previously counselled him to escape and get the Shs. 20/-. Jackson escaped and went home to his father. But instead of getting Shs. 20/- with which to bribe the appellant, he went to the Mbale police station and reported the appellant. As a result of Jackson's complaint, a trap was set for the appellant. Jackson was given a marked Shs. 20/- note which he handed to the appellant while two plain clothes policemen, namely, Nono and Olinga, looked on. When the note was handed to him the appellant simply said "Thank you – come to my house tomorrow and I will tell you what I am going to do." He then put the note in his pocket and walked to the Lukiko hall. The two detectives followed the appellant to his office. Nono told the appellant he had reason to believe that the appellant had received a bribe from Jackson and said that he wanted to search the appellant. The appellant refused to be searched and walked to another office, followed by Nono. In the other office the appellant was seen to take a note from his pocket and put it in his mouth. He was later seen to take a note from his mouth and throw it out of the window, and Olinga, who was outside the window at the time, picked up the note. It proved to be the marked note.

The appellant's defence was that the case against him was a fabrication, that Jackson and the police witnesses were telling lies and that he had, in fact, never received a Shs. 20/- note from Jackson. He denied that he had ever put a note in his mouth and subsequently thrown it away. He alleged that the first time that he had seen the Shs. 20/- note was at Mr. Forbes' office in the police station.

The learned magistrate treated the evidence of Jackson with the very greatest caution in view of the fact that he did not regard him as an altogether satisfactory witness. There were certain minor discrepancies between Jackson's evidence and that of the two detectives to which the learned magistrate had alluded in his judgment. Nevertheless, he accepted the evidence of the prosecution witnesses and rejected the appellant's evidence.

The appellant's counsel has commented on the fact that the two detectives did not arrest the appellant immediately after he was said to have received the note from Jackson. There appears, however, to be a reason for this, namely, that the appellant refused to submit to a search, and until he had put the note in his mouth and subsequently thrown it away, the evidence against him was not complete. It may be contended, however, that there was no reason for not arresting him immediately after he had taken the note out of his mouth and thrown it away. In my view the detectives acted wisely in not attempting to arrest the appellant at his own headquarters in the presence of a hostile crowd, but in awaiting the arrival

of a superior officer, Mr. Forbes.

The English case of *Brannan v. Peek* (1), [1948] 1 K.B. 68; [1947] 2 All E.R. 572, has been cited as authority for the proposition that the police, in setting a trap for the appellant, were counselling and procuring Jackson to commit and offence. It is contended that for this reason the conviction ought not to be allowed to stand. In that case Lord Goddard made the following observations, *inter alia*:

> "It cannot be too strongly emphasised that, unless an Act of Parliament provides for such a course of conduct – and I do not think any Act of Parliament does so provide – it is wholly wrong for a police officer or any other person to be sent to commit an offence in order that an offence by another person may be detected."

This dictum was considered by the Court of Appeal for Eastern Africa in *R. v. Hasham Jiwa* (2) (1949), 16 E.A.C.A. 90.

To quote from the judgment of the court:

> "It is to be noted that the other two members of the court concurred in the judgment of the learned chief justice but made no comment whatever on the obiter dictum which we have quoted. We agree with the Supreme Court that his obiter dictum is entitled to the greatest respect, but we are unable to hold that it is sufficient ground for overruling the 1934 decision of this court which is in our view in accordance with the English decisions.
>
> "It would, in our opinion, be a mistake to consider this dictum except with reference to the particular facts of the case in which it occurred. The facts in that case were that police constables in plain clothes visited the public-house of the appellant and with some difficulty persuaded him to accept the bet which formed the subject of the charge. That is quite a different position from the facts of this case where in regard to the transaction charged Njeroge simply pretended to concur in the proposal of the appellant. Where a police spy himself persuades someone to commit an offence he may lay himself open to adverse comments from the bench as did the police constable in *Brannan v. Peek* (1), but there was nothing of that kind in this case."

In the result the Court of Appeal for Eastern Africa held that its decision in *Habib Kara Vesta and Others v. R.* (3) (1934), 1 E.A.C.A. 191, was still binding on the court and that it correctly embodied the law of England as the Court of Appeal for Eastern Africa conceived it to be.

Reference should be made to a more recent decision of the Court of Appeal for Eastern Africa, namely, *Wanjiko w/o Mukiri v. R.* (4) (1954), 21 E.A.C.A. 386, in which it was held that, in deciding whether the use of a trap is legitimate, the questions for consideration are the nature of the offence and the frame of mind of the accused, and not the provision of the means to commit the offence nor its seriousness. To quote from a passage in the judgment:

> "These are both, as it seems to us, cases in which the use of a trap may be legitimate. The test is not, we think, the provision of the means to commit the offence; otherwise it would be wrong to furnish marked notes in order to prove corruption."

It would appear from this passage that the Court of Appeal considered that corruption was one of the cases in which the means to commit the offence could properly be provided.

In the instant case it cannot be said that the appellant was persuaded by the police or by Jackson to commit an offence. He needed no persuasion since, as found by the learned magistrate, he had already solicited a gift of Shs. 20/- from Jackson. I can see not the slightest reason to suppose that the appellant was wrongly convicted.

With regard to the question of sentence, I concur entirely in the observations of the learned magistrate.

The appeal is dismissed.

Appeal dismissed.

For the appellant:
DLK Lubogo

DLK Lubogo, Kampala

For the respondent:
HSS Few (Crown Counsel, Uganda)
The Attorney-General, Uganda

Wafula s/o Waminira v R
[1957] 1 EA 498 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	19 December 1957
Case Number:	170/1957
Before:	Sir Kenneth O'Connor P, Briggs Ag V-P and Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Rodwell, Ag. J

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[1] Criminal law – Murder – Provocation and intent – Misdirection.

Editor's Summary

Following a beer party, the appellant who had been struck with a stick, stabbed and killed his assailant. At his trial for murder the appellant's plea of self-defence was rejected and he was convicted and sentenced to death, but the judge failed to appreciate that the evidence clearly raised an issue of provocation and also omitted to consider evidence suggesting that the appellant was so drunk as to have been incapable of forming the necessary intent.

Held–

(i) the omission of the judge to direct himself and the assessors on the issue of provocation was a serious misdirection, and the conviction of murder could not stand.

(ii) the conflict of evidence as to the appellant's state of intoxication raised an issue whether the prosecution had established beyond reasonable doubt that the appellant was capable of forming the required intent, and the judge's omission to direct the assessors was a further reason for setting aside the conviction.

Appeal allowed. Conviction of murder set aside. Conviction of manslaughter substituted with sentence of four years' imprisonment.

Cases referred to in judgment:

(1) *Bullard v. R.*, [1957] 3 W.L.R. 656.

Judgment

Forbes JA: read the following judgment of the court: This was an appeal from a conviction of murder and sentence of death by the Supreme Court of Kenya. We allowed the appeal to the extent of setting aside the conviction of murder and sentence of death and substituting a conviction of manslaughter and sentence of four years' imprisonment with hard labour. We now give our reasons.

It appeared, on the evidence accepted by the court, that the appellant had been attending a beer party at the deceased's house; that he left the party at about 1 a.m.; that he returned shortly afterwards and, finding the deceased's wife in the kitchen, told her he would like to sleep with her; that the deceased entered the kitchen at that moment, asked the appellant "Why are you seducing my wife?", struck him with a stick of the thickness of a thumb, and pursued him out through the kitchen door with the stick. Outside, the appellant stabbed the deceased three times, and so caused his death.

The appellant relied on the defence of self-defence at the trial. This was duly considered and rejected. The learned trial judge, however, does not appear to have appreciated that, as was conceded by Crown counsel before us, the facts of the case clearly raised an issue of provocation even though the defence of self-defence was rejected. He stated in his judgment:

> "In my summing up to the assessors I told them that if they thought the accused might have stabbed the deceased in defending himself then they should say that he was not guilty. On the other hand, if they believed the evidence of the first, third and fifth witnesses and were satisfied beyond all reasonable doubt that the accused stabbed the deceased as described by the first witness then they should say that the accused was guilty."

With great respect, this was a serious misdirection. In view of the deceased's attack on the appellant (and the medical evidence confirmed that the appellant had received at least two blows with a stick) there was an issue of provocation which ought to have been put to the assessors and considered by the learned judge himself, notwithstanding the rejection of the defence of self-defence.

> "It has long been settled law that if on the evidence, whether of the prosecution or of the defence, there is any evidence of provocation fit to be left to a jury, and whether or not this issue has been specifically raised at the trial by counsel for the defence and whether or not the accused has said in terms that he was provoked, it is the duty of the judge, after a proper direction, to leave it open to the jury to return a verdict of manslaughter if they are not satisfied beyond reasonable doubt that the killing was unprovoked."

(Judgment of the Privy Council in *Bullard v. R.* (1), [1957] 3 W.L.R. 656 at p. 659.) In *Bullard's* case (1) also (at p. 661) it is once more stated that it is not open to a court of appeal to speculate on what the conclusion on the issue of manslaughter would have been if the issue had been left to a jury. Similarly, it is not for us to speculate on what conclusion would have been reached by the assessors and the learned trial judge had they considered this issue. In the circumstances the conviction of murder could not stand.

There was a further misdirection in the judgment of the learned trial judge. At p. 7 of his judgment he states:

> "I told them" (i.e. the assessors) "that though no doubt all concerned were under the influence of alcohol there was no evidence that the accused was so drunk that he was incapable of forming any intent."

With respect, this was not correct. There was a conflict of evidence as to the state of intoxication that the appellant was in and it may be that the evidence of extreme drunkenness would not have been believed, but there were witnesses who said he was so drunk that he was falling about, and consequently there was an issue as to whether the prosecution had established beyond reasonable doubt that the appellant was capable of forming the intent to kill or do grievous harm. This misdirection also, we consider, would have obliged us to substitute a conviction of manslaughter for the conviction of murder.

In assessing sentence we have taken into account the fact that all the evidence suggests that the appellant was to a considerable extent under the influence of alcohol and may have received some provocation.

Appeal allowed. Conviction of murder set aside. Conviction of manslaughter substituted with sentence of four years' imprisonment.

The appellant in person.

For the appellant:
HS Bhogal, Kitale

For the respondent:
JP Webber (Crown Counsel, Kenya)
The Attorney-General, Kenya

Purshottam B Patel v The Commissioner for Income Tax

[1957] 1 EA 500 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	14 March 1957
Case Number:	3/1955
Before:	Bennett J
Sourced by:	LawAfrica

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[1] Income tax – Undistributed profits – Dividends declared but not paid to shareholders – Company liable to pay on demand – Whether dividends constitute loan capital within s. 22 (1) *of the East African Income Tax* (*Management*) *Act*, 1952.

Editor's Summary

A private company had made profits and declared but had not paid dividends out of these profits. The shareholders had habitually allowed the company to retain and use in its business the moneys representing these dividends and certain bonuses. These monies were credited to the shareholders, of whom the appellant was one, in current accounts kept in the company's books. The funds were repayable on demand and earned no interest. The appellant claimed that the sums held to his credit with the company represented loan capital within the proviso of s. 22 (1) of the East African Income Tax (Management) Act, 1952, and accordingly that the assessments made upon him for the years 1951–1952 were wrong.

Section 22 (1) provides that where the Commissioner for Income Tax is satisfied that

> "in respect of any period for which the accounts of a company resident in the Territories have been made up, the amounts distributed as dividends by that company up to the end of twelve months after the date to which such accounts have been made up, increased by any tax payable thereon, are less than sixty per cent. of the total income of the company ascertained in accordance with"

the Act he may, unless satisfied that a larger dividend would be unreasonable, by notice in writing order that the undistributed portion of sixty per cent. of the company's total income shall be deemed to have been distributed as dividends whereupon the proportionate share thereof of each shareholder shall be included in the total income of that shareholder

> "Provided that when the reserves representing accumulations of past profits which have not been the subject of an order under this section exceed the paid-up capital of the company together with any loan capital which is the property of the shareholders, or the actual cost of the fixed assets of the company, whichever of these is greater, this sub-section shall apply as if instead of the words 'sixty per cent' the words 'one hundred per cent' were substituted."

Held – what the company had done was to postpone payment to the shareholders with their consent of debts due by the company to them and the monies due to the shareholders were not "loan capital."

Attorney-General v. South Wales Electrical Power Distribution Company, [1920] 1 K.B. 552 followed.

Appeal dismissed.

Cases referred to:

(1) *Farmer v. Scottish North American Trust Ltd*., [1912] A.C. 118; 5 T.C. 693.

(2) *Attorney-General v. South Wales Electrical Power Distribution Company*, [1920] 1 K.B. 552.

Judgment

Bennett J: The appellant appeals against the following assessments to tax:

(*a*) an assessment for the year of income, 1951, in the sum of £4,172,

(*b*) an assessment for the year of income, 1952, in the sum of £3,451.

The agreed facts of the case, insofar as they are material, are as follows. The appellant is a shareholder in a private limited liability company carrying on business in Kampala known as The Service Garage Limited. It has been the practice of all the shareholders of this company to allow the company to retain monies due to them by way of dividends and bonuses, and for these moneys to be credited to the current accounts of the shareholders in the books of the company. The moneys of the shareholders so retained were used by the company in its business, but were repayable to the shareholders on demand. No interest was payable to the shareholders on the amounts credited to them in the company's books.

The short point for decision in this appeal is whether these moneys retained by the company and credited to the shareholders in the company's books are "loan capital" within the meaning of the proviso to s. 22 (1) of the East African Income Tax (Management) Act, 1952. If these moneys are not "loan capital" within the meaning of the proviso then it is conceded on behalf of the appellant that the assessments appealed against were correctly made.

It is to be observed that in the company's balance sheet as at December 31, 1950, the sums due to the shareholders on account of dividends and bonuses have been shown under the general heading of "Current Liabilities and Provisions" and under the sub-heading of "Creditors." They have not been shown as capital. However, Mr. Keeble, who appeared for the appellant, contends that these moneys did in fact represent capital lent to the company by the shareholders. He referred to the definition of capital in the Concise Oxford Dictionary as "accumulated wealth used in producing more." He contended that since these moneys were utilised by the company for its own purposes to earn additional profits, they represented part of the capital of the company. Mr. Newbold, who appeared for the respondent, referred me to two English decisions which are very much against the proposition contended for on behalf of the appellant. The first decision was *Farmer v. Scottish North American Trust, Ltd.* (1), [1912] A.C. 118; 5 T.C. 693. The headnote to that case reads as follows:

> "The respondent company carried on an investment business and had under its memorandum of association power to borrow and raise money by way of loan, discount, cash, credit, overdraft, etc., and further to grant security for any sums of money so borrowed. In the course of its business the company purchased in New York bonds, stocks, and other securities of American railroad and other companies. The value of the purchases exceeded the amount of the respondents' available cash, and certain of the securities which were lying in New York they pledged to their bankers in New York, in consideration of which the bankers allowed the respondents' banking account in New York to be overdrawn. The amount of the overdraft fluctuated from time to time as the respondents bought and sold securities, and they were charged periodic interest at current rates from day to day. In 1906 they opened a loan account, in addition to the overdraft, with their bankers, on which the bankers granted a loan not exceeding $200,000 for a period of six months at six per cent. When this loan fell due it was renewed for a further period of six months, after which the loan account was terminated and the balance transferred to current account. The bank collected all the dividends and coupons upon the securities in their hands, paying the interest due to themselves out of the sums so collected, the difference or net amount being credited to the respondents. In the event of the dividends and coupons collected not equalling the amount of the interest payable in any month the interest was debited to the overdraft on the current account. The respondents in stating their profits for assessment for income tax deducted the amount of

interest paid to the bankers, but this deduction was disallowed by the Commissioners

on the ground that the interest in question was interest on capital employed in the business of the company and therefore could not properly be deducted from the profits of the business:

"Held (affirming the decision of the First Division of the Court of Session, 1910 S.C. 966), that the Commissioners were wrong in their decision, for the money borrowed by the respondents could not be treated as 'capital' within the meaning of the Income Tax Acts; and the interest paid for the use of the money was an outgoing by means of which the respondents procured the use of the thing by which they made a profit and, like any similar outgoing, should be deducted from the receipts to ascertain the taxable profits and gains which were earned by them.

"*Anglo-Continental Guano Works v. Bell* (1894), 3 Tax Cases 239, distinguished."

In his judgment Lord Atkinson said:

"These authorities show that money borrowed by such a company as the respondent company in this case in the fluctuating temporary manner in which it has been borrowed by them – the daily borrowing and lending of money being part of their trade and business – is not to be treated under the Joint Stock Companies Act as 'capital.' There is nothing to show that that word should bear a different meaning in the Income Tax Acts when applied to the proceedings of Joint Stock Companies."

The next case to which I was referred was *Attorney General v. South Wales Electrical Power Distribution Company* (2), [1920] 1 K.B. 552. The headnote to this case reads as follows:

"A company being unable to pay the interest on its debenture stock, under the powers of a private Act, issued from time to time 'deferred warrants' in payment of that interest. These warrants themselves bore interest and were payable, both as to principal and interest, after a specified date out of the first available funds of the company:

"Held, that the transaction was not an issue of 'loan capital' nor the creation of a 'funded debt' within the meaning of s. 8 of the Finance Act, 1899, and that the company was not therefore liable to the ad valorem stamp duty imposed by that section. Decision of Rowlatt, J., [1919] 2 K.B. 636 affirmed."

Section 5 of the Finance Act, 1899, contained a definition of the expression "loan capital" which included:

"Any capital raised by any local authority, corporation, company or body of persons formed or established in the United Kingdom which is borrowed or has the character of borrowed money, whether in the form of stock or in any other form."

In his judgment Lord Sterndale, M.R. said:

"In the first place I think it is not capital at all; it is not capital raised at all. It is a mere provision for the payment of overdue interest by postponing the payment in consideration of paying interest upon the overdue amount. That is not raising capital. But it must also be capital which is borrowed or has the character of borrowed money. Again there is no money borrowed here nor has this transaction the character of borrowed money. You do not borrow money by postponing the payment of your debt and agreeing to pay interest upon it, and therefore it seems to me to be quite clear when looked at as a matter of fact, as we have to look at it, that this issue of warrants does not come within the definition of loan capital, unless it be a 'funded debt,' which I passed over for the moment in dealing with the rest of the section."

In the instant case it seems to me that what the company has done is to postpone the payment of its debts to the shareholders with the consent of the shareholders. In my judgment that is not a raising of capital, and the moneys due to the shareholders are not "loan capital" within the meaning of the proviso to s. 22 (1) of the Act. The

appeal is accordingly dismissed. The appellant is to pay the respondent's costs of this appeal.

Appeal dismissed.

For the appellant:
OJ Keeble
Hunter & Greig, Kampala

For the respondent:
CD Newbold QC (Legal Secretary, East African High Commission)
The Legal Secretary, East Africa High Commission

Hasham Meralli and another v Javer Kassam & Sons Ltd
[1957] 1 EA 503 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	9 August 1957
Case Number:	12/1957
Before:	Sir Newnham Worley P, Sir Ronald Sinclair V-P and Briggs JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Connell, J

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[1] Pleading – Amendment of plaint allowed generally – Validity of amended plaint – Civil Procedure Rules, O. VI, r. 18, *r.* 20 *and r.* 21 (*K.*).

Editor's Summary

The Supreme Court with the consent of the appellants had allowed the respondents to amend their plaint generally. After this had been done and the formal order sealed and extracted, the appellants found that the amended plaint was very different from what they had expected. They appealed against the order submitting that it had been made without jurisdiction and that amendments made with leave should be subject to the same rules of disallowance as amendments made without leave.

Held–

(i) the authorities showed that refusal to allow amendments is based not on an absence of jurisdiction to make an order but on settled rules of practice; and that in the present case the order to amend was within the jurisdiction of the court.

(ii) there was no duty to disallow amendments after leave had been given merely because they might have been disallowed if formulated and objected to before leave.

Appeal dismissed.

Cases referred to:

(1) *Ma Shwe Mya v. Maung Mo Hnaung* (1921), 48 I.A. 214.

(2) *Kanda v. Waghu* (1949), 77 I.A. 15.

(3) *Weldon v. Neal* (1887), 19 Q.B.D. 394.

Judgment

Briggs JA: read the following judgment of the court: This was an appeal from an interlocutory order of the Supreme Court of Kenya, and was brought in pursuance of leave to appeal granted by this court, the Supreme Court having refused leave. We dismissed the appeal with costs to the respondent, including the reserved costs of the successful application for leave, and now give our reasons.

The facts are set out in the judgment delivered by Briggs, J.A., on January 9, 1957, in Civil Application No. 16 of 1956, when he granted leave to appeal, and it is not necessary to repeat them. Since that date, however, there had been an important change in the situation, in that on April 4, 1957, the formal order made on November 1, 1956, was sealed and extracted. It formed part of a supplementary record, all of

which was material on the hearing of the appeal. The important part of the formal order is as follows:

> ". . . by consent it is ordered (1) that the plaintiffs be at liberty to amend their plaint within three days."

These words may be compared with the passage from the judge's note quoted in the previous judgment of Briggs, J.A. When Connell, J., refused to grant leave to appeal, he did so on the ground that the consent order, as noted by himself, must mean that the plaintiffs might amend as they might be advised. Briggs, J.A., thought that it was not then possible, in the absence of a formal order, to feel confident that the leave to amend was intended to be perfectly general. The defendants contended strenuously that it was not, and there might at one time have been some substance in that contention; but the time for putting it forward came to an end when the formal order was sealed. There was no suggestion on the hearing of this appeal that the formal order was in any way wrongly drawn, and there has been no attempt to amend it or set it aside. We were therefore bound to accept that it correctly set out the order made and, on the face of it, it gives general leave to amend without limitation or restriction.

Mr. Khanna for the appellants made two main points concerning the order itself. He contended first that we could disregard it as having been made without jurisdiction. There is no doubt that in contested cases it is ordinarily undesirable to give unrestricted leave to amend; but such leave is frequently given by consent, and the suggestion that there is no jurisdiction to make an order of this kind is entirely novel to us. Mr. Khanna cited several cases showing that the Court of Appeal will disallow amendments improperly allowed in face of objection; but the only authorities he was able to cite as showing that an order allowing improper amendments is not merely wrong, but is outside jurisdiction, were certain dicta in two Privy Council appeals. In *Ma Shwe Mya v. Maung Mo Hnaung* (1) (1921), 48 I.A. 214, at pp. 216–217, the Privy Council said that it was "not open to the court" to make such an order. The whole passage is as follows:

> "The first question that arises is whether or no leave to amend was properly given in accordance with the rules by which that leave must necessarily be regulated. All rules of court are nothing but provisions intended to secure the proper administration of justice, and it is therefore essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised, but none the less no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject matter of the suit.
>
> "The provisions as to amendment are those that are to be found in the Code of Civil Procedure of 1908. Section 153 of that Code enacts that 'The court may at any time and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding,' and by O. VI, r. 17, 'The court may at any stage of the proceedings, allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties.' The real question in controversy between the parties in these proceedings was the existence and the character of an agreement alleged to have been made in 1912 for the delivery of certain sites of oil wells specified and identified by the numbers stated in the plaint, which could only have been delivered in respect of that subsequent bargain. When once that contract has been negatived, to permit the plaintiff to set up and establish another and an independent contract altogether would, in their lordships' opinion, be to go outside the provisions established by the Code of Civil Procedure, to which reference has been made. It would be a regrettable thing if, when in fact the

> whole of a controversy between two parties was properly open, rigid rules prevent its determination, but in this case their lordships think that the rules do have that operation and that it was not open to the court to permit a new case to be made."

In *Kanda v. Waghu* (2) (1949), 77 I.A., at p. 21, the board said:

> "The powers of amendment conferred by the Code are very wide, but they must be exercised in accordance with legal principles, and their lordships cannot allow an amendment which could involve the setting up of a new case. The judgment of the board delivered by Lord Buckmaster in *Ma Shwe Mya v. Maung Mo Hnaung* (1) is directly in point. It was there held that it was not open to a court under s. 153 and O. VI, r. 17, to allow an amendment which altered the real matter in controversy between the parties."

It may be noted that O. 6, r. 18 of the Kenya Rules is in somewhat wider terms than the Indian rule quoted, and the rule that a new case, or new cause of action, must not be raised on amendment may not be of universal application.

The leading case is *Weldon v. Neal* (3) (1887), 19 Q.B.D. 394, where Lord Esher, M.R., said:

> "We must act on the settled rule of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments. If an amendment were allowed setting up a cause of action, which, if the writ were issued in respect thereof at the date of the amendment, would be barred by the Statute of Limitations, it would be allowing the plaintiff to take advantage of her former writ to defeat the statute and taking away an existing right from the defendant, a proceeding which, as a general rule, would be, in my opinion, improper and unjust. Under very peculiar circumstances the court might perhaps have power to allow such an amendment, but certainly as a general rule it will not do so.
>
> "This case comes within that rule of practice, and there are no peculiar circumstances of any sort to constitute it an exception to such rule."

And Lopes, L.J., said:

> "But here the amending paragraphs set up causes of action which were not in the original claim and which are now barred by the Statute of Limitations. The effect of allowing those amendments would be to take away from the defendant the defence under that statute and therefore unjustly to prejudice the defendant."

These passages show quite clearly that refusal to allow such amendments is based on a settled rule of practice, but not on absence of jurisdiction to make the order. In the many subsequent cases where the court has said "We cannot do it," or words to that effect, it clearly means that, having regard to the settled rule, it would be wrong to do it. In these cases, and in the two Privy Council cases which we have cited, the question of jurisdiction never arose. The question was always whether it was right or wrong to allow the amendment in question. Here, because the order for amendment was made by consent, that question did not arise. The question whether, amendment having been made in pursuance of general leave under O. 6, r. 18, the amendments or part of them could be disallowed under O. 6, r. 21 or some other power, was distinct.

It was not disputed that O. 6, r. 21 could not apply directly. It applies in terms only to cases of amendment without leave under r. 19 or r. 20. But Mr. Khanna contended that the court should treat amendments made under general leave in precisely the same way for purposes of disallowance as it would under r. 21 treat amendments made without leave. He gave two reasons for this. He said first that an order granting general leave should be read as meaning that only such amendments as would, at a proper time, have been permissible without leave might be made under it. We assume, without deciding the point, that at least one of the amendments made, namely that which alleges an account stated and settled, would not have been permissible in that sense, but would have been disallowed under r. 21. Mr.

Khanna also

submitted that under its inherent powers the court could and should disallow any amendments which contravened the rules under which the propriety of a specified proposed amendment would be considered. He was obliged under this head of argument to say that, even if the order giving leave were treated as authorising the initial making of amendments which contravened those rules, the court under inherent powers should treat the amended plaint in exactly the same way as it would if the amendments were made without leave.

We were unable to accept either of these submissions. We thought that this order meant what it said, that the plaintiffs might file an amended plaint in any form they chose. As we have said, it would have been wrong to make such an order against opposition, because it might enable the plaintiffs to raise new causes of action and to evade the effect of limitation; but the order was not made without jurisdiction and must have its effect. We could not read into it the gloss for which Mr. Khanna contended. On the other argument we of course accepted that the court would have power to strike out a plaint so amended if, for example, it contained scandalous or similarly improper matter. It could stand on no better footing than an original plaint in this respect. But we were unable to accept that there was any duty, or even any power, to disallow the amendments on this appeal merely because they might have been disallowed if formulated and objected to before leave was given. It could not, we thought, fairly be said that injustice resulted from these amendments, because the remedy was in the appellants' own hands. Their previous counsel had only to say that he must see the draft of the proposed amended plaint before giving his consent to an order for amendment. If he had done this, much trouble and expense would have been avoided.

Appeal dismissed.

For the appellants:
DN Khanna and *OP Nagpal*
DN & RN Khanna, Nairobi

For the respondent:
CW Salter QC and *DP Khetani*
DP Khetani, Nairobi

Alfred Granville Ross v R
[1957] 1 EA 507 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	9 August 1957
Case Number:	50/1957
Before:	Sir Newnham Worley P, Sir Ronald Sinclair V-P and Bacon JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Forbes, J

[1] Income tax – False returns – Source of income – Whether income retained abroad was earned in East Africa – Income Tax Ordinance (*Cap.* 254), *s.* 7 (1) (*a*), *s.* 13 (1) *and s.* 75 (1) (*a*) *and* (*e*) (*K.*) – *Excess Profits Tax Ordinance* (*Cap.* 255), *s.* 4 (1) *and s.* 17 (1) (*o*) (*K.*) – *East African Income Tax* (*Management*) *Act,* 1952, *s.* 74 (2) *and* (5).

Editor's Summary

The appellant, a partner in a firm of commission agents carrying on business in East Africa and England, had been convicted on a retrial on thirty-five counts charging the making of false returns to evade tax, and sentenced to one year's imprisonment and fines totalling £50,000. The substance of his appeal against conviction was that the firm's undeclared income was commission from overseas suppliers paid to and retained by his U.K. office and, therefore, was not income derived from East Africa.

Held – the firm procured its income from obtaining orders, and it was open to the jury to find as a fact that the income in question was largely earned in and therefore derived from East Africa within the meaning of the Income Tax Ordinance.

Appeal dismissed.

Cases referred to:

(1) *Rhodesia Metals Ltd. v. Commissioner of Taxes*, [1940] 3 All E.R. 422; [1940] A.C. 774.

(2) *Commissioner of Income Tax v. P. Co. Ltd*., 1 E.A.T.C. 131.

(3) *Erichsen v. Last* (1881), 8 Q.B.D. 414.

(4) *Grainger & Son v. Gough*, [1896] A.C. 325.

(5) *Lovell & Christmas, Ltd. v. Commissioner of Taxes*, [1908] A.C. 46.

(6) *Smidth* (*F.L.*) *& Co. v. Greenwood*, 8 T.C. 193.

(7) *Maclaine & Co. v. Eccott*, 10 T.C. 481.

(8) *W. H. Muller & Co.* (*London*) *Ltd. v. Lethem*, 13 T.C. 126.

(9) *Rowson v. Stephen*, 14 T.C. 543.

(10) *Commissioner of Taxes v. British Australian Wool Realisation Association, Ltd*. [1931] A.C. 224.

Judgment

Bacon JA: read the following judgment of the court: On a re trial ordered by this court in Criminal Appeal No. 340 of 1955, which order was affirmed in Privy Council Appeal No. 12 of 1956, the appellant was convicted after a trial by a judge and jury in the Supreme Court of Kenya on thirty-five out of thirty-six counts charging the making of false returns of income with intent to evade tax.

The counts on which the appellant was convicted related respectively to each of the years of income between 1941 and 1949, both inclusive (the years of assessment 1942 to 1950). They fell into three groups (to which we shall refer as "group (A)," "group (B)" and "group (C)"). Group (A) comprised twenty-six counts under s. 75 (1) (*a*) of the Income Tax Ordinance (to which we shall refer as Cap. 254); group (B) comprised five counts under s. 17 (1) (*o*) of the Excess Profits Tax Ordinance (to which we

shall refer as Cap. 255) read with s. 75 of Cap. 254 as modified and applied by s. 17 (1) (*o*) of Cap. 255 to the assessment and collection of excess profits tax; and group (C) comprised four counts under s. 75 (1) (*e*) of Cap. 254. All the aforementioned

provisions which were said to have been contravened are to be read with the Fifth Schedule to the East African Income Tax (Management) Act, 1952 which took effect prior to the commencement in June, 1955, of the proceedings out of which this appeal arose, but nothing turns upon that schedule for present purposes.

We also here mention that the returns of income made by the appellant were in three categories. He made nine of them – all in group (A) – on his own behalf, which we shall call "the personal returns." He made eighteen of them – nine in group (A), the five constituting group (B) and the four constituting group (C) – in his capacity as the precedent partner in a firm styled "Ross & Elliott" (which we shall call "the firm") on behalf of the firm and relating to its income; these we shall call "the partnership returns." And he made the remaining eight returns – all in group (A) – as the agent of one Thomas Lea Elliott, his only partner in the firm, who was at all material times not resident in Kenya; we shall refer to these as "the Elliott returns."

The essence, however, of each alleged offence falling within any one of the three groups which we have mentioned was the same, whichever of the three categories of returns of income was concerned; for each and every return in question was founded upon what the appellant alleged were the chargeable profits of the firm for the year concerned, and the case for the Crown on each and every count was broadly speaking that, in one way or another, there was a wilful mis-calculation of those profits with intent to evade tax.

The material parts of the enactments relating to the three groups of charges are as follows. As to group (A), s. 75 (1) (*a*) of Cap. 254 reads thus:

> "Any person who wilfully with intent to evade . . . tax . . . omits from a return made under this Ordinance any income which should be included . . . shall be guilty of an offence."

Section 17 (1) (*o*) of Cap. 255, which is relevant to group (B), applies s. 75 of Cap. 254 to the assessment and collection of excess profits tax. The modification of s. 75 when so applied is immaterial on this appeal. Group (C) is concerned with s. 75 (1) (*e*) of Cap. 254, whose terms are as follows:

> "Any person who wilfully with intent to evade . . . tax . . . makes use of any fraud, . . . whatsoever . . . shall be guilty of an offence."

The charging provisions are the following. Section 7 (1) (*a*) of Cap. 254, which affects all three groups, reads thus:

> "Income tax shall, . . . be payable . . . upon the income of any person, who is not resident in the Colony, accruing in, derived from, or received in, the Colony, and upon the income of any person who is resident in the Colony, accruing in, derived from, or received in, the Colony and/or another East African territory in respect of gains or profits from any trade, business, . . . for whatever period of time such trade, business, . . . may have been carried on or exercised;"

Section 4 (1) of Cap. 255, which affects group (B), is this:

> "The profits chargeable with excess profits tax shall be all profits derived by any person from any business chargeable with income tax under the Income Tax Ordinance."

By s. 2 of the Interpretation and General Clauses Ordinance of Kenya "person" includes any unincorporate body of persons, e.g. a firm.

It is unnecessary at the moment to set out verbatim any of the counts on which the appellant was convicted. Each accord precisely with the relative penal section and nothing turned on matters of form.

We must, however, state in detail the sentences passed on the appellant, for we are asked on this appeal to give full consideration to this aspect of the case.

In the case of each of the nine convictions in respect of the personal returns (all being in group (A)) the sentence imposed was a fine and a term of imprisonment in default.

Of the eighteen convictions in respect of the partnership returns, in the case of the nine in group (A) and the four which constituted group (C) the sentence in each instance was one of twelve months' imprisonment, all the thirteen terms to be concurrent.

The remaining five convictions in this category (which constituted group (B)) each carried a sentence of a fine and imprisonment in default.

Lastly, in the case of the eight convictions relating to the Elliott returns (which made up the remainder of group (A)) the sentence in each instance was again a fine and imprisonment in default.

All the imprisonment imposed, whether substantive or in default, was without hard labour. The terms imposed in default were, of course, all consecutive to the substantive twelve months and to each other; the total period of imprisonment in default was six years and eight months. The fines were all on the footing of double the amount of tax which would have been lost on the basis of the appellant's false returns. They amounted to over a million shillings, or, to be exact, to £50,302 18s. 0d.

It is to be observed that, whether the convictions are regarded in the groups or in the categories into which we have divided them, it is not apparent upon what principle the sentence of one kind or of the other was passed in any given case. It was not, however, with this aspect of the matter that Mr. O'Donovan for the appellant submitted that we should be concerned, but rather with the aggregate penalty imposed and its allegedly harsh and unconscionable implications for his client.

Mr. O'Donovan accordingly brought to our notice the following further matters relating to this question of sentence. At his first trial the appellant was sentenced to twelve months' substantive imprisonment and to fines amounting to a much larger sum – about £80,000 0s. 0d. – but not to any imprisonment in default. On his first appeal to this court the appellant succeeded to the extent that all his convictions and the sentence passed on him were set aside, though a new trial was ordered. As a result of that partial success he (a man of approximately sixty years of age and far from robust) had been sentenced in such a manner that, as things stood, if the sentence as a whole were affirmed, he could be obliged to serve a total term of seven years and eight months in addition to almost certainly suffering bankruptcy and quite certainly the destruction of his entire life's work. For at the hearing before us (so far as it went in June, 1957) the position was that counsel for the Crown was then unable to give an undertaking on behalf of the Commissioner that the appellant's properties in Kenya (held by the Commissioner as general security for the appellant's liability in respect of certain other assessments against which he has lodged objections and appeals) would be earmarked for the payment of the fines in the instant case; and, since the assessments for tax now made in respect of the years 1950 onwards amounted to an additional sum so large that, if payment of tax were given priority, the appellant would have no chance whatever of paying any part of the fines.

Accordingly, on those submissions made towards the end of that first stage of the hearing, whereas we reached and announced our decision that the appeal against the thirty-five convictions and the sentences of twelve months' imprisonment failed, we adjourned for further hearing the question as to the remainder of the sentences so that the Commissioner might have an opportunity for fresh inquiry and consideration and so that counsel for the appellant might be in a position to inform us more precisely of the appellant's assets and of other figures; we also stated that we would thereafter give our reasons for our decision on the entire appeal.

The further hearing has since taken place, when we reserved our decision as to the remainder of the sentences. We now give, first, our reasons for dismissing the appeal against the convictions and, secondly, our decision on the sentences as a whole and our reasons therefore.

The first matter raised on this appeal was the refusal of the learned trial judge to accede to an application on behalf of the appellant for an adjournment of the trial for a number of months on the

ground that the appellant was in such ill-health that he was incapable of giving sustained attention to the evidence, of properly instructing counsel or of undergoing prolonged questioning in the witness-box. It was submitted at the trial that the appellant was suffering from what psychiatrists call an “anxiety state” bordering on a nervous breakdown and rendering him unable to concentrate –

a condition which was said by the appellant to one of his doctors to have had its origin long ago inasmuch as "he had been very nervous for a very long time." (Incidentally, no such application had been made at the first trial, which opened on July 11, 1955; it had on that occasion been stated by his advocate that the appellant had "been in very poor health" but that an adjournment was not asked for). Mr. O'Donovan expressly stated that he was not seeking to establish that the appellant was unfit to plead (in the technical sense), but that to proceed with the case against him then and there would result in an unfair trial.

For the defence Mr. O'Donovan called Dr. E. L. Margetts, a fully qualified psychiatrist in charge of the Mathari Mental Hospital, and Dr. G. A. Siley, a surgeon and physician practising in Nairobi who had seen the appellant once some three months before and had had him under his care for the past five days. The Crown called Dr. A. D. Charters and Dr. P. E. F. Manson-Barr, the senior specialist in the service of the Kenya Government. Those gentlemen fundamentally differed in their views of the appellant's condition; the defence witnesses supported Mr. O'Donovan's submission and were of the opinion that the appellant needed a substantial period of medical treatment; both of those for the Crown conceded that the appellant was suffering from an anxiety state but thought him "fit to attend court," Dr. Manson-Barr describing the anxiety state as "mild" and Dr. Charters expressing the view that the appellant was "probably able to give his sustained attention to a complicated trial."

When ruling that the trial should proceed the learned judge said this:

> "Mr. O'Donovan, on behalf of the accused, has asked for an adjournment of the trial on the ground that the accused is in such a state of mental ill-health as not to be able to attend trial and make a proper defence. He made it clear that he was not seeking to establish that the accused was incapable of making his defence by reason of unsoundness of mind . . .
>
> "I am not satisfied that it has been established that the accused is in such a state that he is unfit, and will be unfit for at least six months, to undergo trial. He has already undergone trial once for this offence, notwithstanding that the anxiety state complained of was of old standing, and he does not appear to have suffered undue effects from that trial."

The learned judge concluded the matter by referring to the appellant's alleged inability to concentrate for long periods, by offering "to consider any application for short adjournments" and by saying that with the aid of such adjournments it should be possible to hold "a perfectly fair trial."

At no stage did Mr. O'Donovan avail himself of what was tantamount to a promise to adjourn the proceedings from time to time within reason. At the close of the Crown case, when an application for an adjournment would plainly have been granted, he announced on the appellant's behalf that the latter had no statement to make and thereafter again called Dr. Siley, who expressed the opinion that the appellant was at that moment "quite unfit to be questioned in the witness-box as to charges against him." The appellant did not testify and did not offer a word of personal explanation of the allegedly false returns made by him year after year. He could, of course, have avoided cross-examination altogether by making an unsworn statement from the dock. Moreover, the trial would undoubtedly have been adjourned for a reasonably short time had an application been made, and, if it had then been thought by Dr. Siley that the appellant was still unfit to go into the box the doctor could have so testified with very much more persuasive effect. Yet again, even after Dr. Siley had stated his view, there was no application to adjourn. The defence preferred to continue studiously to decline any advantage as offered by the court: any short adjournment was deliberately avoided.

In all those circumstances, when before us Mr. O'Donovan submitted that the trial judge had in his

ruling not posed the right question (that of the prospect of an unfair trial) and that the continuance of the trial was “half as bad as trying the appellant in his absence,” we thought the submission to be founded on very unconvincing facts.

The appellant was no doubt far from being in good health, and that is why we have thought it necessary to deal with this aspect of the trial at some length. But it seems clear to us that the learned judge did ask himself and did answer the right question, that he duly and properly exercised his discretion and that if the jury formed a bad impression from the appellant's complete silence at the trial no injustice was done. Had the appellant done what on the medical evidence he would clearly have been able to do, namely at least to state briefly his reason for making the returns as he did, or had there been any other sign of a bona fide attempt on his part to face his trial and to meet the charges as best he could, we might well have been more open to the suggestion that there was a miscarriage of justice by reason of failure on the part of the court to appreciate a genuine dilemma. As the record stood, however, we had no hesitation in rejecting this first ground of appeal. We have already observed that no application for an adjournment was made at the first trial. We also observe that the appellant did not give evidence or make a statement at that trial.

We now pass to the main ground of the appeal against conviction. The material facts were as follows.

On May 29, 1925, Thomas Lea Elliott, who then carried on in Birmingham, England, the business of manufacturers' agent and merchant under the style of T. Lea Elliott & Company, made an agreement in writing (exhibit red 79) with the appellant whereby the latter was appointed the former's agent for Kenya, Uganda, Tanganyika and Zanzibar and the sub-agent for those territories of certain manufacturers whose agencies T. Lea Elliott & Company held. Elliott and the appellant worked together under that agreement until on January 1, 1927, they gave effect, by means of a second written agreement (exhibit red 80), to a fresh arrangement whereby they became partners in respect of their business in those territories.

Under this second agreement (hereinafter called "the partnership agreement") the name of the new firm was to be "Ross & Elliott"; the firm's business was recited as being

> "the business of manufacturers' representatives in Nairobi and elsewhere in British East Africa"

and was (by cl. 2) to be carried on at Nairobi or elsewhere in British East Africa as might be agreed; the firm's bankers were to be the Standard Bank of South Africa Limited, Nairobi or such other bankers as should from time to time be agreed upon (clause 3); each partner was to transfer to the firm the British East African agencies held by him (cl. 5 and cl. 6); and (by cl. 7) the net profits,

> "that is the balance remaining after deduction of all business expenses from the income derived by way of commission and any other source earned by the said partnership business,"

were to go as to one-third to Elliott and as to two-thirds to the appellant. By cl. 12 it was provided that:

> "Generally speaking the duty and responsibility of the said Alfred Granville Ross shall be those outlined in the original agreement between the partners hereto dated the first day of May one thousand nine hundred and twenty-five under cl. 2."

Clause 2 of the former agreement read as follows:

> "The agent undertakes during the continuance of this agreement to canvass customers regularly and conduct the business to the best of his ability in the interests of all concerned and generally to abide by the terms and conditions entered into by the principals in their manufacturers' agency agreements.
>
> "Further to provide at his own cost a suitable permanent showroom at Nairobi, Kenya and to visit Mombasa at least twice a year and the following places at least once a year – Kisumu, Nakuru, Kampala, Jinja, Dar-es-Salaam, Tanga and Zanzibar and submit for customers' inspection a suitable range of samples.
>
> "Further to correspond regularly with the principals and the chief manufacturers giving detailed reports of

work done on their behalf.”

The appellant and Elliott carried on business under the partnership agreement throughout the material period. The appellant resided in and conducted his part of the business from the firm's head office in Kenya. Elliott had his office in Birmingham where there was situated a company known as Elliott & Company Limited; that company was the central organization which looked after the English end not only of this firm's business but also of that of a number of other similar firms (concerned with other territories) in which Elliott was a partner; each of those firms had a nameplate at the door of the offices of Elliott & Company Limited. The firm of Ross & Elliott could thus be said to have an English office in Birmingham, but only, apparently, an office in name, for it was established by the evidence of Mr. Williams, a director and the secretary of Elliott & Company Limited, that it was that company which really conducted affairs on behalf of the firm in so far as they required attention in England. The learned trial judge put to the jury the following passage from Mr. Williams' evidence as shewing the true position:

> "Elliott & Company Limited were to negotiate new agencies on behalf of the partnership, were to pass on correspondence and indents, record invoice copies from manufacturers for shipment to East Africa, and latter to check the record of invoice copies received against commission statements received. Elliott & Company Limited also received commission payable to Ross & Elliott in respect of goods shipped to East Africa."

Mr. O'Donovan divided the firm's total income into three parts, and it is convenient to adopt that division. The first part consisted of commissions earned on sales effected locally in East Africa and paid direct to the firm's Nairobi office. The second part was commissions earned on sales effected outside East Africa but either paid or remitted to the Nairobi office. The third part was commissions earned on sales effected, (that is to say, contracts of sale concluded) outside East Africa, paid in Birmingham and not remitted to East Africa. Mr. O'Donovan conceded that the first two of those parts had to be included in the returns of income for taxation purposes, but contended that the third part was not chargeable with Kenya tax and therefore that the appellant was entitled to omit it from the returns.

This third part in fact constituted the bulk of the firm's earnings. The commercial practice of the firm in earning most of it was as follows. The appellant having procured from an East African customer an order for an English or European manufacturer's product, the order was sent to Birmingham. The Birmingham organization then procured the manufacturer's acceptance of the order. Arrangements were subsequently made by or with the assistance of the Birmingham organization whereby the product, when about to be shipped, was paid for by a confirming house to the manufacturer. Eventually the manufacturer paid the firm's commission to the Birmingham organization, which credited the firm therewith. There were also, as Mr. Williams testified, instances of an East African customer making a direct approach to the source of supply; if the agency was held by the firm, the firm ultimately received its commission on the transaction. There was no evidence as to how much commission was earned in this way.

The firm thus built up this third part of its gross profits and kept them (at all events for the time being) in England. The appellant was periodically advised by Birmingham of the amount of such earnings; there was no suggestion that he was ever in doubt or ignorance as to their amount at the end of any given year. The appellant, however, in effect excluded from all the returns of income made out by him – to whichever of the three categories such returns belonged – the greater part of such earnings; for each return showed an amount of income calculated on the footing that the firm had earned the third part, but not the first and second parts, of its income, viz. somewhat more than the total of the first two parts of its income but very substantially less than the aggregate of all three. It was in respect of such omissions from the returns that all the charges in groups (A) and (B) were brought. On those thirty-one charges,

therefore, the decisive issue was as to whether the third part of the firm’s income was

"accruing in (or) derived from" East Africa "in respect of gains or profits from any . . . business" within the meaning of s. 7 (1) (*a*) of Cap. 254.

Expressed in simple terms, the question was: what was the source of the income concerned? For their Lordships of the Privy Council in *Liquidator, Rhodesia Metals Ltd. v. Commissioner of Taxes* (1), [1940] A.C. 774, at p. 789, appear to have accepted

> ". . . the view that the source of an income and the place from which it is derived are the same, and that the source or derivation is a question of fact."

(per Briggs, J.A., in *The Commissioner of Income Tax v. P. Co. Ltd.* (2), 1 E.A.T.C. 131 at p. 162) and

> "There is no mystery in the words 'derived from;' to say that a thing derives from a place is merely to say it has its source in that place"

(per Worley, V.-P., as he then was, ibidem at p. 165).

In the course of a long and very careful summing-up the learned trial judge put that main question to the jury in the following passages:

> "Well, gentlemen, the point really is – where did the partnership substantially carry on the business which earned the commission? Was it in England, where the agency agreements were made with manufacturers and where the manufacturers accepted orders sent from East Africa, and where Elliott & Co. Ltd. carried on some accounting and office work for the partnership and received payment of the commission? Or was it in East Africa, where the head office of the partnership was situated; where the accused canvassed for the orders that earned the commission and generally kept the manufacturers' names before prospective customers; where the orders for goods originated; and where the bulk of the expenses charged against the partnership in the partnership accounts was incurred? . . .
>
> "You have heard that no apportionment of the income between Kenya and England was ever attempted, and no basis for such an apportionment was suggested to you. While a notional apportionment would no doubt have been possible, I think on the evidence that it seems clear that no given part of the income could be said to be wholly earned in England or wholly earned in East Africa. As I have already pointed out to you, it is perfectly possible for income to be derived from more than one source. Do you consider that the activities of the partnership in East Africa in the person of the accused contributed substantially to the earning of the commission which was paid in England? If you are satisfied that it contributed substantially to the earning of the commission, then you may say that that commission was derived from East Africa, notwithstanding that it may also possibly have been derived from England . . .
>
> "Well, gentlemen, the question whether or not the commission paid in Birmingham to Elliott & Co. Ltd., on behalf of the partnership was derived from East Africa is the first question I want you to consider . . . In any event, however, if you decide that, in fact, the items of commission received in England were not derived from East Africa, then, in including those items in the returns, the accused would actually have made a large over-statement of returnable income . . .
>
> "If, on the other, you come to the conclusion that the commissions paid in Birmingham were, in fact, largely earned in East Africa and therefore derived from East Africa within the meaning of s. 7 of the Income Tax Ordinance--and, for myself, I find it difficult to come to any other conclusion--then you must proceed to consider the individual charges against the accused and see if you are satisfied that they have been established."

Mr. O'Donovan's first and foremost submission to us was, generally speaking, that the learned trial judge put the whole matter to the jury on the footing that, although certain functions of the partnership business were performed in Birmingham, nevertheless, if the business was "substantially" carried on in East Africa and the commissions paid in Birmingham were "largely earned" in East Africa, the source of its

entire income for present purposes was East Africa – and this despite the fact that (as was established by the evidence) it was in England (or elsewhere outside East

Africa) that the individual contracts of sale from which the third part of the firm's income flowed in the form of commissions were made.

In particular, Mr. O'Donovan contended that the judge was wrong in treating the places at which the commission-earning contracts were made as only one element on a par with others. Mr. O'Donovan argued that the true legal view upon which the summing-up should have been founded consisted of the three following propositions: first, that where a business "essentially consists in making contracts from which its commission is earned," the location of the resulting commission is the place where such contracts are made; secondly (a rule ancillary to the first), that the place where the contract is made is in nearly all such cases conclusive as to the source of income, and, where not conclusive, is by far the most important matter for consideration; and thirdly, that the canvassing of orders or the keeping of suppliers' names before the public has never been held to be the criterion as to the locality of profits.

In examining those submissions we first refer to a group of decisions cited by Mr. O'Donovan in support of his first two propositions: *Erichsen v. Last* (3) (1881), 8 Q.B.D. 414, at p. 417; *Grainger & Son v. Gough* (4), [1896] A.C. 325; *Lovell & Christmas, Ltd. v. Commissioner of Taxes* (5), [1908] A.C. 46, at pp. 51–52; *F. L. Smidth & Co. v. Greenwood* (6), 8 T.C. 193 at pp. 199, 201 (C.A.) and 206 (H.L.); *Maclaine & Co. v. Eccott* (7), 10 T.C. 481 at pp. 547, 554 and 561; *W. H. Muller & Co.* (*London*) *Ltd. v. Lethem* (8), 13 T.C. 126 at p. 153; *Rowson v. Stephen* (9), 14 T.C. 543 at p. 550; *Commissioner of Taxes v. British Australian Wool Realization Association Ltd.* (10), [1931] A.C. 224, at p. 255; and *Liquidator, Rhodesia Metals Ltd. v. Commissioner of Taxes* (1).

All but three of those cases were concerned with the question as to whether a concern situated outside the United Kingdom was carrying on trade within it by virtue of its employment of agents who operated within it. The rule which emerged from the decisions, and upon which Mr. O'Donovan relied, may best be stated by typical quotations from the judgments. In *Lovell & Christmas Ltd.'s* case (5), their Lordships of the Privy Council said this ([1908] A.C. 46 at p. 51):

> "One rule is easily deducible from the decided cases. The trade or business in question in such cases ordinarily consists in making certain classes of contracts and in carrying those contracts into operation with a view to profit; and the rule seems to be that where such contracts, forming as they do the essence of the business or trade, are habitually made, there a trade or business is carried on within the meaning of the Income Tax Acts, so as to render the profits liable to income tax."

And Rowlatt, j., said in *Maclaine & Co.'s* case (7), (10 T.C. 481 at p. 547).

> "I think the result of the cases is that the place of the making of the contract is the most vital element, and further that there may be trades in which the making of the contracts in this country is alone enough to establish the exercise of the trade here. I think Brett, L.J. and Cotton, L.J., were of this opinion in *Erichsen v. Last* (3). Most of the cases have dealt with foreign manufacturers seeking in this country a market for their wares, and the question has been really . . . whether they have, in addition to manufacturing, set up a merchant's trade here."

The three remaining cases in the group cited by Mr. O'Donovan were the following.

In *Lovell & Christmas Ltd. v. Commissioner of Taxes* (5), the question was whether, under the New Zealand Income Tax Acts, the appellant company, which was registered in England and carried on the business of selling goods of New Zealand origin in London on commission, was liable to pay New Zealand tax on the commissions so earned. The goods in question were produce shipped by growers in New Zealand under arrangements and contracts made in New Zealand for sale by the company. The relevant New Zealand enactment provided that, in the case of a company, tax was to be assessed and

levied on its income from business, which income was to be "deemed to include all profits derived from . . . New Zealand." Their lordships

held that the commissions concerned were not chargeable in New Zealand for the following reason ([1908] A.C. 46 at pp. 52–53):

> ". . . the business which yields the profit is the business of selling goods on commission in London. The commission is the consideration for effecting such sales. The moneys received by the appellants, out of which they deduct their commission, and from which, therefore, their profits come, are paid to them under the contract of sale effected in London. The earlier arrangements entered into in New Zealand appear to their lordships to be transactions the object and effect of which is to bring goods from New Zealand within the net of the business which is to yield a profit. To make those transactions a ground for taxing, in New Zealand, the profits actually realized in London would, in their lordships' opinion, be to extend the area of taxation further than the authorities warrant."

In our opinion that decision does not assist the present appellant, for it was founded on facts which, in their lordships' opinion, indicated that the preliminary arrangements and agency agreements made by the appellant company in New Zealand were to be regarded as subsidiary to its operations in London where the sales were effected, which were the real source of the income in question. So, in the instant case, it was open to the jury to take the view (which they evidently did take) that the agency agreements assigned to the firm under the partnership agreement and those subsequently made by the firm outside East Africa, and the functions performed in Birmingham in relation to particular orders and shipments, were all subsidiary to the appellant's operations in East Africa which were the real source of the firm's earnings.

Secondly, the *British Australian Wool* case (10), was not, as regards the decision, relied on; the passage in the advice of the Privy Council ([1931] A.C. 224 at p. 255) which was relied on did no more than affirm the rule as stated in *Lovell & Christmas Ltd.'s* case (5), which we have already quoted.

Thirdly, there was the *Rhodesia Metals* case (1). We do not think that that decision availed the present appellant. The Privy Council there held that an English company whose sole business operation consisted in the purchase, development and sale of certain mining claims in Southern Rhodesia was liable for Southern Rhodesian tax on its profits, despite the fact that the contracts of purchase and of sale were made in England and the consideration for the sale was received there. So far from that case being of any assistance to the present appellant, we cite their lordships' ratio decidendi as indicating the correctness of the basis upon which the learned trial judge summed up to the jury in the instant case. Their lordships said this ([1940] A.C. 774 at pp. 789–790):

> "Their lordships incline to the view quoted with approval from Mr. Ingram's work on South African Income Tax Law by de Villiers, J., in his dissenting judgment: 'Source means not a legal concept, but something which a practical man would regard as a real source of income'; 'the ascertaining of the actual source is a practical hard matter of fact.' At any rate, in the present case, whatever may be the right view of the source of receipts derived from trading in commodities, their lordships find themselves dealing with a case where the sole business operation of an English company is the purchase of immovable property in Southern Rhodesia and its development in that territory for purposes of transfer in that territory at a profitable price. The company never adventured any part of its capital except on that or those immovable. As a hard matter of fact the only proper conclusion appears to be that the company received the sum in question from a source within the territory, namely, the mining claims which they had acquired and developed there for the very purpose of obtaining the particular receipt."

In our opinion the fallacy in Mr. O'Donovan's argument on this main question lay in his seeking to apply to this case of a firm of commission agents operating in, and procuring its income from obtaining orders in, East Africa the principles of law which govern, not the firm's liability for East African Tax, but that of manufacturers

or merchants who enter into contracts in England for the shipment of goods to East Africa and perform those contracts and receive payment for the goods in England. Mr. O'Donovan spoke of the firm's business having "consisted in making contracts from which its commission was earned"; but that is not what the firm did; they obtained orders, but were not a party to the contracts which resulted there from. No decision was cited to the effect that, where commission agents were canvassing, collecting orders and "nursing" their market in territory A but sending the orders to territory B for acceptance by the suppliers, the shipment of the goods and the payment of the commission, it was territory B and not A which, as a matter of law, was to be regarded as the source from which the agent's profits were derived. Clearly, in our view, no such decision is to be found; for the source of income is a question of fact in each case.

If Mr. O'Donovan was right – as he may well have been – in his third proposition, it was, we think, because commission agents have not previously sought to persuade a court of law to hold them exempt from tax in the territory where they have had their principal office, have exerted their main efforts and have reaped all the orders from which their income is obtained. We add that in the instant case the partners themselves evidently appreciated that the appellant in East Africa would be the prime operator and the more responsible for producing income, for to him was granted a two-thirds share of the profits together with markedly preferential treatment as regards expenses. That was the realistic view of the firm's activities. It would, we think, have been surprising if the jury had come to the opposite conclusion.

Mr. O'Donovan's next complaint was that the learned trial judge expressed to the jury a strong opinion as to how he himself would decide the issue. We agree that he did. But he commenced his summing-up with these perfectly clear directions:

> "In the first place, you should understand the relative functions of judge and jury. In a criminal case, the function of the judge is to direct you on matters of law, and you must accordingly take the law from me. Questions of fact and matters of credibility are for you. You are the judges of fact in the case; and while I may express my opinion on fact you are not bound to accept that opinion. You can ignore it and prefer your own. It is your verdict on the facts in this case which is required."

Moreover on several later occasions the judge told the jury quite plainly that the decision as to whether the commissions paid in England were derived from East Africa was a question of fact for them. A trial judge is not prohibited from voicing his own view of the question for the jury. He must, of course, make sure that the jury understand that they are in no way fettered thereby. We do not think that here the learned judge exceeded his right or failed in the smallest degree to make the jury's position in the matter quite clear to them.

Next, while we agree with Mr. O'Donovan that the learned trial judge misdirected the jury when he referred to the firm's "only" bank account being in Nairobi, we think it was a comparatively trivial error, for the jury must of course have fully appreciated that a considerable amount of the firm's money was received and kept in England by Elliott & Company Limited.

On the other hand we do not agree that it was a misdirection to speak of "the capital of the partnership – such as it was – adventured in East Africa"; the expense of conducting the business from the Nairobi office was the main outlay by the firm.

As regards, therefore, all the counts relating to omission of income from the annual returns (groups (A) and (B)) we concluded that there was no such misdirection as could possibly avail the appellant on this appeal. On the contrary the summing-up was comprehensive, careful and – with one small exception of no moment – an accurate exposition of both sides of the case. It was open to the jury in law, and

incidentally in our opinion palpably right in fact, to take the view that East Africa was the fons et origo of the disputed part of the firm's income.

Lastly, there was group (C), the four counts alleging fraudulent inclusion of expenses with intent to evade tax. In the early days it was agreed by the East African Revenue authority that £500 per annum should be allowed to Elliott personally in respect of

Birmingham expenses incurred for the firm. As from 1946 onwards that arrangement lapsed by oversight. As between the partners themselves the position was as follows. Although expenses were in fact incurred in Birmingham on behalf of the firm throughout the material period, nothing was ever debited to the firm's trading accounts under that head. There was nothing in the partnership agreement to relieve the firm of liability for such expenses; but it appeared, as the learned judge suggested to the jury, that "it must be accepted as a recognized term of the partnership," in other words as a mutually agreed modification of the strict terms of the written agreement, since the evidence as to the course of business as between the partners was all one way. This modification was of course to the appellant's advantage. The partnership was dissolved before the date of the trial; the final account, which was in evidence, showed that up to the very last Elliott never claimed that any of the Birmingham expenses should be debited before the profits were ascertained.

The appellant, however, included in the returns made by him on behalf of the firm for the years of assessment 1947 to 1950 inclusive alleged expenses, in excess of those agreed between the partners as having been incurred in East Africa, to the tune of £1,500, £3,000, £4,000 and £4,000 respectively.

The materials phrase in s. 13 (1) of Cap. 254, which authorizes deductions from gross income, is

> ". . . all outgoings and expenses wholly and exclusively incurred during the year preceding the year of assessment by such person in the production of the income . . ."

It was argued for the defence at the trial that the appellant's additions to the East African expenses represented his estimates of the Birmingham expenses, included in his returns misguidedly but honestly. That defence was expressly put to the jury in the summing-up. On appeal it was contended that, if expenses were relevant at all, they should be taken to include those in fact incurred for the firm in Birmingham, whether debited to the firm's account or not. Mr. O'Donovan was, as we understood him, contending that the jury were misdirected on this issue inasmuch as they should have been told that the appellant was in law entitled to include certain expenses in fact incurred by Elliott & Co. Ltd., in Birmingham (as to which, incidentally, no figures were proved) as being expenses "incurred by such person," viz. the firm, within the meaning of s. 13 (1) of Cap. 254, and that, though the appellant was not at liberty to make arbitrary estimates thereof, if his estimates were honest guesses he should be acquitted on group (C) of the counts. We rejected this argument and took the view that there was no misdirection, on the ground that "expenses incurred by such person" in s. 13 (1) does not include expenses incurred by some other person who might possibly have claimed reimbursement from the person whose return of income is in question but who has clearly never had, or alternatively has abandoned, any intention of attempting to make any such claim. The evidence was perfectly clear: as Mr. Williams said, Elliott & Co. Ltd., incurred expenses in Birmingham "for the promotion of business" of the firm, but they were never debited to the firm, even in Elliott & Co. Ltd's Books; with full knowledge throughout the life of the firm that the firm was never called upon to pay a penny of those expenses the appellant created from his own imagination the sums which we have mentioned. In our view his defence, for what it was worth, was put plainly to the jury and there was abundant, indeed overwhelming, evidence upon which they could convict.

Accordingly we dismissed the appeal against the thirty-five convictions.

The remaining question is that of the sentence. The hearing on this part of the appeal was concluded on August 2, when full information as to the appellant's total liability under all the assessments made and fines imposed on him up to 1956 inclusive and as to his apparent total assets was before us and we heard the final submissions of both parties. Mr. Bechgaard offered on behalf of the Crown-respondent to accept

that the appellant's total liability in respect of income tax and excess profits tax up to and including the year of assessment, 1956, and of the fines imposed in the proceedings which gave rise to the instant appeal, should be fixed at the sum of

£132,058 on condition that the appellant withdrew his pending appeal under s. 74 (5) of the Income Tax (Management) Act, 1952, against certain assessments and also his notices of objection given under s. 74 (2) of that Act. Mr. Sirley (who on August 2 appeared for the appellant) submitted several alternative proposals which we need not now record in detail; for his final submission was that, on the appellant undertaking to withdraw his afore-mentioned appeal and objections, the terms of imprisonment imposed by the Supreme Court of Kenya in default of payment of the fines should be set aside, the appellant's properties at present lodged with the commissioner as security should be released and thus become available for realization by the appellant to provide funds to pay, in the first instance, the £50,302 18s. 0d. fines, and that we should substitute for the Supreme Court's order (which involves immediate liability to pay the tax and the fines) an order for payment of the fines by instalments. It was pointed out that, assuming that he were to earn full remission, the appellant's term of twelve months' imprisonment would not terminate until the end of January, 1958, and it was submitted that the fines should be payable by instalments of £200 per month as from then until December, 1958, when the balance would become payable. As already mentioned, we reserved our decision on the sentences other than the twelve months' substantive imprisonment which we had already affirmed.

We have come to the conclusion that the sentences as regards the fines and imprisonment in default should be varied on the lines proposed at the final hearing, but with modification as to detail. Our decision is upon the footing that the Crown-respondent's offer to treat the appellant's total liability under all headings up to 1956 inclusive as amounting to £132,058 is accepted and henceforth binding on both parties, the appellant on his part giving the aforementioned undertaking to withdraw his appeal and objections now pending in the Supreme Court, and the appellant thus being at liberty to call for the release of any or all of his securities for the purpose of sale to raise funds. That is, of course, without prejudice to the appellant's right to petition for leave to appeal against this court's dismissal of his present appeal against the convictions.

On that footing we order that the sentences as a whole be as follows. The term of twelve months' imprisonment without hard labour is confirmed. Each of the fines imposed is confirmed. The term of imprisonment in default is in each instance set aside and the case is to be remitted to the Supreme Court of Kenya with a direction that the following be substituted therefor. The fines shall be paid (1) by eight monthly instalments, each of £200 payable on or before the last day of each calendar month, the first such instalment to be paid on or before September 30, 1957, and the last on or before April 30, 1958, all such payments being appropriated to the twenty-two counts concerned in their numerical order, and (2) by payment on or before May 31, 1958, of the balance remaining unpaid. In default of payment of any such instalment or of such balance outstanding or of any part thereof the provisions of sub-s. (3), (4), (5) and (6) of s. 333 of the Criminal Procedure Code shall apply.

Appeal dismissed.

For the appellant:
B O'Donovan
B O'Donovan, Nairobi

For the respondent:
K Bechgaard and *DC Kennedy* (Crown Counsel, Kenya)
The Attorney-General, Kenya

Commissioner of Income Tax v Jaffer Brothers Limited
[1957] 1 EA 519 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	14 March 1957
Case Number:	9/1956
Before:	McKisack CJ
Sourced by:	LawAfrica

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[1] Income tax – Sum paid by taxpayer to protected tenant as inducement to vacate premises – Vacated premises later occupied by taxpayer – Whether sum paid is "expenditure for a capital purpose" or an outgoing incurred by taxpayer in production of income – The East African Income Tax (*Management*) *Act*, 1952, *s.* 14 (1) (*b*) *and s.* 15 (2).

Editor's Summary

The assessments of the respondents for the year 1953 included among their taxable income the sum of Shs. 6,000/- shown in the accounts of the respondents as being "amount paid to tenant for vacating premises." The tenant was protected by the Rent Restriction Ordinance and the payment was made to induce him to vacate. The respondents contended that the sum paid by them was an outgoing properly deductible under s. 14 (1) (*b*) of the East African Income Tax (Management) Act, 1952, which reads

"rent paid by any tenant of land or buildings occupied by him for the purpose of acquiring the income."

The Jinja Income Tax Local Committee allowed an appeal by the respondents against this assessment and the Commissioner of Income Tax appealed against that decision, contending that the sum paid to the tenant was "expenditure for a capital purpose" and, consequently, under s. 15 (2) of the Act, no deduction was allowable. On the hearing of the appeal before the High Court, the respondents' main contention was that the expenditure in question was an outgoing wholly and exclusively incurred by them during the year of income in the production of the income and, as such, deductible under the general provisions of s. 14 (1) of the Act.

Held – the payment to the tenant secured for the respondents the use of additional premises in which to carry on their expanding business and thereby an "enduring benefit," and there were no special reasons why the payment should be treated otherwise than as "expenditure for a capital purpose."

Dictum of Viscount Cave, L.C. in *British Insulated and Helsby Cables Ltd. v. Atherton*, [1926] A.C. 205 at p. 213 applied.

Appeal allowed.

Cases referred to:

(1) *British Insulated and Helsby Cables Ltd. v. Atherton*, [1926] A.C. 205; 10 T.C. 155.

(2) *Green v. Favourite Cinemas Ltd*., 15 T.C. 390.

(3) *Commissioner of Inland Revenue v. Adam,* 14 T.C. 34.

(4) *Mitchell v. B. W. Noble Ltd*., [1927] 1 K.B. 719.

Judgment

McKisack CJ: This is an appeal by the Commissioner of Income Tax against a decision of the Jinja Income Tax Local Committee allowing an appeal by Jaffer Brothers Ltd. (the present respondents, to whom I shall refer as "the company") against an assessment. The committee's decision was that a sum of Shs. 6,000/- paid by the company to a tenant occupying premises owned by the company, as an inducement to vacate those premises, was an outgoing properly

deductible for the purposes of s. 14 of the East African Income Tax (Management) Act, 1952.

The facts of the case are not in dispute. The Statement of Facts filed by the appellant is as follows:

"1. By Assessment No. U22942 the appellant assessed for the purposes of Income Tax the income of the respondent for the year of Income, 1953.

"2. Included among the taxable income of the respondent, in the assessment referred to in para. 1 hereof, was the sum of Shs. 6,000/- which was shown in the respondent's accounts for that year as being the 'amount paid to tenant for vacating premises.'

"3. The person to whom this amount of Shs. 6,000/- was paid is one P. R. Pithawalla and the premises in question have been owned by the respondent, and are still so owned, since 1943.

"4. Upon the payment of the sum of Shs. 6,000/- referred to in para. 2 and para. 3 of this Statement of Facts, the said P. R. Pithawalla executed the agreement which is attached to this Statement of Facts as Annexure I and subsequently vacated the premises in respect of which the agreement was made.

"5. The premises in respect of which the agreement referred to in para. 4 of this Statement of Facts are situated next to the office of the respondent and are now occupied by him for the purposes of his business.

"6. The respondent objected to the inclusion of the sum of Shs. 6,000/- referred to in this Statement of Facts in his taxable income and in due course appealed to the Jinja Income Tax Local Committee. A copy of his Memorandum of Appeal is attached as Annexure 2 to this Statement of Facts.

"7. The Jinja Income Tax Local Committee met on February 5, 1956, and communicated their finding to the appellant by means of the letter, a copy of which is at Appendix 'A' of the Memorandum of Appeal."

The agreement referred to in para. 4 of the Statement of Facts is as follows:

"Received from Messrs. Jaffer Brothers Ltd. the sum of Shs. 6,000/- (Shillings six thousand) as agreed. In consideration of this payment, I hereby agree to vacate the premises owned by you and occupied by me in Plot 8 Johnstone Street on or before January 31, 1954.

"I accordingly undertake to give you vacant possession of the premises on January 31, 1954.

Sd. P. R. Pithawala."

The Commissioner of Income Tax contends that the sum which the company has paid to the tenant is "expenditure for a capital purpose" and consequently, under the provisions of s. 15 (2) of the East African Income Tax (Management) Act, 1952, no deduction is allowable in respect of that expenditure. The company, in para. 5 of the memorandum of appeal (see Annexure 2 to the Statement of Facts) submitted to the Jinja Income Tax Local Committee, argued that the expenditure was by way of rent and consequently was deductible under para. (*b*) of s. 14 (1) of the Act, which reads:

"(*b*) rent paid by any tenant of land or buildings occupied by him for the purpose of acquiring the income."

At the hearing of the present appeal, however, counsel for the company has not relied upon that argument, but contends that the expenditure in question was an outgoing wholly and exclusively incurred during the year of income by the company in the production of the income, and as such is deductible under the general provision set out at the beginning of s. 14 (1) of the Act; and that para. (*c*) of s. 15 does not apply in the special circumstances of this case.

The Commissioner of Income Tax argues that the case falls within the general principle enunciated by Viscount Cave, L.C. in *British Insulated and Helsby Cables Ltd. v. Atherton* (1), [1926] A.C. 205 at p. 213, as follows:

“But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a

> trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital."

I have therefore, to decide whether the payment of the Shs. 6,000/- to the company's tenant was

> "with a view to bringing into existence . . . an advantage for the enduring benefit"

of the company's business, and further, if the payment was of that nature, whether there were any "special circumstances" which lead to the conclusion that the payment should not be treated as capital expenditure.

On the admitted facts, the payment in question has secured for the company the use of additional premises in which to carry on the company's expanding business. The payment was made to induce the company's tenant, who was protected by the Rent Restriction Ordinance, to vacate the premises and so make them available to the company. This is made quite clear in the company's memorandum of appeal to the Local Committee (Annexure 2 of Appellant's Statement of Facts), in particular by the following passages:

> "3. With the expansion of my business it became necessary to obtain additional accommodation. I repeatedly requested the tenant to vacate the premises but without success. I could not take any legal action in view of the Rent Restriction Ordinance. In the end, Mr. Pithawalla agreed to vacate the premises provided I was prepared to contribute towards the premium he had to pay to lease another flat. As an additional accommodation was urgently needed, the other alternative I had was to lease adequate office accommodation in any one of the new buildings in the City Square. For my requirements, I would have had to pay a minimum rent of about £600 per annum. Had I taken that course, I could have let that portion of the premises occupied by the Company at the Standard Rent i.e. £60 per annum.
>
> "6. In reply to the Commissioner's argument on the point, I wrote to him on November 29, 1955, as follows:
>
> " 'I am glad to see you appreciate my argument about this payment. I am prepared to agree that the acquisition of the premises has resulted in the expansion of my business. At the same time it has also achieved a lasting benefit in the taxable profit of the company which is an advantage to the Income Tax Revenue. My argument on this expenditure was fully explained in my letter of 16th ultimo.' "

The references to the expansion of the company's business and to the payment of the Shs. 6,000/- having achieved "a lasting benefit in the taxable profit of the company" could hardly be more apt to bring the case within the test laid down by Lord Cave which I have already cited. Two cases have been cited to me by Mr. Hooton which tend to show that this payment must be treated as capital expenditure, though in each of those cases the facts were, for reasons attributable to the particular terms of the contract which fell to be construed by the court, described as being such as to make it a borderline case. In *Green v. Favourite Cinemas Ltd*. (2), 15 T.C. 390 Rowlatt, J., held that, where a company leased a theatre for 21 years under a lease providing for an annual rent and a premium payable by quarterly instalments over the whole period of the lease, those quarterly payments were capital expenditure. In the instant case we have not got the complication of payment by instalments and, had that complication been absent in *Green v. Favourite Cinemas Ltd.* (2), it appears the Rowlatt, J., would have had no hesitation in holding the premium to be capital expenditure. In the instant case the Shs. 6,000/- was not, of course, paid as premium for a lease, but it was a sum paid to acquire the use of the company's own premises which the tenant was otherwise unwilling to surrender. That was the substance of the transaction, as is quite clear from the agreement (Annexure 1 to Appellant's Statement of Facts). The case of *Commissioner of Inland Revenue v. Adam* (3), 14 T.C. 34, is also of some assistance. In that case a carting contractor secured the

provision of dumping accommodation for waste soil by means of an eight-year contract under which he undertook to deposit a minimum amount of soil each year and to pay 4 shillings for every 5 cubic yards deposited; in addition he was to pay the landowner a sum of £3,200 by half-yearly instalments of £200. It was held that the £3,200 was a payment for a capital asset and that no deduction was admissible for income tax purposes. The Lord President (Lord Clyde), at p. 42, said that

> ". . . the provision of dumping accommodation, which was secured by means of the contract, was in the same position as the provision of premises, or any other capital asset of a relatively permanent character . . ."

In the instant case also, it was "the provision of premises" which was secured by the payment of Shs. 6,000/-, even though the premises were the property of the company which made that payment.

Mr. Phadke, for the company, urges that, although the payment may have the appearance of securing an "enduring benefit" for the company, the special circumstances of the case nevertheless make it appropriate to treat the payment as not having been made for a capital purpose. He points out that the payment was a course adopted by the company as an alternative to paying a rent of some £600 a year for other premises, and that such rent, if they had chosen to pay it, would, of course, have been a deductible outgoing. No case, however, has been cited to me that is an authority for the proposition that a payment made to secure the use of premises without having to pay rent for them is an admissible deduction, but Mr. Phadke relies upon *Mitchell v. B. W. Noble Ltd.* (4), [1927] 1 K.B. 719. In that case a payment was made by a company to one of the directors for the purpose of getting him to retire from the company, and the commissioners found that it was necessary to do so in order to save the company from scandal. It was held that this was not a capital expenditure, since (to quote from the judgment of Lord Hanworth, M.R., at p. 737)

> "It was a payment made in the course of business, with reference to a particular difficulty which arose in the course of the year and was made not in order to secure an actual asset of the company, but to enable the company to continue to carry on, as it had done in the past, the same type and high quality of business unfettered and unimperilled by the presence of one who, if the public had known about his position, might have caused difficulty in its business and whom it was necessary to deal and settle with at once."

Between the facts of that case and the facts of the instant case I can see very little in common. Indeed the sole point of resemblance is that a payment has been made, for the company's benefit, to induce a person to do something which he would not otherwise have done. I am unable, therefore, to regard *Mitchell v. B. W. Noble Ltd*., (4), as providing any real support for Mr. Phadke's argument.

In the result, I am of opinion that the payment of Shs. 6,000/- did secure an "enduring benefit" to the business of the respondent company, and that there are no special reasons why it should be treated otherwise than as expenditure for a capital purpose.

The appeal by the Commissioner of Income Tax is accordingly allowed, with costs.

Appeal allowed.

For the appellant:
JC Hooton (Deputy Legal Secretary, East Africa High Commission)
The Legal Secretary, East Africa High Commission

For the respondents:
YV Phadke

Parekhji & Co, Kampala

Mohamed Ahmed v R
[1957] 1 EA 523 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	27 September 1957
Case Number:	50/1957
Before:	Sir Newnham Worley P, Briggs Ag V-P and Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Uganda – McKisack, C.J

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[1] Evidence – Admissibility – Qualifications of expert not shown before examination.

[2] Housing – Demolition order – Public Health Ordinance, s. 59, *s.* 68 (1) *and s.* 118 (*U.*).

[3] Practice – Proceedings incorrectly intituled – Law Reform (*Miscellaneous Provisions*) *Ordinance,* 1953, *s.* 18 (5) (*U.*) *– Law Reform* (*Miscellaneous Provisions*) (*Rules of Court*) *Rules*, 1954, *r.* 3 (*U.*).

Editor's Summary

A resident magistrate having found that the house in which the appellant lived was unsafe within the meaning of s. 59 (16) of the Public Health Ordinance U., and beyond repair, ordered its demolition, and when the order was not complied with directed the appellant to vacate the premises. On application to the High Court for an order of prohibition the appellant submitted firstly that expert evidence given by a district health inspector and a superintendent of public works was inadmissible as their qualifications to give expert evidence were not shown, and secondly that to justify an order under s. 59 there must be evidence that the building was not merely unsafe but was unsafe to public health. The application was refused and the present appeal was brought on the same grounds. The notice of appeal and the formal order embodying the High Court's decision concerning the prerogative order showed the Crown as being the respondent.

Held–

(i) although it is a rule of practice that the competence of an expert witness should be shown before hearing his evidence its non-observance will not render such evidence inadmissible; the two witnesses were by their callings *prima facie* qualified to give expert evidence and as their capacity so to do was not challenged, their evidence was rightly received.

(ii) the construction of s. 59 (16) does not justify the contention that the word "unsafe" is to be read in conjunction with the words "to health" but it can be said that in a wider sense any structurally unsafe building necessarily involves a danger to health in that it endangers the life and limb of those inside it and of neighbours and passers by.

(iii) as prerogative orders are issued in the name of the Crown this appeal was wrongly intituled in that

it joined the Crown as respondent.

Decision of McKisack, C.J. ([1957] E.A. 277 (U.)), affirmed.

Cases referred to:

(1) *Gatheru s/o Njagwara v. R.* (1954), 21 E.A.C.A. 384.

(2) *Mombasa Municipal Board v. Mohanlal Kala and Another* (1955), 22 E.A.C.A. 319.

Judgment

Sir Newnham Worley P: read the following judgment of the court: This was an appeal brought under s. 18 (5) of the Law Reform (Miscellaneous Provisions) Ordinance, 1953, from an order of the High Court refusing the appellant's application for an order of prohibition. At the conclusion of the hearing we dismissed the appeal with costs and now give our reasons.

We will refer to a matter of form before considering the merits, such as they were, of the appeal. The appellant first obtained *ex parte* leave to apply for an order from

a judge of the High Court in pursuance of r. 3 of the Law Reform (Miscellaneous Provisions) (Rules of Court) Rules, 1954. His application for this leave was correctly intituled:

> "In the matter of an application by Mohamed Ahmed for leave to apply for an Order of Prohibition
>
> and
>
> "In the matter of Criminal Case No. 463/1956 of the District Court, Soroti: District Health Inspector *v.* Gurbachan Singh Kalsi of Kumi."

It appears from our record that the order granting leave was never drawn up and the appellant's advocate, when filing his notice of motion under r. 5 and in all subsequent documents, continued to intitule them as in the matter of an application for leave to apply for an order. The notice of motion itself is intituled as follows:

> "In the matter of an application by Mohamed Ahmed of Kumi for leave to apply for an Order of Prohibition and/or Certiorari
>
> and
>
> "In the matter of an application by the District Health Inspector in Miscellaneous Cause No. of 1956 in the District Court of Teso sitting at Soroti.
>
> and
>
> "In the matter of demolition order Section 68 (1) of the Public Health Ordinance concerning Plot 4 A Kumi. Affidavit filed pursuant to Section 19 of the Law Reform (Miscellaneous Provisions) Ordinance, 1953."

The formal order embodying the decision of the High Court on the motion is headed:

> "In the matter of an application by Mohamed Ahmed for an Order of Prohibition,"

and the notice of appeal to this court is headed:

> "Mohamed Ahmed ..... Appellant
>
> and
>
> Crown ..... Respondent
>
> (Appeal from Order of the High Court of Uganda at Kampala (Honourable Chief Justice McKisack) dated the 11th June, 1957,
>
> in
>
> Miscellaneous Cause No. 66 of 1956
>
> between
>
> Mohamed Ahmed
>
> and
>
> Crown."

This notice was served on the attorney-general. The memorandum of appeal has the same heading. The notice of motion was addressed to and presumably served on the Resident Magistrate, Soroti; Gurbachan Singh Kalsi; District Health Inspector, Soroti of the Township Authority, Kumi; the Hon. the Attorney-General, Entebbe, and P. J. Wilkinson Esq., Advocate, Mbale. On the hearing of the motion, Mr. de Silva appeared for the applicant and Mr. Few (a Crown counsel) is recorded as having appeared for "the respondent." This recital reveals a series of muddles and errors which is not unique in Uganda and is attributable to laxity in practitioners' offices and in some registries of the High Court. The appellant's advocate appears to have failed entirely to realise that prerogative orders, like the old

prerogative writs, are issued in the name of the Crown at the instance of the applicant and are directed to the person or persons who are to comply therewith. Applications for such orders must be intituled and served accordingly. The Crown cannot be both applicant and respondent in the same matter.

When proceedings in the High Court by originating summons or originating motion are inter partes, it is not sufficient to intitule them as “In the matter of,” etc. This must be followed by the names of the applicants and respondents. If this had been done in this case, the error would have been obvious on the first draft, and would

probably have been corrected. When the appeal was called we drew Mr. Few's attention to the misjoinder of the Crown as respondent; but as he did not wish at this stage to take the objection, we allowed the appeal to proceed.

This matter arises out of a demolition order made on October 15, 1956, by the resident magistrate, Soroti, under s. 68 (1) of the Public Health Ordinance (Cap. 98) in respect of a house situated in the township of Kumi, and owned by Gurbachan Singh. The order was made on the application of the district health inspector, Soroti, on the grounds that it was unsafe and could not be rendered safe without demolition. The owner was present at the hearing. The two occupants of the house (of whom the present appellant is one) had been notified of the application and were also present. They had nothing to say except that they had no alternative accommodation. The demolition order was not complied with and the occupants, including the present appellant, were ordered to vacate the premises. The appellant then began these proceedings for an order prohibiting the resident magistrate, Soroti, the owner, and the township authority of Kumi from further proceedings under the demolition order. The grounds of the unsuccessful application to High Court and of the appeal to this court were twofold.

In the first place, the appellant complains that the learned magistrate based his finding that the house was so unsafe as to constitute a nuisance on inadmissible evidence, in that it was not and should have been expert testimony. The witnesses were, in fact, the district health inspector, Teso district, and a superintendent of works of the Public Works Department, Uganda. The substance of their evidence was that the house in question was built of corrugated iron sheets on a wooden frame with a mud mortar plinth and earth floor, badly cemented. The foundation, if it can be so called, was being eaten away by white ants, and there was no means of stopping their advance other than taking up the whole foundation, which would entail demolition of the whole house. There was also in evidence a detailed report by the health inspector which showed that the premises were structurally unsound, dilapidated and insanitary. The roof timbers had also been attacked by termites.

We agreed with the court below that there is no merit in the objection to this evidence. It is true that the witnesses did not state their qualifications or their experience. In fact, although the owner was represented by an advocate, no objection was made to their evidence on the score of admissibility. Mr. de Silva has conceded that this court can take notice of the ordinary duties of a health inspector and a superintendent of works. *Prima facie* by their callings they were qualified to give evidence on the condition of the suit premises: the degree of their qualifications was not gone into because their capacity to give expert evidence was not challenged. It is true that in *Gatheru s/o Njagwara v. R.* (1) (1954), 21 E.A.C.A. 384, this court said that the competency of an expert witness should be shown before his evidence is admitted. That, however, is a rule of practice and the omission to observe it will not in all cases render the evidence inadmissible; particularly when, as in the instant case, the witness's occupation imports a *prima facie* qualification and his capacity to give expert opinion is not challenged. The rule will obviously be applied more strictly in criminal proceedings than in civil ones, and the original proceedings here, though entered as a criminal cause, were more in the nature of a civil case.

The second ground of appeal, as argued by Mr. de Silva, was that in order that a building should constitute a nuisance within the meaning of para. (16) of s. 59 of the Public Health Ordinance, it is not sufficient to find that it is unsafe: there must be a finding on proper evidence that it is "unsafe to health." In the catalogue of what may be deemed to be nuisances, para. (16) prescribes:

> "any public or other building which is so situated, constructed, used or kept as to be unsafe or injurious or dangerous to health."

Mr. de Silva argued that however unsafe the building there was no evidence that there was any injury or danger to public health. He relied upon the judgment of MacDuff, J., in *Municipal Board of Mombasa v. Mohanlal Kala & Another* (2) (1955), 22 E.A.C.A.

319, but we do not think that case is of any assistance to him. At p. 330 of the report, MacDuff, J., considers para. (1) of s. 118 of the Public Health Ordinance of Kenya which is in the same terms as s. 59 (16) of the Uganda Ordinance. The real issue which the learned judge then had before him was whether a Mombasa Municipal By-Law dealing with dangerous structures was repugnant to any provision of the Public Health Ordinance. He says this in his judgment:

> "Section 118, para. (1) uses the words 'so constructed as to be unsafe, or injurious or dangerous to health.' This to my mind means 'so constructed as to be unsafe to public health'."

We think that this gloss was clearly intended to be confined to the words "so constructed as to be unsafe." One cannot read "unsafe or injurious or dangerous" as merely a collective expression: each of these adjectives must be given its particular meaning.

We have some doubts as to whether the gloss put upon the word "unsafe" by MacDuff, J., is necessary or justified. Clearly it is not always necessary to relate a nuisance under s. 59 to the public health, unless this expression is used in a very wide and rather loose sense: for example, it is sufficient for a chimney or a cemetery to be "offensive," para. (21) and para. (22). See also para. (23) and para. (24).

But, on the other hand, the correct view may be that the public health involves the health of every individual in the community and, if that be so, the gloss is justified for an unsafe building is dangerous to life and limb of those inside it and may be dangerous to neighbours and passers-by.

MacDuff, J., thought it conceivable that a building may be in such a defective structural condition that it constitutes a danger to passers-by and adjoining property and yet not be dangerous or injurious to health from the point of view of public health That may be so in one sense of the expression "public health," but the building will, nevertheless, if it is unsafe, be a "nuisance" within the meaning of s. 59 (16).

We thought, therefore, that on any construction of that paragraph, Mr. de Silva's argument could not succeed.

There is one other point to which we should refer. Under sub.-s. (1) of s. 68 of the Public Health Ordinance, before the court can make a demolition order, it must be satisfied, not only that the condition of the premises constitutes a nuisance, but also that "repairs to or alterations of the premises are not likely to remove the nuisance." In the instant case, the owner, who is a building contractor, said at the hearing of the complaint that, in his opinion, the premises could be repaired and he was prepared to carry out the necessary work. The learned magistrate rejected this in the following passage of his judgment:

> "The white ants cannot be effectively checked and the house made safe without replacing the mud mortar in the foundations by cement. You cannot replace in toto the foundations of a house without first pulling the house down. I am satisfied that demolition is the only course."

The learned chief justice on first appeal characterised this as the statement of an obvious truth and found that the magistrate's finding on this point was fully justified. We are of the same opinion. When the section speaks of "repairs and alterations" which are likely to remove the nuisance, it clearly contemplates only such works as may reasonably be expected to ameliorate the condition complained of without destroying the identity of the building. With modern building techniques applied to a building of permanent construction it would perhaps be possible to replace the foundations without demolition of the whole building. But this was at best a semi-permanent building: the question as to whether the nuisance could be removed by repairing the foundation (which in this case did mean renewal) was one of fact and

there was ample evidence to justify the learned magistrate's finding.

Appeal dismissed.

For the appellant:
BE de Silva
PJ Wilkinson, Mbale

For the respondent:
HSS Few (Crown Counsel, Uganda)
The Attorney-General, Uganda

Girdhari Lal Vidyarthi v Ram Rakha
[1957] 1 EA 527 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	19 November 1957
Case Number:	7/1957
Before:	Briggs Ag V-P, Forbes JA and Connell J
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Rudd, J

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[1] Pleadings – Disallowance of appeal on ground not in pleadings.

Editor's Summary

The respondent, who was the registered owner of certain premises occupied by the appellant, obtained from the Supreme Court an order for possession, the appellant's defence that he was a co-owner and held with others under a resulting trust being rejected. On appeal, counsel for the appellant without abandoning the plea of the existence of a resulting trust submitted that the evidence established the existence of an express trust.

Held–

(i) in view of the pleadings the appellant could not be heard to allege an express trust;

(ii) while the appellant might have been able to establish some equitable interest in the land had the case been pleaded differently, he had failed to establish any such interest as was pleaded and therefore he was not entitled to remain in possession.

Appeal dismissed.

Cases referred to:

(1) *Bull v. Bull*, [1955] 1 All E.R. 253.

(2) *Macdonald v. Macdonald*, [1957] 2 All E.R. 690.

(3) *Groves v. Groves*, 148 E.R. 1136.

(4) *Bowmaker Ltd. v. Barnet Instruments Ltd.*, [1944] 2 All E.R. 579.

(5) *Alexander v. Rayson*, [1935] All E.R. Rep. 185; [1936] 1 K.B. 169.

November 19. The following judgments were read:

Judgment

Briggs Ag V-P: This is an appeal from a judgment of the Supreme Court of Kenya ordering in favour of the respondent possession of certain premises, damages for wrongful occupation thereof, and costs.

The respondent is the registered proprietor of a plot some 3½ acres in extent at Parklands. There are a number of buildings on the plot, including a block of four rooms with outhouses attached. These, or at least three of them, were occupied at the inception of the proceedings by the appellant, who is the brother of the respondent. The plaint avers that the occupation of the appellant was under an oral licence determinable at will and duly determined by notice with effect from February 1, 1955. The claim was for vacant possession and for damages for wrongful occupation at Shs. 20/- per diem from that date until recovery of possession.

The precise form of the defence is of considerable importance. The following paragraphs are material.

> "4. With regard to para. 4 of the Plaint, the defendant denies that he is occupying the said premises 'on an oral licence from the plaintiff.' The defendant will maintain that he is a co-owner of the said plot together with buildings thereon because the said plot was purchased and buildings thereon erected with moneys belonging to the firm of Colonial Printing Works of which the defendant is a partner. The defendant denies that he has occupied the premises since 1944; the correct date of occupation was April 1, 1945. Of the total sum of over sixty thousand shillings spent on this property, it now appears that (without the knowledge and consent of the partners of the firm) the plaintiff who was

keeping the books of the firm fraudulently debited a total sum of Shs. 6515/25 to his own personal account, the balance being debited to the firm.

"8. The said plot and buildings have always been treated and dealt with as property of the said firm of Colonial Printing Works.

"9. The said plot of land was registered in the name of the plaintiff as trustee for (i) the defendant, (ii) Shamdas Bootamal Horra, (iii) Vanshi Dhar, son of Shamdas and (iv) Satya Vrat Ram Rakha (the four partners of the said firm) or as

" 'Karta of the joint Hindu family consisting of the plaintiff the said Shamdas Bootamal Horra, Vanshi Dhar and the defendant. The plot was allowed to be registered in the personal name of the plaintiff on his representation that it would be easier to get a permit from the building control if the plot were registered in his name.' "

The learned trial judge, after considerable argument and certain preliminary proceedings, said,

"As I understand the case so far the issue is whether the defendant is entitled to remain in possession against plaintiff on the basis that he is a beneficial co-owner by reason of the facts stated in the written statement."

On that basis it was agreed that the defendant must begin. In the opening, his counsel said

"We contend property bought with money from Colonial Printing Works and first two sets buildings erected with such moneys too."

The suit premises were part of those buildings. This is clearly a submission that there was a resulting trust in favour of whoever might properly be described by the words "Colonial Printing Works." It follows the allegation in para. 4 of the defence. When, many days later, the time came for final speeches Mr. Khanna for the respondent said,

"On pleading this is a claim for resulting trust posed on allegation purchase made with moneys belonging to the defendant."

He addressed on that basis alone and stressed that the court and the appellant were bound by the pleadings. Mr. Chanan Singh for the appellant made no protest. He opened his reply squarely on the basis of a resulting trust. He never suggested in any way or at any stage that he relied on an express trust. In the judgment the learned trial judge says,

"The defendant's Counsel's argument it seemed to me was confined to what would be the legal effect if the plaintiff had been at all times a partner in the firm and if the land had been bought with money belonging to the firm for the benefit of the firm and not for the plaintiff's sole benefit."

It is clear that he regarded the defence as raising only a resultant, and not an express, trust. It is to be noted that there was no allegation in the defence that the plaintiff was ever a partner in the firm.

Before us Mr. Nazareth for the appellant sought to rely on quite different contentions. Without abandoning the allegation of resulting trust, he submitted that certain passages in the evidence established the existence of an express trust, and that this was sufficiently pleaded in para. 9 of the defence. Particulars had been given of certain allegations in para. 1 and para. 4 of the defence, and the material requests and particulars are as follows,

"Please state why and on what ground it is alleged that the plaintiff is not entitled to turn the defendant out of the house on plot No. 209/107/2/1."

"The ground is that the defendant is a co-owner of the property, being one of the partners of the firm which paid for it. The defendant maintains that the registered proprietor is holding the property as a trustee, not as a beneficial owner, and is not therefore entitled to turn out one of the beneficial owners."

“Please give full particulars of the fraud alleged against the plaintiff for debiting his personal account with a total sum of Shs. 6,515/25.”

> "The plaintiff had agreed with the defendant that he would hold the plot as trustee for the firm of Colonial Printing Works, knowing this, and also knowing that the firm was paying for the plot, he debited his personal account in the firm's books with the costs of the plot, although he debited all other costs (including the cost of buildings) to the firm. It is now clear that his intention was later on to claim the property as his own in breach of trust."

The question whether an express trust was sufficiently pleaded was argued at some length. We came to the conclusion that, whereas para. 9 of the defence might possibly in itself be ambiguous, the whole conduct of the proceedings below made it proper to read it in the sense in which the parties had obviously themselves read it, namely as a mere expansion and elaboration of the allegation of resulting trust contained in para. 4. It is to be observed that allegations of resulting and express trusts arising in the same circumstances must necessarily contradict one another. They cannot both be correct. But para, 9 of the defence is not raised in the alternative to the allegations of resulting trust. On the contrary, it seems to be a part of them. We therefore ruled in the course of the hearing that Mr. Nazareth could not be heard to allege an express trust.

The case of the appellant as regards resulting trust is more complex than it appears to be from his pleading. The business of Colonial Printing Works was at all times prior to July 1, 1943, the sole property of one Horra, the father of the parties. It was financed largely, if not wholly, by the respondent, and for various reasons he may possibly have made himself liable to third parties as a partner; but as between himself and Horra he was, or at any rate appeared to be, a creditor and nothing more. At this period the appellant was employed in the business, and after 1936, when Horra left Kenya, he was its manager. The plot in question was bought in 1941. It was paid for by instalments by cheques of Colonial Printing Works, and therefore *prima facie* out of Horra's moneys; but in the books of the business the amount of each of those cheques was debited to the respondent's loan account, which thereafter still showed him to be Horra's creditor. This would indicate that he was buying the plot out of his own moneys, and not Horra's. Horra was in India from 1940 onwards and it is not shown that he took any active interest in the firm. It was managed, as I have said, by the appellant, but the respondent acted as bookkeeper and kept all books other than those of first entry, and it was he who debited against himself the amounts of the cheques. It was not disputed that the entries were made approximately contemporaneously with the payments; but the appellant claims that they were made without his knowledge or approval, and in fraud of Horra, himself and others concerned, namely Vanshi Dhar, another brother, and Satya Vrat, a son of the respondent. On July 1, 1943, Horra admitted the defendant, Vanshi Dhar and Satya Vrat to partnership in the firm of Colonial Printing Works. They brought in no capital and paid no consideration, but they became full partners entitled to equal shares with Horra in the assets and profits. The appellant contends that one of those assets was the plot in question. No buildings had been erected on it at that date.

The case on this basis accords with para. 4 of the defence; but it involves certain difficulties. Assuming that the respondent bought the land out of Horra's money and that a resulting trust in favour of Horra arose, there is little or nothing to indicate that Horra ever held, or intended to hold, his equitable interest in the land as an asset of his business of Colonial Printing Works, and there is certainly no finding to that effect in the judgment. The fact that it never appeared in the balance sheets is some indication that it was not regarded as an asset of the business. If it was not, the appellant and the other new partners obtained no interest in it by virtue of their partnerships.

The appellant, however, sought to raise in addition a somewhat different case. He alleged that at all material times before July, 1943, Horra, although in law solely entitled to the assets of Colonial Printing

Works, held those assets, subject to the liabilities of the business, in trust for himself and the members of his family under a family arrangement described as an “equitable partnership.” The appellant claimed

on this basis to have obtained an equitable interest in the plot at the time of its purchase in 1941. Here again we thought that the appellant was attempting to raise a case not open to him on the pleadings. His only allegation of partnership in the defence is that he "is" (i.e. is at the time of filing the defence) a partner in Colonial Printing Works. It would have been necessary to give precise particulars of the origin and nature of the family arrangement relied on. This has never been attempted. Indeed the appellant's counsel was quite vague in argument as to the nature of the alleged arrangement, apparently contending that if he could show some equitable interest that would be sufficient.

The further suggestion that the land became an asset of a Hindu undivided joint family failed at the outset for lack of evidence. There was no evidence that the persons concerned or any of them were members of an undivided joint family. There was not even any evidence that they were Hindus. For all I know, they may all be Christians.

It is necessary now to deal with certain matters subsequent to the purchase of the land. The first buildings erected thereon were the suit premises, which were built in 1944 and 1945. The books show that they were paid for by cheques of Colonial Printing Works, but that some person unnamed brought into the business cash to meet those cheques. It is in dispute whether that person was the respondent. A second set of buildings was erected in 1946, out of moneys held by Colonial Printing Works, and known as the "charity fund." This was not the fund so often kept by Indian firms out of their own profits for charitable purposes, but something rather special. It represented public subscriptions raised as an expression of sympathy and means of support for the appellant, who had been in conflict with the authorities on political matters and gone to prison on a conviction for sedition. There is nothing to indicate that the funds were to be used in any special way, and I think they should be regarded as the appellant's own moneys. It is in dispute who decided to spend them in this way. The appellant says the respondent did it on his own initiative. The respondent says that Vanshi Dhar controlled the fund and applied it in this way with the appellant's concurrence. A third set of buildings was later erected by the respondent out of his own moneys. All these buildings are permanent buildings and became part of the land. The respondent is prepared to concede that the appellant may, subject to settlement of other questions, be entitled to an equitable charge in respect of some part of the cost of some of the buildings, but that is not now in issue, since it would not confer any right of occupation.

In addition it is common ground that many payments referable to the ownership of the land were made by Colonial Printing Works out of funds of the business, and were not debited to the respondent. These include interest on unpaid instalments of the purchase price, costs of the conveyance to the respondent, ground rents, undeveloped site tax and the like.

The appellant relies on all this expenditure, including that on erection of buildings, in support of all his different contentions leading to the conclusion that he is now an equitable co-owner of the plot. If they stood alone, they would certainly indicate very strongly that the appellant and his partners in Colonial Printing Works after the inception of the partnership at least believed themselves to have an interest in the plot. The items prior in date to July 1, 1943, also afford some indication that Horra was then treated as having an interest. I am not, however, prepared to accept that they indicate that Horra treated, or intended to treat, the land as an asset of his business, even if he was the equitable owner. It does not appear that Horra had any funds in Kenya, out of which such payments could have been made, except the funds of Colonial Printing Works. The payment of personal expenses out of a business account is such a common practice among Indians that I think no inference arises that the land was an asset of the business and, as I have said, it is only on that footing that the appellant could on the

pleadings establish equitable co-ownership in himself. It remains only to note that Horra, though he is old and blind, was available in Nairobi to give evidence at the trial and was not called. He might have been an

invaluable witness for the appellant on this particular issue, and I draw an inference unfavourable to the appellant from the failure to call him.

For the reasons given I think that all contentions open to the appellant on the pleadings fail; but since the evidence at the trial and the arguments before us went to many other matters I think it is desirable that I should deal with the facts in rather more general terms.

The members of this family were on intimate and affectionate terms at all times prior to 1951, when quarrels broke out which led to dissolution of partnership, appointment of a receiver, and a good deal of litigation, including this suit. The respondent, the eldest son, was at all material times employed in the Public Works Department, and so was forbidden to take any part in business. He seems to have made in one way or another a good deal of money. Horra, on the other hand, was consistently unsuccessful in a number of business ventures, and Colonial Printing Works only began to be really prosperous after he had ceased to take an active part in it. Although neither party can be heard to say so in these proceedings, I think it is almost certain that on the inception of the business of Colonial Printing Works there was a family arrangement between Horra, the appellant, the respondent and Vanshi Dhar that the respondent, who was putting up the money, should have a substantial share in the control and assets of the business, but that this should be kept secret because of his position in the Public Works Department. I think that this was also substantially the view of the learned trial judge. After Horra left Kenya in 1936 I think the parties and Vanshi Dhar together controlled the business and that all alike were responsible for policy and for any major transaction. I believe that from the time when income tax was introduced it was part of their policy to conceal the true profits of the firm. All the books of original entry of the firm have disappeared save one, Exhibit 8, a rough cash book for 1944, which survived by accident and was produced by the receiver. It carefully distinguishes between cash receipts which could be traced by receipts given or otherwise and cash receipts which could not be traced. The latter, which amounted to about 40% of the year's takings, were not transferred to the fair cash book. Each party says the other was responsible for this. I have not the slightest doubt that both were responsible, that it was a deliberate fraud on the revenue, and that the same sort of thing was done in other years as well. Equally I have no doubt that one of the purposes to which the concealed cash was put was the purchase of assets such as land for the benefit of the family generally. Whether this was the true basis of the respondent's ownership of the land in question does not so clearly appear. If it was, the subsequent transactions relating to the land would all be easily understood. It would also be reasonable that a family arrangement of such a type should be loose and ill-defined, but it might well be enforceable on the lines of the decisions in *Bull v. Bull* (1), [1955] 1 All E.R. 253, and *Macdonald v. Macdonald* (2), [1957] 2 All E.R. 690, subject only to considerations of illegality. Before discussing that issue, I would remark that there is no reason to suppose that Satya Vrat took any part in, or had any knowledge of, what was being done. He was only thirteen years old when he became a partner, and it is reasonable to assume that he was no more than a nominee of his father. It should also be noted that the firm apparently engaged in extensive black market operations. The details of these remain obscure, but they would provide an additional reason for false accounting and more money to be "salted down." Again I believe that all three brothers must have been aware of what was being done. Here again I would say that I think these were substantially the conclusions of the learned trial judge.

If the respondent's ownership of this land had its inception in a conspiracy with his brothers to carry on unlawful trading and to defraud the revenue, it is clear that neither party would deserve this court's assistance and the only difficult question would be whether to refuse to eject the appellant or to refuse to give effect to his "equitable" defence based on an unlawful agreement. Authorities such as *Groves v.*

Groves (3), 148 E.R. 1136, show that illegality would defeat the appellant's alleged equity, while others such as *Bowmakers Ltd. v. Barnet Instruments Ltd*. (4), [1944]

2 All E.R. 579, and *Alexander v. Rayson* (5), [1936] 1 K.B. 169, seem to show that where a title is vested in one party the courts must, in spite of the title having been obtained by tainted means, give effect to its ordinary incidents, such as the right to possession, unless the party has to rely on his own illegality to show that he is "entitled" to possession. In this case the right to possession appears to be untouched by the illegality, since the grant and termination of the licence is no more than narrative and strictly speaking need not have been pleaded at any stage at least before reply.

I prefer, however, not to make any such special findings of fact as would require us to deal with the case on the basis of proved illegality, but merely to say that, although if the case had been pleaded differently the appellant might have been able to establish some equitable interest in the land, he has failed to establish any such interest as was pleaded, and is consequently not entitled to remain in possession. I would dismiss the appeal, and on this basis there is no ground for depriving the successful respondent of his costs, so he should have them.

Forbes JA: I agree and have nothing to add.

Connell J: I agree.

Appeal dismissed.

For the appellant:
JM Nazareth QC and *ML Handa*
Chanan Singh & Handa, Nairobi

For the respondent:
DN Khanna
DN & RN Khanna, Nairobi

Noor Binti Sharaf Ahmed v Abdo Ali Sallam & another
[1957] 1 EA 532 (SCA)

Division:	HM Supreme Court of Aden at Aden
Date of judgment:	11 April 1957
Case Number:	839/1956
Before:	Campbell CJ
Sourced by:	LawAfrica

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[1] Rent restriction – Possession – Dwelling house let to husband – Subsequent desertion by husband – Wife remaining in occupation – No step by husband to revoke wife's authority to occupy – Right of landlord to recover possession.

Editor's Summary

The first defendant who was the head tenant of the premises concerned in this suit, brought an action against the second defendant for eviction for non-payment of rent. The plaintiff, who was the wife of the second defendant, lived with the second defendant in the premises from 1945. In 1950 the second defendant deserted the plaintiff but returned in 1954 for a short time and then left her again for good. An order for possession was made against the second defendant in default of appearance but when the bailiff attempted to execute the order the plaintiff opposed her eviction and lodged an objection. On the hearing of the objection the court ordered that this suit be brought, since the facts were complicated and in dispute, and legal principles were involved. There was evidence before the court that the plaintiff had always been ready to pay the rent and that at the time the action against the second defendant was begun, she had offered to pay this rent. The first defendant argued that the law of England concerning the possession of premises by deserted wives was not applicable in Aden.

Held – the right of a deserted wife not to be evicted from protected premises of which her husband was the tenant was the same in Aden as in England.

Order that decree for possession be not executed against the plaintiff and her children.

Cases referred to:

(1) *Brown v. Draper*, [1944] 1 All E.R. 246; [1944] K.B. 309.

(2) *Old Gate Estates Ltd. v. Alexander*, [1949] 2 All E.R. 822; [1950] 1 K.B. 311.

(3) *Middleton v. Baldock*, [1950] 1 All E.R. 708; [1950] 1 K.B. 657.

Judgment

Campbell CJ: The facts of this case are shortly as follows. The plaintiff, who is the wife of the second defendant, lived with her husband in the suit premises from about 1945. He deserted her in 1950 and went to the Yemen. He returned in 1954 for a few months and then left her again and she has not seen him since. On September 11, 1956, the first defendant, who is the head tenant of the premises, brought a suit, Civil Suit No. 643 of 1956, against the second defendant to evict him for non-payment of rent. The defendant was served by substituted service and failed to appear on the date of the hearing and an order for possession was made. When the bailiff attempted to execute the order for possession, the present plaintiff opposed her eviction and lodged an objection. When this objection was heard in the course of execution proceedings this court came to the conclusion that the facts were somewhat complicated and in dispute and certain legal principles were involved and decided that the matter was not suitable to be tried in execution proceedings without pleadings. It was ordered that this suit should therefore be brought.

The plaintiff now prays that the decree in Civil Suit No. 643 of 1956 be declared not binding and valid as against her or that a declaration issue that it should not be executed against her.

The first defendant has put forward two contentions. In the first place he says that she has abandoned the premises and has for a long time been living with her brother, Hail Sharaf. I am satisfied that this is quite untrue. I am convinced by the evidence that she has been living uninterruptedly for many years in the suit premises with her three children. I am satisfied also that the husband has left furniture in the house and that he has in no way revoked her licence to stay. The second contention of the defendant, though he has scarcely pleaded this in the written statement, is that she has other premises to go to of which her husband is tenant, and it is urged that no protected tenant can have a tenancy of two houses. It is admitted by Hail Sharaf that the house in which he lives was at one time in the possession, as a tenant, of the second defendant, his brother-in-law. He says, however, that he acquired a sub tenancy from this brother-in-law. I accept this. He has been living in the house ever since his brother-in-law left Aden in 1945 and has been paying rent regularly. The fact that the rent receipts remain in the name of the second defendant seems to me neither here nor there. I accept that he has always been a sub-tenant of his brother-in-law, and has been paying rent regularly, and has been accepted as a sub-tenant by the first defendant.

The position of the deserted wife has frequently been considered in the English courts. In *Brown v. Draper* (1) [1944] K.B. 309, a husband was the tenant of a house on weekly tenancy, and would, in the event of the tenancy being determined, be entitled to the protection of the Rent Restriction Acts. After occupying the house for some months he left it owing to disputes with his wife, but he left his wife and child in occupation of the house, with the use of his furniture, and continued to pay the rent. Having received notice to quit, the husband stopped paying the rent, but he did not revoke his leave to the wife to

reside in the house, nor did he remove his furniture. The landlord later brought proceedings against the wife for trespass, and at the hearing, the husband, who was not made a party to the proceedings gave evidence that he had no interest in the house. It was held that the husband was still in possession of the house and that he could not contract to give up his right to claim

the protection of the Acts, and could still less give it up by a statement of his wishes or intentions. The wife's possession must be regarded as that of the husband and could not be treated as unlawful so long as the husband had the right to claim the protection of the Acts. The protection of the Rent Restriction Acts extended to protect a licensee of the tenant.

Brown v. Draper (1) has been approved on numerous occasions particularly in *Old Gate Estates Ltd. v. Alexander* (2), [1950] 1 K.B. 311. Here the statutory tenant of a flat, after matrimonial disputes, ceased, himself, to reside at the flat but left his wife and his furniture there. When the landlord sought to evict her she refused to leave the flat and the landlord sued the husband and wife for recovery of possession. Between the date of the entry of the plaint and the hearing of the action the husband returned to his wife and flat. It was held that at the time of the entry of the plaint, his wife and furniture remaining at the flat, the husband was still in possession of it as a statutory tenant and, therefore, within the protection of the Rent Restriction Acts. Denning, L.J., said:

> "The reason is because a wife, so long as she behaves herself properly, has a very special position in the matrimonial home. She is not a sub-tenant or licensee of her husband. It is his duty to provide a roof over her head. He is not entitled to tell her to go, without seeing that she has a proper place to which to go. He is not entitled to turn her out without an order of the court: . . . Even if she stays there against his will, she is lawfully there; and, so long as she is lawfully there, the house remains subject to the Rent Restriction Acts . . . and the landlord can only obtain possession of it if the conditions laid down by those Acts are satisfied."

In *Middleton v. Baldock* (3) [1950] 1 K.B. 657, a tenant husband also deserted his wife. The landlord gave the husband notice to quit and brought separate actions against the husband and wife for possession on the ground that as against the husband the contractual tenancy was at an end, and as against the wife as a trespasser. The husband filed an admission of the landlord's title and offered immediate possession. The County Court judge made an order for possession against him and in the second action made an order for possession against the wife. It was held that the order for possession against the husband was without jurisdiction and was erroneous in that a landlord seeking to recover possession against a tenant protected by the Rent Restriction Acts must establish the right to possession on one of the grounds stated in the Acts, unless, after possession had been claimed on such a ground, the tenant admitted facts to support it, in which event the court need not itself investigate the matters of fact admitted; whereas the husband here could not yield possession to the landlord seeing that his wife was rightfully in possession vis-a-vis her husband, and his offer of possession was accordingly futile as being one which he was unable to perform in the absence of either the wife's consent to go out of the house or an order for ejectment against her. Evershed, M.R., says at p. 662:

> "The offer was one which he (the husband) was quite unable to perform, and he wholly failed to perform it. The only way he could do so was by getting a court with competent jurisdiction in matrimonial matters to order his wife out or, possibly, by adopting the medieval method of taking her by the scruff of her neck and throwing her out."

It is urged on behalf of the first defendant that the law concerning the deserted wife in England is not applicable to deserted wives in Aden. It is true that the rights of a wife here are very much less than in England. She can be divorced at will and she can claim no right to maintenance after divorce. Nevertheless I think that her position in all essentials is the same and that she has this "very special position in the home" referred to by Denning, L.J., in *Old Gate Estates Ltd. v. Alexander* (2). It may be that a court one day in Aden will extend the doctrine even further and hold that a divorced wife in Aden is entitled to remain in the matrimonial home in view of the fact that her divorce has arisen from no proved fault on her part, which must be otherwise the case in England. That point, however, does not

arise for decision here as the

plaintiff has not been divorced. There is a statutory liability in Aden upon a husband to maintain his wife as long as they are married and she can bring criminal proceedings against him for this. Her position at common law vis-a-vis her husband is essentially the same in Aden as in England.

Holding as I do therefore that the plaintiff in this case is in exactly the same position as a deserted wife in England I think that she must succeed in this suit. The fact that an order for possession has been made against her husband, the second defendant, does not diminish her rights in any way. I am satisfied that she has always been ready to pay the rent at any time and that she did in fact offer to pay the rent at the time the suit against her husband was being brought. I am satisfied that the first defendant could have obtained rent from her at any time but that he carefully refrained from asking her for it and has attempted to back up his reasons for doing so by saying falsely that the house was shut up at the material time.

A decree will therefore issue in which it will be set out that the decree obtained against the defendant, Hasson Ali El-Hakeemi in Civil Suit No. 643 of 1956, shall not be executed against the present plaintiff and her children. I see no reason why the second defendant should be compelled to pay the costs of his action although he has not appeared or filed a written statement. Although he has deserted his wife I do not see why this should make him liable to the costs of this suit. The costs of the suit must therefore be paid by the first defendant.

Order that decree for possession be not executed against the plaintiff and her children.

For the plaintiff:
PK Sanghani
PK Sanghani, Aden

For the first defendant:
WH Ansari
WH Ansari, Aden

The second defendant did not appear and was not represented.

Paolo Cavinato v Vito-Antonia Di Filippo
[1957] 1 EA 535 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	4 November 1957
Case Number:	13/1957
Before:	Sir Ronald Sinclair V-P, Briggs and Forbes JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Connell, J

[1] Damages – Basis of assessment for personal injuries.

Editor's Summary

The respondent had been awarded general damages for multiple personal injuries sustained in a motor accident. On appeal it was submitted that the award was excessive and that it had been assessed on a wrong principle in that it had been calculated by totalling separate assessments for each injury.

Held – general damages must be assessed on the combined effect of all the injuries on the person injured and not calculated as the sum of independent assessments for each injury; that while the judge had assessed damages on a wrong principle the sum awarded was no more than should have been awarded had the matter been assessed on a correct basis.

Appeal dismissed.

Judgment

Briggs JA: read the following judgment of the court: This was an appeal from the Supreme Court of Kenya which gave to the respondent damages for personal injuries following on a motor car accident.

The appeal was limited to the question of general damages which were awarded at £6,550. The special damages and the small sum awarded to the second plaintiff as general damages were not in issue, and the second plaintiff was not a party to the appeal.

The appeal was brought on two grounds: first, that the learned trial judge had assessed the damages on a wrong principle in that he had considered separately three different sets of injuries suffered by the respondent and had assessed general damages separately in respect of each of the three sets of injuries. Without going in detail into the nature of these injuries, they may be divided into (1) injury leading to amputation of the left hand, (2) fracture of a left heel bone and (3) multiple fractures of vertebrae. The learned judge assessed the general damages in respect of (1) at £3,250; in respect of (2) at £300, and in respect of (3) at £3,000. In arriving at each of these figures he relied on recent cases decided in the High Court of England where the injuries were comparable to the three sets of injury in this case, and the figures he awarded were closely comparable with the figures awarded in those three cases.

It was submitted to us that it is wrong in principle to consider sets of injuries in isolation and to award a sum of general damages in respect of each injury. The danger of such a method will be apparent when it is considered that in many cases the combined effects of two sets of injuries may be much more serious in its results to the person injured than either set of such injuries would have been separately and in isolation from the other. For example, the loss of one eye may be a serious matter, but it is less than half as serious as the loss of both eyes. It is also possible to imagine circumstances in which fair compensation for a number of distinct injuries would be less than the sum of the compensation which should be awarded for each of them separately. It is of course correct to consider the injuries as such seriatim and to assess the severity of each separately, but the assessment of general damages must be a single assessment arrived at by considering the total effect of all the injuries upon the person injured. As a practical result of this, it may be said in general that the most reliable guide to a standard of general damages in cases of multiple injuries will be other cases of multiple injuries of a similar severity, although no doubt it will be difficult to find cases where the multiple injuries are closely comparable in their nature. We think that to consider awards made for single and specific injuries of a similar nature to the several sets of injuries which exist together in the plaintiff, and to arrive at general damages by a mere process of addition, can only be misleading, and that it is an error of law to do so.

We were of opinion accordingly that the general damages awarded to the respondent had been assessed upon a wrong principle and it was necessary for us to consider as res integra the other issue, namely the question whether those general damages were excessive. After listening with care to Mr. Mackie-Robertson’s argument on this issue, we were of opinion that the sum awarded was not excessive and was no more than should have been awarded if the matter had been assessed on a correct basis.

The consideration which affected our decision most on this issue was that the injuries of the back and the loss of the hand must react on one another in such a way as to restrict the respondent’s future activities very gravely. We add to this the further point that it is inevitable that osteo-arthritis will increase, and it seems very probable that in a comparatively few years’ time he will be almost a complete cripple. This is all bound up with the question of his earning powers. He was a craftsman, and although

he is now employed as a foreman by the successors of his previous employers, we think that there may be in such employment an element of most commendable generosity on their part, and that if his prospects of employment were considered apart from his present employment they would be very poor.

We were accordingly of opinion that the appeal failed, and it was dismissed with costs.

Appeal dismissed.

For the appellant:
JA Mackie-Robertson
Kaplan & Stratton, Nairobi

For the respondent:
O Shaw
Carson Gentles & Co, Nakuru

Ngambo Estate and Saw Mills Ltd v Sikh Saw Mills (Tanganyika) Ltd
[1957] 1 EA 537 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	8 November 1957
Case Number:	49/1957
Before:	Sir Ronald Sinclair V-P, Briggs and Forbes JJA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Tanganyika – Mahon, J

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[1] Highway – Dedication – Agent's knowledge of user imputed to owner – Highways Ordinance (*Cap.* 167) (*T.*) *– Land Tenure Ordinance* (*Cap.* 113), *s.* 7 (*T.*) *– Indian Easements Act,* 1882 *– Indian Evidence Act,* 1872, *s.* 48.

[2] Cause of action – Trespass to and conversion of the same property – Whether one continuing transaction – Indian Limitation Act, 1908, *s.* 26, *art.* 39 *and art.* 48.

Editor's Summary

In a suit against the respondents for general damages for obstructing a public right of way, and for trespass and conversion of cut timber, the High Court found that the existence of a public right of way had not been established and that the claim for trespass and conversion was time-barred. The substance of the appeal was that the evidence of unobstructed user of the road was sufficient to support an inference of dedication to the public, and that the lapse of a year between the trespass and the conversion justified their being regarded as separate causes of action which would prevent the claim for conversion from being barred.

Held–

(i) there was cogent evidence of long and uninterrupted public user of the road of which the owner's agent was aware, and as the agent's knowledge must be imputed to the owner the true inference was that the owner had dedicated the road to the public.

(ii) the trespass and conversion were separate and distinct acts with a year intervening between them; accordingly the conversion should be regarded as a separate cause of action which on the facts would not be barred by limitation.

Appeal allowed. Decree of the High Court set aside and the claims for obstruction of the road and conversion of the timber to be retried.

Cases referred to:

(1) *Abbas Brothers v. Fazal Mohamed Champsi* (1951), 18 E.A.C.A. 36.

(2) *Rangeley v. Midland Railway Co.* (1868), L.R. 3 Ch. App. 306.

(3) *Mann v. Brodie* (1885), 10 App. Cas. 378.

(4) *Folkestone Corporation v. Brockman*, [1914] A.C. 338.

November 8. The following judgments were read by direction of the court.

Judgment

Sir Ronald Sinclair V-P: This is an appeal from a decree of the High Court of Tanganyika. The appellants, who were the plaintiffs in the suit, sued the respondents for damages for obstructing a public right of way, for trespass and for conversion of certain cut timber. The respondents, while admitting that they had placed a barrier across a road on their own property denied that the road was a public right of way. They also denied the trespass and conversion alleged. The learned trial judge held that the appellants had not established that a public right of way existed over the road in question and that the claim for damages for trespass and conversion was barred by limitation.

I shall deal first with the question whether a public right of way existed over the respondent's property as alleged by the appellants. The appellants are the owners of Ngambo Estate which they acquired in 1948. The respondents are the owners of an adjoining property called Bulwa Estate. Parts of the boundaries of these two estates are contiguous. There was no definite evidence as to when the respondents acquired Bulwa Estate but it appears to have been shortly before the appellants acquired Ngambo Estate. In a lease dated November 26, 1951, between the respondents and Tanganyika Timbers Limited (exhibit I (1)) it is recited that the respondents have an estate in fee simple in Bulwa Estate. That was not contested at the trial and it must be accepted that the property is freehold.

Both the appellants and the respondents carry on the business of saw millers and when they acquired these estates they commenced to erect saw mills. The materials necessary for the erection of the appellants' saw mills were transported on a road from Korogwe running across Bulwa Estate from west to east and thence over Crown land past Kitivu rice market to the western boundary of the appellants' estate. The appellants used this road until the respondents placed a barrier across it some time in the latter half of 1950. It is this road which the appellants claim is a public right of way.

The road in question has not been declared to be a public highway under the provisions of the Highways Ordinance (Cap. 167) but the case for the appellants at the trial was that there had been unobstructed user of the road by the public for a substantial time from which dedication of the road as a public road should be inferred. That was the main contention of the appellants at the hearing of the appeal: but it was also submitted that a public right of way had accrued by prescription by virtue of s. 26 of the Indian Limitation Act as applied to Tanganyika.

I shall dispose of the latter submission first. Section 26 of the Limitation Act provides, so far as material:

> ". . . where any way . . . or any other easement (whether affirmative or negative) has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right without interruption, and for twenty years, the right to such . . . way . . . or other easement shall be absolute and indefeasible."

In my view that section has no application to a public right of way. It applies only to easements and a public right of way is not an easement. In *Abbas Brothers v. Fazal Mohamed Champsi* (1) (1951), 18 E.A.C.A. 36, the question whether a public right of way could be acquired by prescription under s. 26 of the Limitation Act was considered. In his judgment in that case, with which in this respect the other members of the court concurred, Nihill, P., cited with approval the following passage from *Rangeley v. The Midland Railway Co.* (2) (1868), L.R. 3 Ch. App. 306, quoted in Peacock's Law Relating to

Easements in British India (3rd Edn.) at p. 29:

> "In truth, a public road or highway is not an easement, it is a dedication to the public of the occupation of the surface of the land for the purpose of passing and repassing . . . It is quite clear that it is a very different thing from an ordinary easement, where the occupation remains in the owner of the servient tenement subject to the easement."

The clear implication from the decision in *Abbas Brothers v. Fazal Mohamed Champsi* (1) is that a public right of way cannot be acquired by prescription under s. 26. Moreover, the wording of the section is inconsistent with the acquisition of a prescriptive right by the public since the claimant must establish that he has enjoyed the right claimed for twenty years. It was not the appellants' case that they had enjoyed a right of way for twenty years. Although "easement" in s. 26 has a wider meaning than in England, and in India under the Easements Act may have a wider meaning still, it is clear that it does not extend to a public right of way.

I turn now to the contention of the appellants that the evidence established dedication of the road as a public road. It is settled law that a presumption of dedication may arise from evidence of long and uninterrupted user. In *Mann v. Brodie* (3) (1885), 10 App. Cas. 378 at p. 386, Lord Blackburn stated the law as follows:

> "In *Poole v. Huskisson* Baron Parke says: 'In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an *intention* to dedicate – there must be an *animus dedicandi*, of which the user by the public is *evidence*, and no more; and a single act of interruption by the owner is of much more weight upon a question of intention, than many acts of enjoyment.' But it has been held that where there has been evidence of a user by the public so long and in such a manner that the owner of the fee, whoever he was, must have been aware that the public were acting under the belief that the way had been dedicated, and has taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to find the fact may find that there was a dedication by the owner whoever he was. It is therefore, I may say, in England, never practically necessary to rely on prescription to establish a public way. Now, it is here to be observed that though the length of time during which a road is used as a public highway is an element in determining whether a dedication should be inferred, it is not any definite time, and a very short period of usurpation will often satisfy a jury."

Commenting on that passage Lord Kinnear said in *Folkestone Corporation v. Brockman* (4), [1914] A.C. 338 at p. 352:

> "The points to be noted are, first, that the thing to be proved is intention to dedicate, and secondly, that while public user may be evidence tending to instruct (sic. Query "indicate") dedication, it will be good for that purpose only when it is exercised under such conditions as to imply the assertion of a right, within the knowledge and with the acquiescence of the owner of the fee."

Earlier in the same case Lord Kinnear said at p. 352:

> "The nature of user, and consequently the weight to be given to it, varies indefinitely in different cases, and whether it will import a presumption of grant or dedication must depend upon the circumstances of the particular case."

There was cogent evidence of long and uninterrupted user by the public of the road across Bulwa Estate which the appellants claim is a public right of way. It appears that originally the road continued only as far as Kitivu rice market to the east of Bulwa Estate and that it was extended to the western boundary of Ngambo Estate comparatively recently, probably since 1945. But a path or road across Bulwa Estate has been in existence for a great many years. It is shown as a path or track on German maps. Rajabu bin Mdoe, an old inhabitant of Kwanbaraka, the area in the neighbourhood of the rice market, who gave his age as about 70 years, said that he had always known the road through Bulwa Estate to the rice market, that it was used by the natives of the area who made it and kept it up. Gilbert bin Makange, a sub-chief in the neighbourhood, said that he had always known the road as a road for motor vehicles and that it was maintained by the natives. Mr. Shariff, a director of Shariff Ltd., general merchants of Korogwe, gave evidence that from 1936 until three or four years ago he attended the rice market at Kitivu which was

held twice a year and that on each occasion he transported in a five-ton lorry twenty or thirty loads of rice from the market to Korogwe on the road through Bulwa Estate. The Rev.

H. A. Smith of the U.M.C.A. Mission at Kizara north of Kitivu rice market testified that he had known the road from the rice market through Bulwa Estate to Korogwe for the past twelve years, that the mission relied on the road for its supplies, that he had seen cars on the road usually going to and from the market, that so far as he knew it was maintained by the local native authorities and that he had never been asked not to use the road. He also said that he had visited the area in 1926 when he found "something more than a footpath there." Mr. Humphries, District Commissioner, Korogwe from 1953 and Mr. Cawthra, District Commissioner for two years before that, both expressed the opinion that this was a public right of way. I consider such evidence to be admissible under s. 48 of the Indian Evidence Act and I further consider that the court ought to attach considerable weight to such opinions in a matter of this kind.

That evidence was not seriously contested by the respondents. On the contrary three of their witnesses tended to confirm the evidence given by the appellants' witnesses. John bin Mbeya, a member of the Tanga Native Treasury Board, who worked in the Kitivu area said that he had known the road through Bulwa Estate for many years, that lorries used it at the time of the rice market, that before it was reconstructed by the respondents in 1949 the Africans used to cut the grass on it and that "if anything wanted doing to a bridge they (the Africans) did it." Saidi bin Mgajisi, a headman at Kativo, testified that there was a road across Bulwa Estate before 1949 but "it was not useful for lorries." The third witness, Hassani bin Mkande, sub-chief of Katwo from 1945 to 1949, said that before the respondents reconstructed the road lorries used to go to the market on the road about four times a year and that although lorries could use the road without the grass being cut, he used to tell his people to cut the grass when lorries wished to go to the market. It is true that Dilbagh Singh, an employee of the respondents, gave evidence that Mr. Shariff was working for the native authority to whom, he said, the respondents had given a licence to pass through their estate. But Mr. Shariff was not cross-examined on this point and I think it was a last-minute improvisation to which no weight can be attached.

I have referred to the reconstruction of the road by the respondents. The reconstruction work was commenced in 1949 and completed about August, 1950, and, according to the respondents, cost about Shs. 100,000/-. It was only after the reconstruction work had been completed that the respondents placed a barrier across the road and prevented the appellants from using it. This was because the appellants had refused to contribute towards the maintenance and cost of the reconstructed road which the respondents maintained was a private road constructed exclusively for their own use. For the respondents it was contended that what I have called the reconstructed road was not a reconstruction of the old road but an entirely different entity constructed in a different place from the old road. They relied on the evidence of Dilbagh Singh who said that the road the respondents constructed did not follow the footpath, the evidence of John bin Mbeya who said "The clear road (i.e. the new road) went straight – the footpath twisted," and the evidence of Hassani bin Mkande who said

> "The road did not follow the line of the footpath. The old footpath is on either side of the road."

As to the evidence of Dilbagh Singh I would observe that he did not arrive on the scene until 1950, after the reconstruction of the road had been completed. When the evidence of those witnesses is considered against the background of the evidence as a whole I do not think it means any more than that the reconstructed road did not follow exactly every small twist and turn of the old road, but took a straighter line when that would result in a better road, I can find nothing in the evidence to suggest that there was at any place such a diversion from the old road that it could properly be described as a new and different road. In other words I think the respondents did no more than reconstruct and improve the old road. That

was the opinion of the

respondents' witness Saidi bin Mgajisi who said: "The old road became a better and a newer road."

In my view, therefore, the evidence clearly established open and uninterrupted user of the road by the public for a substantial time before the respondents placed a barrier across it towards the end of 1950. The user was by both foot passengers and vehicles. The evidence of user by foot passengers went back as far as the memory of an old man of 70 years of age and user by vehicles was certainly from 1936 and most probably from 1926 if not earlier. Having regard to the thinly populated area in which the road was situated, I think the extent and nature of the user was such as to imply an assertion by the public of a right to use the road. The user was uninterrupted and without hindrance or objection by the owner or owners of Bulwa Estate until 1950. Moreover, at least until the respondents took possession, the road was maintained by the public in the vicinity who would have had no interest in so doing except in the belief that they had a right to use it.

But before an inference of dedication could be drawn, it had to be established not only that the road was used openly as of right for a substantial time, but also that the user was for so long a time that it must have come to the knowledge of the owner of the land that the public were using it as a right of way. On this aspect the finding of the learned judge was as follows:

> "There is no evidence that when the local inhabitants and others first begun to cross Bulwa Estate there were any saw mills in existence in the neighbourhood. As learned counsel for the plaintiff has observed the area was virgin forest before the defendant company arrived at Bulwa. There is also no evidence as to who the previous owner of this estate was and whether he lived on the estate and so had any knowledge of what was going on. It is, on the evidence, unlikely in the extreme that he ever permitted the passage of heavy motor vehicles and tractors over his land and I can see nothing to support a finding that he ever dedicated any part of Bulwa Estate as a public right of way. At the most the evidence could establish no more than permission to the public to pass over the land by foot and occasionally by motor vehicle. Hassani (D.W. 3) who was some years ago sub-chief of Kitivu and who is now sub-chief of Amani, has said that before this road was made by the defendant company people from Kajengo went to the market along a footpath which was wide enough for lorries, that if a lorry wanted to go to or from the market he told people to cut grass and that he used to inform Davies, a clerk who lived on Bulwa Estate when he needed to cut a road for lorries. This witness was not asked why he informed Davies, but his doing so would perhaps have been consistent with permission granted by the owner coupled with a request that he be informed when it was desired to cut a track for lorries, but this is, of course, mere supposition."

With all respect to the learned judge, although he had earlier in his judgment correctly stated the principles to be applied, I do not think that in arriving at his finding he applied those principles correctly or fully appreciated all the factors which it was necessary to take into account. In the first place I am unable to understand his reference to the absence of evidence of the existence of saw mills in the neighbourhood when the local inhabitants and others first began to cross Bulwa Estate. It was necessary to establish that there had been user for a substantial time by both foot passengers and vehicles, but it was not necessary to show user by the appellants or by any other saw millers. As I have indicated, the evidence established user for a substantial time by both foot passengers and vehicles, including five-ton lorries.

In the second place, I think the statement:

> "There is also no evidence as to who the previous owner was and whether he lived on the estate and so had any knowledge of what was going on"

was a misdirection. It did not follow that because there was no evidence as to who the previous owner was or whether he had ever lived on the estate, there was therefore no evidence of knowledge by the

owner of user of the road. In order to arrive at a

finding as to whether the owner had such knowledge of user of the road by the public that an inference of dedication should be drawn, it was necessary to take into account all the surrounding circumstances. But it appears that as a consequence of this misdirection the learned judge thought the matter was concluded against the appellants and gave no consideration to other relevant circumstances. I propose now to examine those other circumstances.

Bulwa Estate is freehold. There was no evidence as to when the grant of freehold was made, but it is common knowledge that since the enactment of the Land Tenure Ordinance (Cap. 113) in 1923, by s. 7 of which the whole of the lands of the territory were declared to be public lands subject to any title to or interest in land acquired before the date of the commencement of the Ordinance, grants of freehold have been made only rarely and in exceptional circumstances. In those circumstances, and in the absence of any evidence to the contrary, I think the presumption must be that the freehold title was in existence before 1923. There was, therefore, a previous owner who had the capacity to dedicate the road as a public highway.

Although there was no evidence that the previous owner either lived on the estate or personally visited it, in the absence of any evidence to the contrary it is a reasonable presumption that he was a normal owner of property, and, as a normal owner, would exercise some supervision over his property and maintain some acquaintance with the state of the property even if not resident on it. Furthermore, there was the evidence of Sub-Chief Hassani bin Mkande, referred to by the learned judge, that one Davies lived on the estate as a clerk. Though not expressly stated at what period Davies lived on the estate, it was clearly implied that he was the employee of the previous owner.

In my view it would be a reasonable assumption either that the owner paid periodic visits to Davies, or that Davies kept the owner informed by correspondence or otherwise of matters affecting the estate. On this basis I should be prepared to find that the owner was aware of the existence and user of the road. But even if he was not informed of those facts by Davies I think that Davies' undoubted knowledge of the existence and user of the road must in the circumstances be imputed to his master. That Davies was in a position of some authority is confirmed by Sub-Chief Hassani who said that he used to inform Davies when it was necessary to cut a road for lorries. I think he must be regarded as the owner's agent on the estate. He clearly knew that the road was being maintained by communal labour. The fact that Sub-Chief Hassani informed him when it was necessary to cut the grass on the road, does not in my view raise any inference that the permission of Davies was required, and it was not suggested that Davies ever objected to the cutting of the grass or the road being used by the public. On the principle that the knowledge of the agent is the knowledge of the principal, Davies' knowledge and the consequences resulting there from must be imputed to the owner. Taking all those circumstances into consideration, I think that the owner, whoever he was, must be deemed to have had knowledge of the nature and extent of the user of the road and that in view of his acquiescence in that user the true inference is that there was a dedication by the owner.

Because the learned judge found that dedication of the road had not been established he made no finding as to the period when the road was obstructed by the respondents or as to the damages suffered by the appellants as a consequence of such obstruction.

In their amended plaint the appellants alleged that on or about September 28, 1950, the respondents erected a barrier across the portion of the road passing over Crown land and maintained it there until the end of November, 1950: that the respondents then placed a barrier across the portion of the road passing over their own land and maintained it there until December 9, 1950, when the district commissioner,

Korogwe, removed it: that between December 9, 1950, and January 31, 1951, the respondents on divers occasions re-erected the barrier on their own land. In their amended written statement of defence the respondents denied having erected a barrier across the portion of the road passing over Crown land. They admitted having placed a barrier across the road on their own land but denied that it had been put up on numerous occasions

between December 9, 1950, and January 31, 1951. Counsel for the appellants has now conceded that the claim in respect of obstruction of the road more than three years prior to the filing of the plaint was time-barred. The plaint was filed on December 2, 1953.

As to damages, in para. 9 of the amended plaint the appellants alleged that between January, 1950, and November, 1950, the respondents trespassed upon the appellants' estate and therein cut and felled twenty-three soft-wood trees and by obstructing the road in the manner pleaded prevented the appellants from transporting the trees whereby they were damaged by rotting and rendered useless. In the particulars of damage as amended they claimed Shs. 8,261/- in respect of the loss of these trees. Counsel for the appellants has also conceded that the claim in respect of these trees was time-barred as the evidence established that they had rotted and become useless by October or November, 1950. The appellants, however, claimed general damages for obstruction. I think, therefore, that there should be a re-trial restricted, so far as the claim for obstruction is concerned, to the issue as to when and for what periods after December 2, 1950, the suit road was obstructed by the respondents, and to an enquiry as to damages in respect of those periods.

The remaining questions which arise on this appeal relate to the appellants' claim (in para. 10 of the amended plaint) in respect of thirty-one mvule trees which they alleged had been wrongfully cut and removed by the respondents. The learned judge held that the claim was time-barred. There was a similar claim (in para. 11 of the amended plaint) in respect of a further thirteen mvule trees which was also held to be time-barred, but there is no appeal against that decision.

Para. 10 of the amended plaint reads:

> "On divers occasions between a day unknown in or about the month of January, 1950, and a day unknown in or about the month of November, 1950, the defendant company through their servants or agents wrongfully trespassed over the said boundary marked "E"/"F" in exhibit "A" upon the plaintiff company's estate and thereon cut and felled thirty-one mvule trees estimated to measure 21,322 cu. ft., and between October 28, 1951, or thereabouts and November 15, 1951, or thereabouts the defendant company through their servants or agents wrongfully removed the said mvule trees under colour of having purchased the plaintiff company's estate but on oral demand orally agreed to return the said mvule trees. The defendant company has never returned the said trees or any of them and the plaintiff company has thereby been put to a loss estimated at Shs. 214,540/-."

The amount of the loss alleged was subsequently reduced to Shs. 120,208/-. The learned judge was of the opinion that the claim was for compensation for trespass, that art. 39 of the Indian Limitation Act accordingly applied and that under that article time began to run from the date of the trespass and not from the time when the full extent of the damage had been ascertained. For the appellants it was contended that although a claim in respect of trespass alleged was time-barred, the conversion of the trees was a separate act from the trespass giving rise to a separate cause of action to which art. 48 applied. Under art. 48 time begins to run from the date when the person having the right to the possession of property which has been converted first learns in whose possession it is. For the respondents it was submitted that, as pleaded, there was only one cause of action, namely trespass, and that any loss suffered as a consequence of the removal of the trees must be treated as flowing from the original trespass. In my view the contention of the appellants is correct. It may be that where the trespass and conversion constitute one continuing transaction, art. 39 applies to the whole transaction. But in the instant case the trespass and conversion were separate and distinct acts with a year intervening between them. I think the conversion of the thirty-one mvule trees as pleaded gave rise to a separate cause of action to which art. 48 applied and, accordingly, that the claim was not barred by limitation. It follows that there should be a

re-trial on this issue also.

For the reasons I have given I would allow the appeal, set aside the decree of the High Court and order a re-trial limited to the matters which are now in issue. I think that the appellants should have the costs of the appeal but that the costs of the abortive trial should be in the discretion of the judge on the re-trial.

It was agreed by counsel for both parties that if a re-trial were ordered, the existing record of the trial should be used on the re-trial with liberty to either party to adduce further evidence of the same or additional witnesses. I would so order. I think that, if possible, the re-trial should be heard by the same judge.

Briggs JA: I agree and have nothing to add.

Forbes JA: I also agree.

Appeal allowed. Decree of the High Court set aside and the claims for obstruction of the road and conversion of timber to be re-tried.

For the appellant:
CW Salter QC and *RN Donaldson*
Donaldson & Wood, Tanga

For the respondent:
NS Mangat QC and *Mohamed Husain*
Mohamed Husain & Co, Tanga

Juma Subira v R
[1957] 1 EA 544 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	15 October 1957
Case Number:	250/1957
Before:	Bennett J
Sourced by:	LawAfrica

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[1] Attachment – Warrant issued to attach movables including "temporary house" – Warrant affixed to house – Whether valid attachment of house – Civil Procedure Rules, O. 19 *r.* 40 *and r.* 51, (*U.*).

Editor's Summary

By a warrant of attachment issued by the district court, Mbale, a court broker was directed to attach and sell by auction the movable property of the appellant set out in the schedule to the warrant, of which one

item was “a temporary house with c.i. sheets.” After the warrant had been posted on the door of the house, the appellant was warned that he had no right to dispose of the house. The appellant before the sale agreed to sell the house to one, G, without disclosing that the house had been attached, and G paid to the appellant Shs. 2,300/- on account of the price. The appellant was charged with an offence under s. 294 of the Penal Code and the trial magistrate in his judgment convicting the appellant held that although the house had been described in the warrant of attachment as movable, it was immovable and that for this reason the warrant was invalid in relation to the house. He held, however, that the essence of an offence under s. 294 was the non-disclosure of a material fact and that the validity of the warrant was irrelevant. Order 19 r. 40 of the Civil Procedure Rules, under which the warrant was issued, provided for attachment of movable property by actual seizure, whereas O. 19, r. 51 which prescribes the mode of attaching immovable property the attachment is made by an order prohibiting disposal of the property.

Held–

(i) had the order for attachment been made under O. 19 r. 51, it would have been a fact material to the appellant’s title since s. 48 of the Civil Procedure Ordinance enacts that when an attachment is made any transfer of the property shall be void against claims enforceable under the attachment;

(ii) since, however, the purported attachment was not made as prescribed it was invalid and the appellant was not in law prohibited from transferring the house and the purchaser would have obtained a good title.

Appeal allowed.

Judgment

Bennett J: The appellant was convicted by the district court of Mbale of an offence contrary to s. 294 of the Penal Code and sentenced to four months' imprisonment with hard labour. He appeals against his conviction and sentence.

The facts were not in dispute. There was evidence that on May 10 a warrant of attachment issued by the district court, Mbale, was received by the court broker directing him to attach the movable property of the appellant set out in the schedule and to sell the same by public auction. The movable property mentioned in the schedule included "a temporary house with c.i. sheets." On June 12 the broker posted the warrant on the door of the appellant's house, and a copy of it on the notice board at the local Gombolola headquarters, and explained to the appellant that he had no right to dispose of the house. On July 8, before the house had been sold in execution of the decree, the appellant entered into an agreement to sell it to one Gimugu and did not inform Gimugu that the house had been attached. Gimugu paid to the appellant Shs. 2,300/- in part payment of the purchase price on the day that the agreement was signed. Although the house was described in the warrant of attachment as movable property, the trial magistrate found that it was immovable, and that for this reason the warrant was not valid insofar as it related to the house. He held, however, that the essence of the offence created by s. 294 of the Penal Code is the non-disclosure of a material fact and that the validity or otherwise of the warrant under which the attachment was levied was irrelevant. The warrant was issued under O. 19 r. 40 of the Civil Procedure Rules which provides that attachment of movable property shall be made by actual seizure. The mode of attaching immovable property is prescribed by O. 19 r. 51 which reads as follows:

> "51(1) Where the property to be attached is immovable the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge and ordering the judgment-debtor to deliver up to the court the duplicate certificate of title to such property.
>
> "(2) A copy of the order shall be served by affixing it on a conspicuous part of the property or be served on the judgment-debtor and further advertised as the court may direct:"

Now, had an order for attachment of the debtor's property been made under O. 19 r. 51, plainly it would have been a fact material to his title since s. 48 of the Civil Procedure Ordinance enacts that "Where an attachment has been made" any transfer or delivery of the property attached shall be void as against claims enforceable under the attachment. If, however, a purported attachment is, for some reason or other, invalid, then it would seem that s. 48 has no application. Section 48 of the Uganda Civil Procedure Ordinance is modelled upon s. 64 of the Indian Code of Civil Procedure. In the commentary on s. 64 of the Indian Code in Chitaley & Rao (4th Edn.) Vol. 1, p. 668, the following passage occurs:

> "The modes of attachment of various kinds of property are prescribed in O. 21 and an attachment takes effect not from the date of the court's order but only from the date of its actual promulgation in the manner prescribed. In *Muthia Chetti v. Palaniappa Chetti*, their lordships of the Privy Council observed as follows:
>
> " 'No property can be declared to be attached unless first, the order of attachment has been issued and

secondly, in execution of that order the other things prescribed by the rules in the Code have been done.’

> "It follows that where a transfer is made after an order of attachment but before it was actually effected, or where the mode prescribed is not complied with, or where there is a material misdescription or other defect in the attachment, or where the order of attachment is ultra vires or obtained collusively, the section does not apply."

It would thus appear that since no order was made by the magistrate under O. 19 r. 51 the appellant was not, in law, prohibited from transferring the house and that the purchaser would have obtained a good title as against claims enforceable under the purported attachment. In my judgment, the house was never attached and consequently there was nothing material to the title for the appellant to disclose to an intending purchaser.

For these reasons the conviction is quashed and the sentence is set aside.

Appeal allowed.

For the appellant:
MC Ghelani
MC Ghelani, Kampala

For the respondent:
MJ Starforth (Crown Counsel, Uganda)
The Attorney-General, Uganda

R (at the instance of Virapin Lesperance Chetty) v VG Pillay
[1957] 1 EA 546 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	7 January 1957
Case Number:	245/1956
Before:	Sir Ronald Sinclair V-P, Briggs and Bacon JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Seychelles – Lyon, C.J

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[1] Criminal law – Appeal – Conduct likely to cause a breach of the peace – Trespass – Whether party had or thought he had a title to the land material – Whether magistrate's order to execute bond to keep the peace valid when ownership of the land in dispute – Criminal Procedure Code (*Cap.* 77), *s.* 31 *and s.* 285 (*S.*).

Editor's Summary

This was a second appeal in which the original appellant C had joined the Queen and one P as

respondents. On the hearing of the appeal, counsel for the Attorney-General, Seychelles, applied that the Crown be struck out as a party and referred to s. 285 of the Criminal Procedure Code. The Court of Appeal held, following previous decisions of the court, that since even in a private prosecution the prosecutor is, in law, the Crown at the instance of a private prosecutor, the joinder of the Crown as a respondent was irregular and, therefore, if the Crown were to be a party at all, it should be as appellant. The appellant C, however, did not appear at the hearing of the appeal and the court, with the consent of counsel for the Attorney-General, Seychelles, ordered that the Crown be substituted as appellant and the hearing proceeded on that footing. The respondent P, in the proceedings which led to the appeal, had been ordered by the magistrate for the Victoria District to execute a bond with one surety to keep the peace for a year. The respondent P and some of his men had entered on land which had been occupied by C since 1924, of which the ownership was in dispute, and had broken and gathered fruit there. On the occasion of a second visit to the land, they had threatened to return and remove the roof of the house in which C lived. On both occasions the men were armed. The magistrate found that

in the circumstances there was “imminent danger of a breach of the peace” if P repeated this trespass. P appealed to the Supreme Court of Seychelles on numerous grounds and the Supreme Court allowed the appeal and set aside the order of the magistrate without, however, recording any note of the arguments which led to that judgment. Thereupon C appealed, disputing all the conclusions of the Supreme Court.

Held–

(i) the magistrate’s order served on the respondent P clearly disclosed a complaint that the respondent was likely to commit a breach of the peace and accordingly it was within the magistrate’s jurisdiction to make the order.

(ii) on the evidence accepted the respondent was beyond any reasonable doubt likely to do a wrongful act that might occasion a breach of the peace.

(iii) the question whether the respondent had or thought he had a title to the land was immaterial and the learned magistrate was right in holding that in the proceedings before him he had “no right to inquire into title at all.”

(iv) the conclusion of the Supreme Court that the proceedings before the magistrate were really a device for getting an order to keep the respondent off the land was quite untenable; for, whatever the respondent’s belief as to his title to the land might or might not be, he could never found thereon a right to commit a breach of the peace by way of forcible entry or otherwise.

(v) the respondent’s contention that the learned magistrate was wrong to issue the order while the ownership of the land was in dispute was entirely misconceived.

(vi) the respondent’s contention that ex facie the record did not show that the respondent was given a chance to cross-examine C was not valid as C was not called as a witness; and the Supreme Court was wrong in holding that the fact that the appellant was not cross-examined by the respondent was “alone enough reason for setting aside the order.”

(vii) so far as could be ascertained from the record, there was no ground upon which the decision of the Supreme Court could be upheld.

Appeal allowed.

Cases referred to:

(1) *Mohanlal Karamshi Shah v. Ambalal Chotabhai Patel and Others* (1954), 21 E.A.C.A. 236.

(2) *Larose v. Adela*, Bourke’s Digest of Cases, Seychelles (1870–1933), Case No. 8.

Judgment

Sir Ronald Sinclair V-P: read the following judgment of the court: This was a second appeal, pursuant to s. 41 (2) and s. 285 of the Criminal Procedure Code (Cap. 77) of Seychelles, from a decision of the Supreme Court of Seychelles allowing an appeal by the present respondent from an order of the Magistrate’s Court (Victoria District) whereby the present respondent was ordered, under s. 31 of the above-mentioned Ordinance, to execute a bond in the sum of one hundred rupees with one surety in a like sum to keep the peace for a year.

The original appellant on this second appeal was Virapin Lesperance Chetty who, on bringing this appeal, had joined Her Majesty the Queen as a respondent. At the hearing there was no appearance for the original appellant or for the then second respondent, *v.* G. Pillay; Mr. Charters appeared on behalf of the Attorney-General of Seychelles for the Crown. At the outset of the hearing Mr. Charters applied for an order that the Crown be struck out as a party, referring us to s. 285 of the Criminal Procedure Code and to the decision of this court in *Mohanlal Karamshi Shah v. Ambalal Chotabhai Patel and Others* (1) (1954), 21 E.A.C.A. 236, where it was held that even in a private prosecution the prosecutor is, in law, the Crown at the instance of the private prosecutor. It appeared to us that the joinder of the Crown as a respondent together with v. G. Pillay, the respondent in the magistrate's court and

the other respondent on this second appeal, was irregular, and that, if the Crown were to be a party (in name as well as in law) at all, it should be the appellant. Moreover, we thought that, in the absence of any appearance for the then appellant Chetty, it was desirable that the Crown should be on the record as a party and should be represented at the hearing. Accordingly, we asked Mr. Charters whether he consented to the Crown being substituted as the appellant before us. Mr. Charters consented. We therefore ordered that the substitution be recorded and the hearing proceeded on that footing. It should be added that the appeal record included a case in writing which had been prepared on behalf of the original appellant Chetty pursuant to r. 39 (1) and r. 48 of the Eastern African Court of Appeal Rules, 1954, by Mrs. Collet, barrister-at-law, who had appeared for Chetty in all the proceedings below. We took into account the arguments therein contained and derived considerable assistance from that document.

The relevant facts as found by the learned magistrate may be summarised as follows. Chetty had been in possession of a parcel of land at Beolière, Mahé, since 1924. (On the basis of that fact the magistrate held that Chetty was presumed to be the owner of the land until the contrary was proved.) On June 26, 1956, and again on June 30, 1956, the respondent invaded the land with several of his men – and, on the former occasion, also with two police constables whose presence he had procured in order to overawe Chetty with a show of official force. The respondent and his men broke and gathered fruit on the land, and on the latter occasion the respondent threatened to return and to do likewise and moreover to remove the roof from Chetty's house which stood on the land. Some of the respondent's men were armed on those occasions. The learned magistrate further found that in those circumstances there was "imminent danger of a breach of the peace" if the respondent repeated his trespass. "If this kind of thing continues," he said in his judgment (at p. 18 of the record),

> "conflict and bloodshed must inevitably follow, and I would be guilty of neglecting my duty as a magistrate if I refused to take steps to prevent such violence and breach of the Queen's peace."

Accordingly the learned magistrate made the order, under s. 31 of the Criminal Procedure Code, to which we have referred.

The respondent appealed to the Supreme Court of Seychelles on numerous grounds. In view of the form in which the judgment of that court was written it is necessary to set out the grounds of the appeal thereto. They were as follows:

"1. That the said order and/or judgment is wrong in law and in fact.

"2. That the order served on the appellant by your worship dated June 28, 1956, is null and void to all intents and purposes as it discloses no cause of action and/or complaint against appellant.

"3. That the said order is against the weight of evidence adduced in the case.

"4. That the said order should have been stayed and complainant informed that he should bring up his case before the Supreme Court of Seychelles, the magistrate retaining original jurisdiction.

"5. That his worship wrongly construed and wrongly applied the case of *Larose v. Adela* (2), Bourke's Digest of Cases, Seychelles (1870–1933), Case No. 8, which was quoted to him by appellant in the course of the proceedings before the court below.

"6. That his worship was wrong to attach no weight to exhibit A which clearly showed that a case for trespass and ejectment concerning the land, which was the subject matter of the complaint before the magistrate's court, had been filed before the Supreme Court against appellant by complainant and later withdrawn by this latter.

"7. That his worship was wrong to issue the order against appellant as it was clearly shown before the court below that the possession and ownership of the land was in dispute between the parties.

> "8. That his worship was wrong to entertain before the court below the arguments of respondent's counsel on 'action possessoire' as such 'action possessoire' could not be invoked before the magistrate's court.
>
> "9. That complainant was wrong to raise the point of 'action possessoire' when an 'action petitoire' had already been filed for the same land by complainant before the Supreme Court of Seychelles.
>
> "10. That ex facie the record it does not appear that appellant was given a chance to cross-examine complainant before the court below."

The operative part of the judgment of the learned Chief Justice of Seychelles was this:

> "There has been a long dispute between these two litigants over a portion of land at Beolière. The dispute has not been terminated. Indeed in an action filed by respondent against the appellant the respondent (plaintiff in the suit) after many hearings withdrew his claim. The proceedings before the magistrate were really a device for getting an order to keep appellant off the land he claims.
>
> "I do not think I need say more than to express the opinion that paras. 3 to 10 of the notice of appeal are borne out by the record of the magistrate. I agree with Mr. Bonnetard that the magistrate had no jurisdiction in a matter concerning 'action possessoire.' Further the magistrate misconstrued entirely the decision in *Larose v. Adela* (2). Moreover the fact that the respondent in the court below was not cross-examined by the appellant is alone enough reason for setting aside the order. The order of the magistrate of July 26, 1956, is therefore set aside and the respondent will pay the costs both here and below."

It is material to note that in the second paragraph of that judgment there appears an inadvertent misplacement of a phrase which vitally affects the sense: in the sentence commencing "Moreover the fact," the words "in the court below" should have immediately preceded the words "the respondent"; for it was Pillay who complained in the Supreme Court that "it did not appear that he was given a chance" to cross-examine Chetty in the magistrate's court (see ground 10 of his grounds of appeal).

Since in the record there was no judge's note of the arguments on the appeal to the Supreme Court we had only the written case submitted by counsel for Chetty from which to gather the reasons which led to the judgment, apart from the brief observations contained therein. On the second appeal to us the memorandum filed on behalf of the original appellant Chetty disputed the learned chief justice's conclusions as to all the points of law which had been raised by the respondent on his appeal to the Supreme Court. This memorandum was adopted by Mr. Charters for the Crown, when by our order the Crown became the titular appellant on the record.

In our view the judgment of the Supreme Court was unsupportable on any of the points expressly or inferentially relied on therein. We shall deal briefly with the legal issues in the order in which they were raised by the respondent's notice of appeal to that court.

It is plain that the learned magistrate's order served on the respondent pursuant to s. 31 of the Ordinance clearly disclosed a complaint that the respondent was "likely to commit a breach of the peace," and that accordingly it was within the magistrate's jurisdiction to make the order. Moreover the order was not "against the weight of evidence adduced in the case," but was founded on ample evidence which the magistrate was entitled to and did accept as the truth.

There was no good reason why

> "the said order should have been stayed and complainant informed that he should bring up his case before the Supreme Court."

On the contrary, the learned magistrate exercised, as he was bound to do, the jurisdiction conferred upon him by s. 31 in circumstances which clearly brought the case within the mischief of that section.

Evidence was given and was accepted to the effect that the respondent had expressed the intention to act in breach of the peace and had showed by his actions already carried out on two occasions that his threat could not be disregarded as vain. He had probably already committed, and was probably

threatening again to commit with even more violence, the offence of forcible entry contrary to s. 85 of the Penal Code (Cap. 93). On the evidence so accepted the respondent was beyond any reasonable doubt

> "likely . . . to do (*a*) wrongful act that (might) probably occasion a breach of the peace."

The respondent's reliance on *Larose v. Adela* (2) was wholly misconceived. The judgment on first appeal does not state any reason for the learned chief justice's conclusion that "the magistrate misconstrued entirely the decision" in that case. In our opinion that stricture was not justified by anything in the record. *Larose v. Adela* (2) in truth was of no avail to the respondent, as the learned magistrate held; for it was concerned with a matter very different from that with which the courts were called upon to deal in the present instance. There the defendant was prosecuted for trespass contrary to s. 378 of Ordinance No. 6 of 1838. Having been convicted and fined he appealed. On appeal it was held that the trial magistrate had been right in declining, for lack of jurisdiction, to come to a decision on the respective merits of the complainant's and the defendant's titles to the land in question, but wrong in declining to examine them for the sole purpose of establishing whether the defendant had a genuine defence based on a colourable title. In the instant case the learned magistrate was not concerned with a prosecution either for trespass or for any other offence, but solely with the timeous proceedings brought by – or, strictly speaking, at the instance of – Chetty under s. 31 in which no question of a possible title vested in the respondent arose, but only the question as to whether the latter, whatever title he might or might not have, was proved to be likely to commit a breach of the peace. The question as to whether or not the respondent had, or thought he had, a title good, bad or indifferent was immaterial; if another entry on the land vi et armis with the object of taking the fruit or removing the roof of the house would "probably occasion a breach of the peace," that was enough to justify an order under s. 31. The learned magistrate was right in holding that in the proceedings then before him he had "no right to inquire into title at all" (see p. 4 of the record).

The next point taken by the respondent was founded on exhibit A which consisted of a certified extract from the record of a suit in the Supreme Court numbered "Civil Suit No. 79 of 1952." The exhibit was put in by the respondent. In that suit Chetty and another (unspecified) claimed ejectment and damages against the respondent and others. The respondent testified (before the learned magistrate in the present proceedings) that the suit had related to the land which was the scene of the incidents with which this appeal was concerned. The exhibit showed that on June 22, 1956, namely four days before the earlier of those incidents, Chetty had withdrawn the suit. Neither the exhibit nor any witness in the present proceedings disclosed anything further about that suit. But the two material points which were established – first, that it was Chetty, not the respondent, who had made the claim, and secondly that the claim must have been founded on matters alleged to have taken place before either of the events out of which the present proceedings arose – suffice to show that the history of that previous suit could not possibly assist the respondent in the present proceedings. We thought that the conclusion to which the learned chief justice apparently came as a result of his observations on that previous suit, namely that

> "the proceedings before the magistrate were really a device for getting an order to keep appellant" (the present respondent) "off the land he claims,"

was quite untenable; for, whatever the respondent's belief as to his title to the land might or might not be, he could never found thereon a right to commit a breach of the peace by way of forcible entry or otherwise. The respondent's contention that the learned magistrate

> "was wrong to issue the order . . . as it was clearly shown . . . that the possession and ownership of the land was in dispute between the parties"

was entirely misconceived.

Similarly, the respondent's allegation that the learned magistrate had wrongly entertained the arguments of counsel for Chetty on "action possessoire," and his further

allegation as to Chetty having filed an "action petitoire" in the Supreme Court were worthless. Suffice it to say that the learned magistrate expressly and very rightly declined to consider either of such forms of claim, both of which were irrelevant to the only issue before him.

Finally, the respondent contended that

> "ex facie the record it does not appear that (he) was given a chance to cross-examine (Chetty)."

In fact Chetty was not called as a witness; his sworn information (in writing) was rightly accepted by the learned magistrate as material upon which he should proceed under s. 31, and there was no necessity for Chetty to testify thereafter, since ample evidence was forthcoming from other persons.

In our view the learned chief justice was, with respect, wrong in holding that the fact that Chetty "was not cross-examined" by the respondent was "alone enough reason for setting aside the order." It was, in our opinion, not a matter of which the respondent could complain at all.

Accordingly there was no ground, so far as we could ascertain from the record, upon which the decision of the Supreme Court could be upheld. We accordingly allowed the appeal, set aside the judgment and order of the Supreme Court, and restored the order of the magistrate's court.

Appeal allowed.

For the Attorney-General, Seychelles:
DD Charters (Crown Counsel, Kenya)

For the appellant:
The Attorney-General, Kenya

The respondent did not appear and was not represented.

Mohamed Yusuf Arap Abdulla Arap v R
[1957] 1 EA 551 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	4 July 1957
Case Number:	77/1957
Before:	Sir Newnham Worley P, Sir Ronald Sinclair V-P and Bacon JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Somaliland Protectorate – Greene, J

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[1] Criminal law – Accused unrepresented – Ingredients of offence not explained to accused – Plea of guilty – Whether accused understood offence charged – Indian Penal Code, s. 323 *and s.* 325

Editor's Summary

The appellant was charged before the High Court of Somaliland Protectorate on charges of attempted murder and of voluntarily causing hurt by a dangerous weapon. When arraigned, the prosecutor informed the court that he did not propose to proceed with the charge of voluntarily causing hurt by a dangerous weapon but sought and obtained leave to file a charge against the appellant of voluntarily causing grievous hurt. The appellant pleaded not guilty to attempted murder but pleaded guilty to the new charge, whereupon the prosecutor stated that, having examined the stick which caused the injury, he was satisfied that it was not a weapon likely to cause death and he offered no evidence on the charge of attempted murder, whereupon the accused was discharged on that count. But on his own plea of guilty to the charge of voluntarily causing grievous hurt, he was convicted and sentenced to four years' rigorous imprisonment. The appellant sought leave to appeal against his sentence and on a review of the record of the proceedings in the High Court, the attention of the appellate court was drawn to the fact that the evidence did not disclose that the injury

inflicted amounted to grievous hurt within s. 320 of the Penal Code, more especially since the blow struck by the appellant merely caused a scalp wound, requiring two stitches.

Held–

(i) where a court accepts a plea of guilty from an accused, who is not legally represented, all the ingredients of the offence charged should be carefully explained so that these ingredients are fully understood by the accused.

(ii) the appellant had pleaded guilty to voluntarily causing grievous hurt under a misapprehension as to the nature of the offence charged, and the proper charge to which the appellant should have been asked to plead was a charge of voluntarily causing simple hurt under s. 323 of the Penal Code.

Conviction under s. 325 set aside and conviction under s. 323 substituted, with sentence of one year's rigorous imprisonment.

No cases referred to in judgment

July 4. The following judgment was read by direction of the court:

Judgment

In this matter we granted the appellant leave to appeal against a sentence of four years' rigorous imprisonment passed on him by the High Court of Somaliland on his pleading guilty to a charge of voluntarily causing grievous hurt contrary to s. 325 of the Indian Penal Code. After perusing the record of the proceedings in the High Court and the committal proceedings in the magistrate's court we set aside the conviction under s. 325, substituted a conviction for voluntarily causing hurt contrary to s. 323 of the Penal Code and imposed a sentence of rigorous imprisonment for one year. We now give our reasons for so doing.

The facts are not in dispute. In 1954 the appellant came into collision with a motor-bicycle which was being ridden by a Mr. Wharton and suffered a fracture and other injuries which kept him in hospital for six months. He considered, and apparently still does consider, that he was entitled to compensation but has never taken any action to recover damages. Mr. Wharton has always denied liability. On March 5 this year the appellant, having the previous day again applied unsuccessfully to Mr. Wharton for compensation, walked into the latter's office in Berbera and hit him on the head with a stick. In consequence of this the appellant was committed for trial on charges of attempted murder contrary to s. 307 and of voluntarily causing hurt by a dangerous weapon contrary to s. 324 of the Penal Code.

When he was arraigned before the High Court the prosecutor informed the court that he did not propose to proceed with the charge under s. 324 but sought and obtained leave to file a charge under s. 325. The appellant pleaded not guilty to the charge of attempted murder but did plead guilty to the charge under s. 325. The prosecutor then stated that having examined the stick which caused the injury he was satisfied it was not a weapon which would be likely to cause death and offered no evidence on the charge of attempted murder. The accused was then discharged on that charge but convicted on the charge of voluntarily causing hurt on his own plea and, as we have said, sentenced to four years' rigorous imprisonment.

This court has on many occasions stated that before a court accepts a plea of guilty from an accused

who is not legally represented it should carefully explain all the ingredients of the offence charged and ensure that they are fully understood by the accused. We cannot think that this was done in the present case for there was no medical evidence before the learned judge other than that recorded on the depositions and that evidence does not disclose that the injury inflicted on Mr. Wharton amounted to grievous hurt. “Grievous hurt” is defined under s. 320 of the Penal Code and of the eight heads specified in that section the injury inflicted in the instant case could only have come under the sixth or the eighth head. In fact the one blow struck by the appellant merely caused a scalp wound which required two stitches. There was no fracture and the evidence of the medical officer, Berbera, was that Mr. Wharton

would be under treatment for about one week. There was nothing to suggest that there would be any permanent disfiguration of the head or that the hurt inflicted endangered life or caused Mr. Wharton to be during the space of twenty days in severe bodily pain or unable to follow his ordinary pursuits. It seems quite clear that this was recognised by the committing magistrate when he decided to prefer the charge under s. 324. It seemed equally clear that the nature of the hurt inflicted was overlooked by the prosecutor and by the learned judge when the charge under s. 325 was substituted.

In the circumstances therefore we were satisfied that the appellant pleaded guilty to voluntarily causing grievous hurt under a misapprehension as to the nature of the offence charged against him and that since the prosecutor considered that the stick used (which we have not seen) was not an instrument likely to cause death, the proper charge to which the appellant should have been asked to plead was a charge of voluntarily causing simple hurt.

Conviction under s. 325 *set aside and conviction under s.* 323 *substituted, with sentence of one year's rigorous imprisonment.*

The appellant did not appear and was not represented.

For the respondent:
DD Charters (Crown Counsel, Kenya)
The Attorney-General, Kenya

Kaplotwa s/o Tarino v R
[1957] 1 EA 553 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	19 December 1957
Case Number:	171/1957
Before:	Sir Kenneth O'Connor P, Briggs Ag V-P and Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Rodwell, Ag. J

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[1] Criminal law – Insanity – Fitness of accused to plead – Finding that accused fit to plead not justified by medical evidence – Criminal Procedure Code, s. 162 (*K.*).

Editor's Summary

The appellant was charged with murder before the Supreme Court of Kenya. When arraigned, the question of the appellant's fitness to plead was considered and medical evidence was called showing that, due to senility and hardening of the arteries of the brain, the appellant at times appeared to be wanting,

but would be capable of understanding the nature of the charge in his more lucid moments. The trial judge found that the appellant was fit to plead and subsequently, in his judgment, held that a cautioned statement made by the appellant some five months before the trial confirmed that the finding that the accused was fit to plead had been correct. The trial judge convicted the accused of murder and sentenced him to death. On appeal, the question of the appellant's fitness to plead was considered.

Held–

(i) since the cautioned statement relied on by the trial judge was made more than five months before the trial, it afforded little evidence of the appellant's mental condition at the date of the trial.

(ii) the point for determination for the trial judge was not whether the appellant was sufficiently sane to appreciate the charge, but whether under s. 162 of the Criminal Procedure Code he was at the trial "of unsound mind and consequently incapable of making his defence."

(iii) there was nothing in the evidence to indicate that the appellant, at the time of his trial, was enjoying one of his more lucid moments and, since the trial judge did not consider whether he was capable of making his defence, the conviction must be set aside.

Appeal allowed. Order for a new trial.

Cases referred to:

(1) *R. v. Sharp*, 41 Cr. App. R. 197.

(2) *Cheung Shing v. R.*, E.A.C.A. Criminal Appeal No. 472 of 1955 (unreported).

Judgment

Forbes JA: read the following judgment of the court: The appellant was convicted by the Supreme Court of Kenya for murder and was sentenced to death. We set aside the conviction and sentence, but ordered that the appellant be put up for trial again, and that in the meantime he be remanded in custody to Mathari Mental Hospital for observation. We now give our reasons.

When the appellant was arraigned the question of his fitness to plead was considered, and the medical officer in charge of the African hospital at Kitale was called to give evidence on the point. The material part of his evidence is as follows:

> "I examined the accused, Kaplotwa s/o Tarino. I formed the opinion that due to senility and the hardening of arteries of brain, at times his brain appeared wanting. I think that he is capable of understanding the nature of the charge in his more lucid moments."

That is the whole of the evidence called to establish the appellant's fitness to plead. Upon it the learned trial judge said:

> "I feel that accused is fit to plead and order that the information be read and explained to accused in Suk . . ."

And in his judgment the learned judge added:

> "I heard the medical evidence as to the accused's ability to plead and was satisfied that although the accused might be senile he was sufficiently sane to appreciate the charge against him. After reading the accused's cautioned statement – exhibit 3 – I am satisfied that my finding was correct."

With the greatest respect to the learned trial judge this finding can hardly be said to be justified by the medical evidence. The cautioned statement was made more than five months before the trial, by a man said to have lucid moments, and affords little evidence of his mental condition at the date of the trial. And, in any case, the point for determination by the learned trial judge was not whether the appellant was sufficiently sane to appreciate the charge against him, but whether he was "of unsound mind and consequently incapable of making his defence" (Criminal Procedure Code, s. 162). There are occasions when a court may proceed with a trial if the accused is sane, although he cannot understand the proceedings (Criminal Procedure Code, s. 167), but here the medical evidence clearly suggested unsoundness of mind and it was the duty of the court to inquire into it, and decide whether he was capable of making his defence.

In *R. v. Sharp* (1), 41 Cr. App. R. 197, Salmon, J., directed the jury that while a prisoner is normally presumed to be fit to plead, if the court has reason, in any particular case, to doubt his fitness, it is the

duty of the court to inquire into the matter and the onus is on the Crown to begin and prove fitness. In our view this is the law applicable to proceedings under s. 162 of the Criminal Procedure Code, and it is for the Crown under that section to prove fitness to plead if a question arises as to the sanity of an accused person. The Crown did, indeed, in the instant case call the medical officer, but the medical officer's evidence is only to the effect that he thought that the appellant was in his more lucid moments capable of understanding the charge. There is nothing whatever to indicate that the appellant was enjoying one of his more lucid moments at the time of his trial. Neither apparently was the question whether

he was capable of making his defence, as distinct from his capacity to understand the proceedings, considered by the medical officer. Certainly he gave no evidence on the point. In *R. v. Sharp* (1) *supra*, Salmon, J., further directed the jury that if they found the defendant unable to communicate with his legal advisers, he was unfit to plead. (See also *Cheung Shing v. R.* (2), E.A.C.A. Criminal Appeal No. 472 of 1955 (unreported).) It is true that in the instant case the appellant's advocate did not assert that the appellant had been unable to communicate with him, but nevertheless, since there was clearly reason to doubt his fitness on the ground of unsoundness of mind, it was the duty of the court to consider not only whether he was capable of understanding the charge, but also whether he was capable of making his defence, in the sense of being able to provide to a reasonable extent for the instruction of his advocate and the conduct of his defence. This the learned judge did not do. In the circumstances we considered that the conviction and sentence must be set aside and a new trial ordered at which the question of the appellant's fitness to plead could be properly considered.

We would also mention that there appeared to be a further unsatisfactory feature of the trial, in that the learned trial judge omitted to direct the assessors or himself on the issue of provocation although that issue arose on the evidence.

Appeal allowed. Order for a new trial.

The appellant in person.

For the respondent:
JP Webber (Crown Counsel, Kenya)
The Attorney-General, Kenya

Robert Confait v R
[1957] 1 EA 555 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	9 May 1957
Case Number:	249/1956
Before:	Sir Ronald Sinclair V-P, Briggs and Bacon JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Seychelles – Lyon, C.J

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[1] Criminal law – Accused poor person – Refusal on application made to grant legal aid – Whether such refusal affects validity of trial – Legal Aid (*Criminal Procedure*) *Ordinance* (*Cap.* 89), *s.* 2, *and Criminal Procedure Code* (*Cap.* 77), *s.* 304 (*S.*).

Editor's Summary

The appellant, a youth of sixteen years, had been convicted of an attempt to commit arson contrary to s. 319 of the Penal Code and sentenced to three years' imprisonment with hard labour by the Supreme Court of Seychelles. Throughout the proceedings at first instance he was unrepresented and his conviction was essentially founded upon admissions made by him in the witness-box under cross-examination. The appellant appealed against his conviction and sentence on several grounds submitted in writing but the appellate court referred to only one ground as it was conclusively in his favour. This ground alleged that he had "made an application for legal aid which was refused by the court" and that as he "was refused bail and legal aid, it was impossible for him to prepare his defence." The record contained no reference to any application for legal aid having been made. The appellant swore an affidavit stating that he had applied to the chief justice in chambers for legal aid, that the chief justice asked him if he had any money, that he replied that he had none and his application was then refused. He also swore that this was done in the presence of the registrar and the prosecuting police officer. Affidavits filed by the registrar and the prosecuting police officer stated that they were present at all the sittings of the

Supreme Court during the trial of the appellant and that no verbal application was made to the chief justice for legal aid in the preparation and conduct of his defence, but they failed to deal with the question of an application to the chief justice in chambers.

Held–

(i) as the appellant's sworn allegation that he made an application for legal aid to the chief justice in chambers stood uncontradicted, it must be taken as proved.

(ii) an application for legal aid made, as this one was, without legal advice or representation calls for the most studious avoidance of any arbitrary decision; since the chief justice appeared to have confined himself to (*a*) asking the one vital question of whether the appellant had money or not, (*b*) declining to accept the appellant's answer and (*c*) dismissing the application out of hand, the court was unable to treat such dismissal as a judicial decision.

(iii) the appellant must be treated as having been obliged, without justification in law, to defend himself unaided, and therefore there was no effective trial. *Galos Hired and Another v. R.*, [1944] A.C. 149, applied and *R. v. Kingston*, 32 Cr. App. R. 183, considered.

Per Curiam – ". . . that the purported trial was a nullity is a conclusive decision per se. But we desire to add that even if the question on this appeal had been res Integra and we had taken the view that the trial by the Supreme Court of Seychelles was not in law a nullity we should still have refused to support the decision by means of s. 304, since the wrongful refusal of legal aid 'in fact occasioned a failure of justice,' for the appellant was deprived of the skilled assistance which the law deems necessary for his proper defence."

Appeal allowed. Conviction and sentence set aside.

Cases referred to:

(1) *R. v. Kingston*, 32 Cr. App. R. 183.

(2) *Galos Hired and Another v. R.*, [1944] A.C. 149; [1944] 2 All E.R. 50.

Judgment

Bacon JA: read the following judgment of the court. In September 1956, the appellant was convicted by the Supreme Court of Seychelles of an attempt to commit arson contrary to s. 319 of the Penal Code and sentenced to three years' imprisonment with hard labour. On the hearing of this appeal against conviction and sentence he has been absent and unrepresented throughout but has presented his case in writing, as he was entitled to do, under r. 39 of the Eastern African Court of Appeal Rules, 1954.

At the time of his trial the appellant was, according to the opening words of the judgment, nearly seventeen years of age. Throughout the proceedings at first instance he was also unrepresented. The particular offence with which the appellant was charged was an attempt to set fire to a petrol store at Victoria, Mahe, by means of a home-made bomb. He was charged and tried alone, but the record shows that if he committed the offence he was by no means the instigator or the sole offender. The appellant's conviction was essentially founded upon admissions made by him in the witness-box under cross-examination, in the course of which he admitted to having carried the bomb to the site and to

having kept watch for his alleged accomplices.

The memorandum of appeal and the written case contain a number of grounds of appeal. In the circumstances which have since arisen we deem it proper to refer to one ground alone, which in our view is conclusive in the appellant's favour. It is set out in the written case as follows:

> "Ground 2. The appellant made an application for legal aid which was refused by the court. As the appellant was refused bail and legal aid, it was impossible for him to prepare his defence."

Section 2 of the Legal Aid (Criminal Proceedings) Ordinance (Cap. 89, Seychelles) contains the relevant provisions:

> "2.(1) Any person charged with an offence before the Supreme Court may apply as in this section provided for free legal aid in the preparation and conduct of his defence, and shall be entitled to have a barrister or attorney assigned to him for that purpose, if a certificate is granted in respect of that person under this section.
>
> "(2) A certificate shall be granted under this section if, upon application being made in that behalf, the chief justice is satisfied that the person in respect of whom it is to be granted has insufficient means to enable him to obtain legal aid for the preparation and conduct of his defence at his trial, but not otherwise."

The appeal was first called on January 3. Neither the appeal record nor the original file furnished by the trial court contained any reference to any application for legal aid. The learned chief justice's note of the trial contained only the two words "Butler accused" (and, at a later stage, the words "Attorney-General – accused") by way of reference to the appearance on either side. Accordingly we informed Crown counsel that we wished to hear him on the matter. On his stating that he was without detailed instructions the hearing was adjourned sine die.

The first adjourned hearing was on February 27, the long interval being accounted for by the delays in postal communication with Seychelles. Crown counsel then before us had no fresh material to submit. We were given to understand that a request for evidence on the point in issue had been sent to the Attorney-General for Seychelles, but Crown counsel was at that moment unable to tell us in what form the report of the earlier proceedings before us had gone to the attorney-general. We were, however, informed of the latter's reply, namely a letter dated January 15 in which the Attorney-General for Seychelles had written as follows:

> "On the point of whether an application was made for legal aid it is difficult for me to obtain an affidavit from somebody present at the trial on the prosecution side. Mr. Suave who took the case was not present all through the trial. The police sergeant who handled the case at the outset and was present all through the case can say that when he was present no application was made."

In those circumstances Crown counsel applied for a further adjournment to enable evidence to be obtained. On his undertaking to act with all possible speed we again adjourned the hearing sine die, having nothing before us upon which any satisfactory decision could be founded.

The next adjourned hearing took place on March 28. By then two affidavits had been filed. The first, sworn by the registrar of the Supreme Court of Seychelles on March 1, was first to the effect that the appellant had never made an application in writing for legal aid and had never orally applied to the deponent. The affidavit ended thus:

> "3. I was present at all the sittings of the Supreme Court when the aforementioned case of Robert Confait was being heard or dealt with. I do not remember and therefore cannot say whether verbal application was made to the chief justice for legal aid in the preparation and conduct of his defence in the said case.
>
> "4. No such verbal application for legal aid was ever recorded by the chief justice or by me."

This affidavit was notably silent on the question as to whether an application had been made to the chief justice in chambers, and was of course of no assistance on the question as to whether the appellant had applied at one of the sittings of the Supreme Court. In the circumstances the affidavit proved nothing.

The other affidavit was sworn on March 2 by one Georges Butler, described therein as:

> “a sergeant of the Seychelles Police Force and public prosecutor appointed for the Supreme Court.”

Sergeant Butler deposed as follows:

> "1. I was present during all the sittings of the Supreme Court of Seychelles when the case of Robert Confait (Supreme Court Case No. 78 of 1956) was being heard or dealt with.
>
> "2. At any such sittings Robert Confait or anyone else on his behalf never made any verbal application to the chief justice for legal aid in the preparation and conduct of his defence in the aforementioned case."

This carried the matter further, but still left at large the question of an application to the chief justice in chambers.

At the hearing on March 28 we were informed by Crown counsel that those affidavits had been served on the appellant but that his advocate was then away from Seychelles. This was evidently a reference to Mr. J.E. Thomas, counsel, who had signed the memorandum of appeal and the written case. It was submitted that, as there is only one mail boat per month and no air mail from Seychelles, more time should be given to the appellant to reply. We thought that that was the proper course in all the circumstances. We adjourned the hearing to April 29 and directed that the registrar in Seychelles should be informed by cable that the matter would be disposed of on that date and that the appellant and his advocate were to be advised of that fact.

The final hearing took place accordingly. We now had before us an affidavit sworn by the appellant on April 8 in the following terms:

> "I cannot remember exactly when, but after I was arrested and kept in custody I was brought before the chief justice in chambers and I asked him if I could be allowed legal aid. There were present Sergeant Butler, Mr. Bossy the registrar and the chief justice himself. The chief justice asked me if I had any money. I said no and then the chief justice informed me that he could not grant me free legal aid. As a result I was kept in custody and was unable to communicate with anybody since the date of my arrest and until the date of my conviction and was thus unable to prepare my defence or to receive any advice."

After argument by Crown counsel we reserved our judgment.

The first question is what are to be taken as the proved facts. An important feature of the evidence as it stands is that, although the appellant has deposed that his application was made to the chief justice in chambers in the presence of the registrar and of Sergeant Butler – and, incidentally, swore his affidavit before the registrar himself – no further affidavit dealing with that precise allegation has been tendered. In such a state of affairs we think that we must take the allegation as proved; for there is no evidence whatever to contradict it. It should be added that we were unwilling to grant any further adjournment; yet more delay, with the appellant already in custody for seven months since the trial, would in our view have been manifestly unjust in the events which had happened. We therefore proceed upon the footing that the appellant duly applied for legal aid pursuant to the Legal Aid (Criminal Proceedings) Ordinance.

The next question is whether his application was wrongly refused. In the absence of anything to contradict the appellant's affidavit we can only answer this question on the footing that the sole material available to the learned chief justice was the appellant's statement that he had no money, and that the latter was neither invited to produce nor warned that it was for him to produce evidence to satisfy the chief justice, assuming that he was not already satisfied. Any application under s. 2 of the Ordinance which is made, as this application was, without legal advice or representation calls for the most studious avoidance of an arbitrary refusal to grant it; if there was any doubt as to the truth of the appellant's answer to the chief justice's question the appellant should have been given a proper opportunity of

dispelling it. As it was, the chief justice appears to have confined himself to asking the one vital question and then, refusing to accept the appellant's answer, to have dismissed the application out of hand. We are unable to treat such a dismissal as a judicial decision arrived at in accordance with the law. We cannot, of course, say that the chief justice *was*

"satisfied" within the meaning of s. 2; but we can and do say that the appellant appears to have been deprived in limine of any chance to establish his right thereunder. We add that, judging from the unfortunate circumstances of his life as disclosed in the record, it seems most probable that he could have done so. For the purpose of this appeal we must therefore treat the appellant as having been obliged, without justification in law, to defend himself unaided.

Crown counsel first argued that the wrongful refusal of legal aid in this case was not such an illegality as went to the root of the proceedings but only an irregularity which had not, in the words of the curative section (s. 304) of the Criminal Procedure Code (Cap. 77) (Seychelles), "occasioned a failure of justice." However, there came to light two authorities with which he agreed that he was faced.

We refer first to the judgment of the Court of Criminal Appeal, delivered by Humphreys, J., in *R. v. Kingston* (1), 32 Cr. App. R. 183. In that case counsel had been briefed for the defence at the trial but, owing to a misunderstanding, was not present in court. The trial was before an assistant recorder and a jury. The assistant recorder declined to postpone the proceedings or to afford to the accused facilities for her defence by other counsel. In the result she was tried as an unrepresented person. Although her rights were clearly explained to her by the assistant recorder she did not cross-examine, testify, make a statement from the dock or call any witness. It appears from the judgment (at p. 185) that the sole complaint on appeal was

> "that the appellant was, through no fault of her own, . . . deprived of the services of her counsel, her family . . . having briefed him."

Nothing turned on any complexity or any particular difficulty as regards the conduct of the defence: the appellate court said (also at p. 185) that "the case was a very simple one." Moreover the court said (at p. 187) that "nothing could have been fairer or more appropriate" than the manner in which the assistant recorder explained to the appellant her rights which arose at the conclusion of the case for the Crown. It was, however, held on appeal that the course adopted by the trial court

> "was tantamount to depriving the appellant of the right which she had of being defended by counsel"

– though not on the ground that her own counsel who had been briefed had failed to appear, but solely because of the assistant recorder's refusal to invite other counsel then present to take up the brief. "The result," said the appellate court (at p. 189), "is that the jury have never had any opportunity of knowing what was the defence . . ." The conviction was accordingly quashed.

That case of course differed from the instant one inasmuch as here the appellant, though an unenlightened youth of sixteen years, purported to conduct his defence as best he could. We say nothing as to the merits of his case, or (assuming for this purpose that he committed the offence) as to his relative culpability and other matters which might well affect the question of sentence. Suffice it to record the obvious comment that his defence throughout would, if in the hands of an advocate, doubtless have been conducted with greater advantage to him.

The second relevant authority is the decision of the Privy Council in *Galos Hired and Another v. R.* (2), [1944] A.C. 149. Under the Poor Persons Defence Ordinance, 1939, of the Somaliland Protectorate, an advocate was assigned to the appellants for the preparation and conduct of their first appeal to the Protectorate Court of Appeal. Due to circumstances beyond the advocate's control he was unable to attend the hearing, the appellants conducted their case in person and their appeal was dismissed. On second appeal their lordships held that the first appeal had not been effectively heard and must be restored for hearing in circumstances which would enable an advocate to conduct it. As in the instant

case, the relevant provisions of the Ordinance were mandatory in the event of a specified condition being fulfilled. The condition having been fulfilled in *Galos Hired's* case (2), it was submitted that the first appellate hearing was illegal because there was a denial of the accepted principles of justice and a contravention of the Ordinance. Allowing the appeal, their lordships gave their reason in the following passage (at p. 155):

> "Just as a conviction following a trial cannot stand if there has been a refusal to hear the counsel for the accused, so, it seems to their lordships, an appeal cannot stand where there has been a refusal to adjourn an appeal in which the appellant was entitled as of right to be heard by a counsel assigned to him by the Government who was unable, without any default on his part to reach the court in time to conduct the appeal. The result is that the appeal to the Protectorate Court of Appeal, which appears to have been properly lodged, has not been effectively heard."

Treating, as we have said we must treat, the appellant as having been unlawfully deprived of the services of an advocate before and at his trial, we think that there is no distinction in principle between *Galos Hired's* case (2) and the instant one. The factual difference which we have mentioned as between *Kingston's* case (1) and the instant one does not obtain as between the latter and *Galos Hired's* case (2). The decision in *Galos Hired's* case (2) to the effect that the proceedings in question were a nullity despite the fact that the appellants there presented their case in person is in our view exactly applicable to the case before us and we therefore hold that it disposes of this appeal. There was no effective trial, and accordingly the purported conviction and sentence are quashed.

It follows that we are not called upon to consider the application of s. 304 of the Criminal Procedure Code to this case: that the purported trial was a nullity is a conclusive decision per se. But we desire to add that even if the question on this appeal had been res Integra and we had taken the view that the trial by the Supreme Court of Seychelles was not in law a nullity we should still have refused to support the decision by means of s. 304, since the wrongful refusal of legal aid "in fact occasioned a failure of justice," for the appellant was deprived of the skilled assistance which the law deems necessary for his proper defence.

The appellant is to be set at liberty forthwith.

Appeal allowed. Conviction and sentence set aside.

The appellant did not appear and was not represented.

For the respondent:
KC Brookes (Crown Counsel, Kenya)
The Attorney-General, Kenya

GR Hunter v R
[1957] 1 EA 561 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	30 December 1957
Case Number:	376/1957
Before:	Sir Ronald Sinclair CJ and Rudd J
Sourced by:	LawAfrica

[1] Street traffic – Dangerous driving – Notice of intended prosecution – Whether letter addressed to registered owner of motor vehicle inquiring who the driver was at a particular time and alleging dangerous driving constitutes notice – Traffic Ordinance, 1953, *s.* 45 (1) *and s.* 48 (*c*) (*K.*).

Editor's Summary

This appeal was from a conviction by the special magistrate at Tigoni of dangerous driving contrary to s. 45 (1) of the Traffic Ordinance, 1953. The appellant was on May 26, 1957, travelling along the road known as "A" route in the Limuru area in a motor car of which he was the registered owner. No accident or actual collision occurred. The appellant was not warned at the time that the offence was committed that the question of prosecuting him would be considered, nor was he served within fourteen days of the commission of the offence with a summons for the offence. By s. 48 (*c*) of the Ordinance, a prosecution is barred unless within fourteen days of the commission of the offence a notice of the intended prosecution specifying the nature of the alleged offence and the time and place where it is alleged to have been committed is served on or sent by registered post to the person intended to be prosecuted. On May 28, 1957, the chief inspector of police, Tigoni, sent by registered post a letter to the appellant in the following terms:

> "Re KAH 172. As the registered owner of the above car I hereby require you under s. 107 of the Traffic Ordinance, 1953, to provide me with the name and address of the person driving it on Sunday, May 26, at about 5.15 p.m. At this time the vehicle was on 'A' route proceeding towards Nairobi and it is alleged that it was driven in a dangerous manner."

The appellant replied on June 5, 1957, intimating that he was driving the said car at that particular time and place, stating his account of the incident in question and denying having driven dangerously. The appeal was confined to one point, namely that the appellant had not received proper notice of the intended prosecution in accordance with s. 48 (*c*) of the Ordinance within the fourteen days prescribed by that section.

Held–

(i) the letter from the police inspector dated May 28, 1957, was a sufficient notice of the intended prosecution as it specified the nature of the alleged offence and the time and place where it was alleged to have been committed;

(ii) when the registered owner of a motor vehicle is informed in writing by a responsible police officer that it is alleged that the motor vehicle was driven dangerously at a certain time and place, there is clear intimation that the police are contemplating a prosecution.

Dictum of Branson, J., in *Milner v. Allen*, [1933] 1 K.B. 698 applied.

Appeal dismissed.

Cases referred to:

(1) *Milner v. Allen*, [1933] 1 K.B. 698; [1933] All E.R. Rep. 734.

(2) *Venn v. Morgan*, [1949] 2 All E.R. 562.

(3) *Pope v. Clarke*, [1953] 2 All E.R. 704; 37 Cr. App. R. 141.

Judgment

Sir Ronald Sinclair CJ: read the following judgment of the court: The appellant appeals from a conviction of dangerous driving contrary

to s. 45 (1) of the Traffic Ordinance, 1953. The conviction was attacked only on the ground that the appellant had not received proper notice of the intended prosecution in accordance with s. 48 (*c*) of the Ordinance within the fourteen days prescribed by that section.

The incidents which gave rise to the prosecution occurred on May 26, 1957, on "A" route in the Limuru area when the appellant was driving a saloon motor car No. KAH 172 of which he was the registered owner. No accident or actual collision occurred. The appellant was not warned at the time that the offence was committed that the question of prosecuting him would be considered, nor was he served within fourteen days of the commission of the offence with a summons for the offence. Consequently, the prosecution would have been barred under s. 48 of the Traffic Ordinance, unless within fourteen days of the commission of the offence

> "a notice of the intended prosecution specifying the nature of the alleged offence and the time and place where it is alleged to have been committed was served on or sent by registered post to him."

On May 28, 1957, the chief inspector of police, Tigoni police station, sent by registered post addressed to the appellant a letter in the following terms:

> "Re KAH 172. As the registered owner of the above car I hereby require you under s. 107 of the Traffic Ordinance, 1953, to provide me with the name and address of the person driving it on Sunday, May 26, at about 5.15 p.m. At this time the vehicle was on 'A' route proceeding towards Nairobi and it is alleged that it was driven in a dangerous manner."

The appellant replied on June 5 to the effect that he was the person driving the said car at the time and place stated in the letter of May 28, stating his account of the incident in question in the prosecution and submitting that he had not driven dangerously.

The question upon which the result of the appeal depends is as to whether or not the registered letter of May 28 was a sufficient notice of an intended prosecution to comply with the requirements of s. 48 (*c*) of the Traffic Ordinance, 1953. That section corresponds with s. 21 of the Road Traffic Act in England. The English section was considered in *Milner v. Allen* (1), [1933] 1 K.B. 698, in which Branson, J., said at p. 703:

> ". . . A notice of the intended prosecution, . . . means no more than a notice that a prosecution was in contemplation. There is no reason for applying to the word 'intended' the meaning that the intention should have been irrevocably arrived at before the notice is sent out."

That was a case in which notice was given of an intention to prosecute for driving in a manner dangerous to the public and a summons was later issued for the lesser offence of driving without due care and attention. *Venn v. Morgan* (2), [1949] 2 All E.R. 562, was a case in England in which the notice that was served stated:

> ". . . it is intended to institute proceedings against you for an offence against s. 12 of the Road Traffic Act, 1930, namely that you did drive a motor car on the Cambridge-Linton Road, Babraham, at approximately 4.25 p.m. on Saturday, January 29, 1949."

The words of s. 12 describing the offences thereunder, viz. "driving without due care and attention," or "without reasonable consideration for other persons using the road" were omitted from the notice. Oliver, J., said at p. 564:

> "A notice . . . should not be considered as a formal document like a summons or a conviction. The object of the notice is to call the attention of the driver of the motor car to the time and circumstances in respect of which he may be charged so as to give him, . . . an opportunity, in good time while memories are still fresh, to

prepare his defence."

This dictum was approved in a later case of *Pope v. Clarke* (3), 37 Cr. App. R. 141.

In our opinion, the letter dated May 28 which was sent to the appellant was a sufficient notice of the intended prosecution. It specified the nature of the alleged

offence and the time and place where it was alleged to have been committed, and we think that when the registered owner of a motor vehicle is informed in writing by a responsible police officer that it is alleged that the motor vehicle was driven dangerously at a certain time and place, there is clear intimation that the police are contemplating a prosecution.

The dictum of Branson, J., in *Milner v. Allen* (1) applies.

We therefore dismiss the appeal.

Appeal dismissed.

For the appellant:
AE Hunter
Daly & Figgis, Nairobi

For the respondent:
GP Nazareth (Crown Counsel, Kenya)
The Attorney-General, Kenya

Dhirajlal Ramji Khetani v R
[1957] 1 EA 563 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	27 September 1957
Case Number:	85/1957
Before:	Sir Newnham Worley P, Briggs Ag V-P and Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Uganda – Lewis, J

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[1] Criminal law – Evidence – Accomplice – Whether certain prosecution witnesses were accomplices and required corroboration.

Editor's Summary

The appellant was convicted in the District Court of Kampala jointly with one Chatwani on three counts of forgery and one of receiving stolen property. Chatwani appealed unsuccessfully to the High Court of Uganda against his conviction but succeeded on a second appeal to the Court of Appeal. The case against the appellant was that he had been involved in furnishing a number of the witnesses for the prosecution with forged entry permits and a forged re-entry pass for the purpose of the immigration regulations. There was evidence that these witnesses had each paid sums varying between Shs. 2,000/- and Shs.

3,000/- for the documents supplied to them. At the trial before the magistrate it was submitted that these witnesses must have known the transactions were irregular since the payments made by them were so large and that they should accordingly be regarded as accomplices. The magistrate, however, held that the evidence did not support this contention and on appeal to the High Court the judge reached the same conclusion.

Held–

(i) the inference was irresistible that the witnesses must have contemplated that the documents would only be forthcoming in consequence of some crime to be committed by the appellant and, since they in effect instigated and procured the commission of the forgeries, they were accomplices.

(ii) although the expert evidence of handwriting proved the forgeries but did not relate them to the appellant, the only evidence connecting the payment with the documents was wholly uncorroborated by untainted evidence.

Appeal allowed.

Cases referred to in judgment:

(1) *Davies v. Director of Public Prosecution*, [1954] 1 All E.R. 507; 38 Cr. App. R. 11.

Judgment

Briggs Ag V-P: read the following judgment of the court: This was an appeal from a judgment of the High Court of Uganda sitting in appellate criminal jurisdiction. The appellant was convicted jointly with one Chatwani on three counts of forgery and one of receiving stolen property by the District Court of Kampala, and was sentenced to five years' imprisonment with hard labour. Both accused appealed unsuccessfully to the High Court. Thereafter Chatwani appealed to this court in Criminal Appeal No. 299 of 1956. His appeal was allowed and the convictions and sentences on him were set aside. After that decision the present appellant obtained leave to appeal to this court out of time. We allowed his appeal, set aside the convictions and sentences, and ordered him to be set at liberty for the following reasons.

We delivered a written judgment on Chatwani's appeal. It sets out the general facts governing this appeal also, and we find it unnecessary to repeat them. In addition it set out the reasons why the evidence of Falleiro could not be accepted without corroboration. From that point, however, the issues arising on the two appeals were different. The only remaining evidence against Chatwani may be summarised as evidence of general association with this appellant. We held that that evidence was not corroboration of Falleiro, and in any event, even if Falleiro could have been believed, did not point irresistibly to Chatwani's guilt.

The evidence against Khetani, apart from Falleiro's, was that of a number of persons all of whom claimed to have been actively concerned in procuring from him the forged entry permits and forged re-entry pass which were the subject matter of the three counts of forgery. Different witnesses were involved as regards each of the three documents, and they took different parts in the process of obtaining them; but we were of opinion that for the purpose of this appeal they all stood on the same footing and could be considered together. The question for us was whether they were accomplices and so required to be corroborated. The learned magistrate in his judgment dealt with the matter thus:

> "Mr. Wilkinson has submitted that the people who obtained these documents for large sums should be regarded as accomplices since they must have known that they were paying money for a purpose that was bad. The evidence does not in my opinion support this proposition. As the prosecution has stated, Chamji, Chotabhai and Kashibhai all were obviously ignorant of the procedure to be adopted in getting passports; they wanted assistance; they approached Khetani and simply did what they were told – they obviously trusted him and paid what he demanded."

On first appeal the learned judge after referring to *Davies v. Director of Public Prosecutions* (1), 38 Cr. App. R. 11, said:

> "When these principles are applied to the facts in this appeal can it possibly be said that the witnesses I have mentioned are accomplices? . . .
>
> "As to the Indian witnesses who spoke to paying Khetani. I think it can reasonably be inferred that the object of these large payments was to obtain entry into Uganda and no questions asked. Here again there was no evidence or suggestion that they took part in the forgery or theft of the book of permits. They were not therefore accomplices. The learned magistrate considered the defence's suggestion as to accomplices and came to the conclusion for different reasons that such witnesses were not accomplices."

We thought the solution to this problem lay in the words “and no questions asked,” with which we entirely agreed. With great respect to the learned magistrate, we thought it quite impossible that the persons concerned in paying such large sums as Shs. 3,000/-, Shs. 2,500/- or Shs. 2,000/- could have believed that they represented

normal fees and disbursements for obtaining the documents in question in a lawful and regular manner. The Asian population of Uganda takes a close interest in questions of passports and immigration procedure and even the most ignorant members of it would know that these figures implied something very irregular. No doubt they did not know precisely what was going to be done, and would not have been so tactless as to inquire; but in our view the inference was irresistible that they must have contemplated that the documents would only be forthcoming in consequence of some crime to be committed by the appellant. It might be forgery or theft or corruption, or a combination of these. But while we agreed with the learned judge on the facts, we thought that his conclusion of law was erroneous. It is true that there was no evidence that the witnesses took any part in the forgery or the theft of the book of permits; but in our view they instigated and procured the commission of the forgeries, and must have been accomplices in respect of them. Two arguments to the contrary were put forward. It was said, first, that the witnesses could not be held to be participants in any crime which the appellant might commit to serve their purpose, for example in a murder committed in order to obtain the documents. The answer to this is that they would not be accomplices in any crime that could not reasonably be expected to be committed; but forgery was clearly within reasonable expectation in the circumstances. Secondly, it was said that the witnesses wanted genuine documents, not forgeries which might be detected, and so they should not be taken as expecting forgery to be committed. We thought on the other hand that they merely wanted documents which would be effective for their purpose, and were not at all concerned whether they were genuine or forged.

The fourth count raised rather a different issue. Whoever may have stolen the book of entry-permits, it appeared that it was probably done before, and therefore not in consequence of, any instigation or procurement by the witnesses. We thought, however, that there was another basis on which the witnesses might have been held to be accomplices as regards this count. The appellant was not charged with theft of the book, but with receiving some of its leaves, knowing them to have been feloniously stolen. Two of the counts of forgery related to two of those leaves. We were inclined to think that the witnesses concerned in receiving those two documents, which they may not have known to have been feloniously stolen, must at least have had reason to believe that they had been unlawfully obtained within the meaning of s. 298 (2) of the Penal Code. This would constitute them receivers equally with the appellant and in respect of the same stolen property.

However that might be, we thought that if it was established that the witnesses were accomplices in the crime of forgery, their evidence was tainted for all purposes of the trial and would require corroboration in relation to the count of receiving as well as those of forgery. The courts below had never considered the case on the basis that these witnesses were accomplices. The expert evidence on handwriting proved the forgeries, but did nothing to relate them to the appellant, and the evidence connecting him with the documents was wholly uncorroborated by untainted evidence. We were therefore obliged to quash the convictions.

Appeal allowed.

For the appellant:
PJ Wilkinson
Russell & Co, Kampala

For the respondent:

HSS Few (Crown Counsel, Uganda)
The Attorney-General, Uganda

Boniface s/o Muhindi and another v R
[1957] 1 EA 566 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	24 June 1957
Case Number:	40/1957
Before:	Sir Newnham Worley P, Sir Ronald Sinclair V-P and Bacon JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Tanganyika – Harbord, J

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[1] Criminal law – Practice – Court calling witness – Prosecution witnesses called after defence opened – Whether any miscarriage of justice – Penal Code s. 151 (*T.*).

Editor's Summary

On October 19, 1956, the appellants, who were in Bukoba, engaged a taxi driver to give them a lift to Ishozi. They had with them when they left Bukoba a tin of petrol. Seventeen miles along the road the appellants stopped the car and walked off with the tin of petrol. Half-an-hour later the appellants returned to the taxi, when the first appellant said they wanted to leave quickly. Although an alarm was heard from the direction from which they had come, the appellants got in the car and the driver drove off. Meanwhile, the house of an African pastor of the Swedish Mission at Ishozi was found to be on fire, with a strong smell of petrol coming from it. Before the car was driven off from Ishozi its registration number had been noted and a villager, who had seen the car arrive near Ishozi and had remained nearby, identified the appellants at the trial as the passengers. There was abundant evidence associating the appellants with the firing of the house but their motive remained a mystery.

During the trial, counsel for the prosecution informed the court that he required an adjournment since he wished to call the taxi driver and a police constable, who had, on the day following the fire, gone round Bukoba searching for the appellants until the driver found and identified them. The adjournment was granted and when the trial was resumed neither the driver nor the constable had arrived but no further adjournment was asked for. The hearing accordingly proceeded and the appellants gave evidence.

Thereafter, before the remaining witnesses for the defence were called, the court ordered an adjournment with a view to calling the driver as a witness under s. 151 of the Criminal Procedure Code (T.). When the trial was resumed, the driver and constable were present and each was called and examined by the court and by counsel for the defence through questions put to the witnesses through the judge. Thereafter, the remaining defence witnesses were called with a view to supporting an alleged alibi and the trial proceeded normally to a conclusion, when the appellants were convicted of arson and sentenced.

The appellants did not, after the trial, as they should have done, ask leave to appeal against sentence but they did apply for a certificate that the case was fit for appeal on questions of fact and mixed fact and law. that application was refused on the ground that no such certificate was required, since each appellant had included at least one question of law in his memorandum of appeal. On the hearing of the appeal, at which neither appellant was present nor represented, the appellate court decided, under r. 41 of the Eastern African Court of Appeal Rules, 1954, to exercise its discretion to consider the sentence passed on the appellants. The court also reviewed the circumstances in which the taxi driver and police constable had been called at the instance of the trial judge, after the appellant's evidence at the trial had been completed.

Held–

(i) the ground upon which the trial judge had dismissed the application for a certificate that the case was fit for appeal, on questions of fact and mixed fact and law, was unsound; notwithstanding that many questions of law alone may be raised by a criminal appeal in the Tanganyika jurisdiction of the Court of Appeal, it still remains necessary, in order to raise other questions, to obtain either a certificate of

the trial judge or the leave of the Court of Appeal; this is also applicable when the court is exercising any other jurisdiction where there is similar procedural provision to that contained in s. 344 (1) (*b*) of the Criminal Procedure Code, Tanganyika.

(ii) s. 151 of the Criminal Procedure Code gives a wide discretion to a Criminal Court of first instance to summon and examine any person as witness and the two witnesses in question were persons whose evidence appeared "essential to the just decision of the case" and, having regard to sub-s. (2) of s. 151, it was mandatory on the trial judge to adopt the procedure he took.

(iii) despite the absence of motive, there was ample evidence to support the conviction and, as regards the sentences, having regard to the gravity and prevalence of the offence, the previous convictions of the appellants and their respective ages, there was no ground for the court to interfere.

Appeal dismissed.

Cases referred to:

(1) *Tadepalli Subbiah v. Emperor* (1934), A.I.R. Mad. 735.

(2) *R. v. Mohamed Alli* (1947), 14 E.A.C.A. 126.

(3) *R. v. Mangatinda Ole Dusiat* (1933), 15 K.L.R. 112.

(4) *R. v. Harris*, 20 Cr. App. R. 86.

Judgment

Bacon JA: read the following judgment of the court: The appellants were jointly charged with and tried for arson contrary to s. 319 of the Penal Code of Tanganyika, the allegation being that on the evening of October, 19, 1956, after darkness had fallen, they had together wilfully and unlawfully set fire to the house of an African pastor of the Swedish Mission at Ishozi village in Lake Province. Having been convicted by the High Court of that territory and sentenced to seven and five years' imprisonment respectively they gave notice of appeal against conviction and sentence.

They did not, as they should have done, (or so it appears from the learned trial judge's note of their only post-trial application) seek leave to appeal against sentence but, since they were neither present nor represented at the hearing before us, we exercised the discretionary power given by sub-r. (2) of r. 41 of the Eastern African Court of Appeal Rules, 1954, to consider the sentences without an appeal having been duly brought against them.

Another point of procedure to which we should call attention was this. It seems (from the learned judge's note to which we have already referred) that the appellants did apply for a certificate of fitness for appeal on questions of fact and questions of mixed law and fact under sub-s. (1) (*b*) of s. 344 of the Criminal Procedure Code (Cap. 20 of Tanganyika) but that their application was refused on the ground that no such certificate was required since each appellant had included at least one question of law alone in his memorandum of appeal. With respect, that was no good reason for dismissing the application: however many questions of law alone are raised by a criminal appeal in the Tanganyika jurisdiction of this court (and in any other jurisdiction where there is a procedural provision to the same effect), it still remains necessary, in order to raise other questions, to obtain either a certificate of the trial judge or the

leave of this court. In the instant case, no objection being submitted by the Crown advocate, we treated the memoranda of appeal as embodying the requisite applications for leave and, having given leave, considered all questions of every kind which arose.

The facts proved by the prosecution, as found by the learned trial judge with ample justification on the strength of the evidence admitted, were briefly as follows. On the afternoon of October 19, 1956, the appellants were in Bukoba. At about 4.30 p.m. a taxi arrived there from Kampala, divan by one Mifboses s/o Yovansoba. The second appellant approached the taxi driver and asked for a lift to Ishozi, allegedly to take petrol to an unnamed chief's car. The driver agreed. The second appellant

went off and returned shortly afterwards with a one gallon tin, accompanied by the first appellant; the former said "This is the petrol we are taking." He had in fact just bought a gallon of petrol at a pump near by. At about 7.30 p.m. the driver set out for Ishozi with the appellants as passengers and the tin in the car. After seventeen miles the appellants stopped the car and walked off with the tin. About half-an-hour later they returned; the first appellant said they wanted to leave quickly; an alarm was heard from the direction from which they had come; the first appellant said that a woman had died (which was found to be untrue); the appellants got into the car; and the driver drove off. Meanwhile the pastor's house was discovered to be on fire, with a strong smell of petrol emanating from it. Before the car was driven off on the return journey its registration was correctly noted. A villager, who had seen the car arrive at the place where it stopped near Ishozi and had remained by it until it left, identified the appellants at the trial as its passengers. At about 9.30 p.m. the car reached Bukoba and the appellants, to one of whom the driver handed the tin which was now empty, walked away. The registration of the car having been reported to the police, a constable went round Bukoba next day with the driver on a search for the appellants. The driver found and identified them both. An attempt to prove an alibi in Bukoba during the time occupied by the journey to and from Ishozi broke down.

There was thus an abundance of evidence associating the appellants with the firing of the house. although their motive remained a mystery. Much of it was given by witnesses other than the taxi driver and the constable, but those two – particularly the former – contributed a great deal towards the completion of the case for the Crown.

The only point of any substance on the appeal arose out of the circumstances in which the taxi driver and the constable gave evidence. The sequence of events was as follows. While the Crown case was still being presented the Crown advocate informed the court (on February 12) that he could go no further that day as the taxi driver's arrival from Uganda was awaited, and asked for an adjournment. The adjournment was granted. On February 16, the Crown advocate informed the court that the driver had not arrived, that the constable had also failed to attend and that no further adjournment was asked for. Accordingly the hearing proceeded and the appellants gave evidence. Immediately thereafter, that is to say before the remaining witnesses for the defence were called, the court of its own volition ordered an adjournment to February 22 with a view to the calling of the driver as a court witness. When the court re-opened on February 22 the driver and the constable were in attendance and each was called and examined by the court and by the defending advocate through the court. Thereafter the witnesses called to support the alleged alibi testified and the trial proceeded to its conclusion in the normal manner.

There is nothing in the record to suggest that the defending advocate protested or commented in any way, or applied either for an adjournment or for the recall of the appellants, in connection with the calling of the driver and the constable. The memoranda of appeal, which raise a complaint as to that matter at some length, do not suggest that any such protest, comment or application was made, but assert that neither of those witnesses had been called at the preliminary inquiry, that their evidence had been sprung on the defence as a surprise and by way of filling gaps in the prosecution's case, and that they were unworthy of belief.

The well-known principle whereon a criminal court of first instance has a wide discretion in the matter of eliciting evidence of its own motion is, in Tanganyika, elected by s. 151 of the Criminal Procedure Code in the following terms:

> "(1) Any court may, at any stage of an inquiry, trial or other proceeding under this code, summon any person as a witness, or recall and re-examine any person already examined; and the court shall

summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.

"(2) The power created by sub-s. (1) shall be exercised in the same circumstances

and subject to the same limitations as the power created by s. 540 of the Indian Code of Criminal Procedure, 1898."

It is, we think, plain at a glance that, but for sub-s. (2) of that section, there could not be any question as to the proprietary of what was done in the instant case. The taxi driver and the constable who accompanied him in his search for the appellants were persons whom the Crown clearly ought either to call or to make available as witnesses, and it was the Crown's intention to call them. When by some mishap they were not in attendance the Crown, after one adjournment, did not press for another. But that, of course, did not in the least detract from their potential value as persons who should be able to shed a great deal of light on the vital issue: in the words of sub-s. (1), they remained persons whose evidence appeared "essential to the just decision of the case." And the court called them as witnesses at the first possible moment and before the defence was closed.

In our view, however, sub-s. (2) – unfortunately, as we think – involves the necessity of examining the practice established by the courts of India when giving effect to the provisions of Indian law therein mentioned, which are identical with those of sub-s. (1). For sub-s. (2) is mandatory and may thus in some instances preclude the courts of Tanganyika (and this court when sitting in its Tanganyika jurisdiction) from applying sub-s. (1) according to criteria long ago recognized by non-Indian courts as calculated to ensure "the just decision of the case." There is, we think, another good reason for the deletion of sub-s. (2): it must, in practice, be impossible for many courts in Tanganyika to have access to Indian reports, and indeed, even for the High Court it is doubtless becoming more and more difficult.

We have accordingly examined the Indian practice under s. 540 of the Code of 1898. We have, however, been unable to find any authority contra the procedure adopted by the learned trial judge in the instant case. On the contrary, he appears to have been not merely justified under the first part of sub-s. (1) of s. 151 but obliged by its imperative second part to do as he did, for it was plain that the person who was in a better position than anyone else to inform the court as to the activities of the appellants was the driver of the car in which the appellants were said by the fourth and second Crown witnesses respectively to have left Bukoba and to have arrived near Ishozi. We cite one out of a number of Indian decisions to the effect that in such circumstances it is not only the right but also the duty of the court to summon and examine the witness: *Tadepalli Subbiah v. Emperor* (1) (1934), A.I.R. Mad. 735, where it was held that s. 540 is equally available to the prosecution and to the defence, and is mandatory if the proposed evidence – in that instance, to be tendered by re-calling the complaint – appears to the court to be "essential to a just decision of the case."

By the same token it was the duty of the court in the instant case to summon and examine the constable who alone was able to corroborate or to contradict the taxi driver's evidence as to the all-important matter of his finding and identifying the appellants on the day after the incident.

Incidentally, *R. v. Mohamed Alli* (1) (1947), 14 E.A.C.A. 126 was a case in which this court, on second appeal, considered *inter alia* the effect of s. 151 of the Criminal Procedure Code of Tanganyika. The trial magistrate had of his own motion summoned and examined a witness when, at the conclusion of the case for the Crown, it appeared to him that the witness would be able to give the most authoritative evidence available on a matter which had emerged as an important feature. This court dealt with that incident in these words:

> "A magistrate has, of course, the power to summon any person as a witness at any stage of a proceeding if it appears to him that the evidence is essential to a just decision of the case."

In our view, if the trial court steadfastly adheres to that principle its intervention is not open to criticism merely because it transpires that it has resulted in the strengthening of the case for the Crown. In the instant case that is what happened, but the result might have been the very reverse.

It follows from what we have said that decisions on the corresponding section (s. 150) of the Criminal Procedure Code of Kenya do not necessarily apply in Tanganyika, as for example *R. v. Mangatinda Ole Dusiat* (3) (1933), 15 K.L.R. 112 (following *R. v. Harris* (4), 20 Cr. App. R. 86).

Accordingly we are of the opinion that there is no substance in this appeal against conviction and it is dismissed.

As regards the sentences, there is in our view no ground upon which we should interfere. The learned trial judge very properly took into account the gravity and prevalence of the offence, the appellants' previous convictions and their respective ages. The appeal against sentence by each appellant must also be dismissed.

Appeal dismissed.

The appellants did not appear and were not represented.

For the respondent:
K Bechgaard
The Attorney-General, Tanganyika

Shantilal Maneklal Ruwala v R
[1957] 1 EA 570 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	26 November 1957
Case Number:	75/1957
Before:	Sir Kenneth O'Connor P, Briggs Ag V-P and Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Uganda at Kampala – McKisack, C.J

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[1] Criminal law – Obtaining money by false pretences – Medical practitioner issuing reports based on another doctor's reports without examining the persons concerned – Whether false pretence as to existing fact.

[2] Appellate court – Findings of facts – Duty of first appellate court to consider and evaluate evidence – Whether on second appeal findings of facts can be attacked – Criminal Procedure Code, s. 337 (*U.*).

Editor's Summary

The appellant, a medical practitioner, was employed by an insurance company to examine persons proposing to take out life insurance policies. In certain cases, the insurance company habitually obtained

medical reports from two doctors and, in the two instances with which the case against the appellant was concerned, it was alleged that he had not examined the proposes but had based his reports to the insurance company of the intending assured upon reports previously made by another doctor who had examined them. The appellant had been charged in these circumstances with obtaining money by false pretences and, at his trial before a magistrate, it was not proved that the appellant had access to the reports of the examination made by the other doctor but the magistrate found that it would have been possible for the appellant to have access to these reports. The magistrate convicted the appellant and an appeal to the High Court of Uganda was also dismissed. On the second appeal it was contended for the appellant that any promise the appellant might have made to examine proposes could not amount to a false pretence since it related to matters in future; that there could be no false pretence because the medical reports were medically correct; that both the magistrate and the judge on first appeal had misdirected themselves in holding that it was sufficient for the prosecution to show that it was possible to have had access to the reports of the other doctor and that the findings of both courts below on the facts were wrong.

Held–

(i) the submission of a report to the insurance company was a representation that the appellant had examined the intending assured and was a representation as to a past fact.

(ii) the charges against the appellant were not that he had falsely pretended that the proposes were acceptable risks, when they were not so, but that the appellant had falsely pretended he had carried out medical examinations on the proposes and what the insurance company had lost was the added security of a second and independent medical examination of each proposer and the fees for these, which had been paid but had not been earned.

(iii) it would have been quite impossible for the appellant to have made the reports he had without either examining the persons concerned or substantially copying the reports of another doctor and, since examination of the reports of the appellant and the other doctor showed that they were very similar, though not identical, the findings of the courts below could logically be supported.

(iv) the High Court had carefully considered and evaluated the facts in all respects before confirming the findings of the magistrate and the correctness of those findings was not open to argument.

Per curiam – in *Pandya's* case ". . . this court intervened not because the first appellate court had made an incorrect decision on the facts but because it had failed in effect to consider and weigh the evidence. . . . if any future attempts are made to raise questions of fact before us on second appeal under the principles of *Pandya's* case we shall before permitting any general argument on the facts addressed to us require first to be satisfied that those principles are properly applicable to the case in question."

D. R. Pandya v. R., [1957] E.A. 336 (C.A.), explained and distinguished.

Appeal dismissed.

Cases referred to in judgment:

(1) *D. R. Pandya v. R.*, [1957] E.A. 336 (C.A.).

Judgment

Briggs Ag V-P: read the following judgment of the court: This was a second appeal against two convictions for obtaining money by false pretences. We dismissed the appeal and now give our reasons. The appellant is a medical practitioner and was employed by an insurance company to effect medical examinations of persons intending to take out life policies. He was paid Shs. 40/- for each such examination and report. The case proved against the appellant was that on two occasions he had submitted reports on intending assured persons, and had obtained payment for such examinations, whereas in fact he had not examined them at all, but had based his reports on reports previously made by another doctor who had examined them. His appeal to the High Court was dismissed.

The first point taken for the appellant was that, at the time when he was originally employed, any promise which he may have made to effect examinations could not amount to a false pretence, since it related to matters in future. It was contended that we should look back to that promise and not to the effect of the reports themselves. This argument was wholly unrealistic, and ignored both the wording of the charges and the practical effect of what took place. The submission of a report to the company was

inevitably, in the circumstances, a representation that the appellant had examined the intending assured, and was a representation as to a past fact.

Mr. Kaplan, for the appellant, next argued that there was no false pretence because the medical reports were medically correct: accordingly, the insurance company had not be dandified: the policies were still in existence and had not been cancelled. We felt unable to accede to that argument. The evidence was that the company always required a second medical examination by a separate doctor when the proposer was an Asian or when the sum to be paid on the death of the insured was to be over £3,000. It was in respect of second medical examinations that the appellant was

charged. The charges were not that the appellant had falsely pretended that the proposes were acceptable risks, when they were not; but that the appellant had falsely pretended that he had carried out medical examinations on the proposes, when he had not. What the company lost was the added security of a second and independent medical examination of each proposer, and the fees for the second medical examinations which were paid but had not been earned.

Another point of law was properly raised by the memorandum of appeal, but was not argued before us. It was that the learned magistrate and the learned chief justice on first appeal had both misdirected themselves in holding that it was sufficient for the prosecution to show that it would have been possible for the appellant to have access to the reports of the first examination, without proving that he did so. We considered this point, and were of opinion that it was not well founded. It would have been quite impossible for the appellant to have made out the reports he did without either examining the persons concerned or substantially copying a report by another doctor, since some of the answers required a present examination of the proposer and it was common ground that the answers were medically correct. There is no suggestion that (excepting the appellant's reports) any reports on these persons were ever made by anyone other than Dr. Shah, the other doctor who examined and reported on them for the company. We have examined the appellant's and Dr. Shah's reports and they are very similar, though not identical. The courts below must have found, and did find, as a fact that the appellant substantially copied Dr. Shah's reports. If it had been impossible that he should have done so, there could have been no such findings and no convictions. The evidence accepted as true showed that it was not impossible, and the findings were logically open to the courts. It would, of course, have been of advantage to the prosecution if they had been able to show by direct evidence that the appellant had access to Dr. Shah's reports; but it was sufficient to show it as a necessary inference from other proved facts. We were impressed by, among other things, Dr. Shah's admission that sometimes the forms for reports reached him in blank already bearing the signature of the persons to be examined. This must from the company's point of view have been a grave irregularity, since the statement purported to be a personal statement made before a medical officer of the company whose name was written or stamped thereon. This suggested to us that some one or more of the company's agents or servants were not to be trusted to deal carefully and honestly with reports, and may well have been the channel whereby Dr. Shah's reports came irregularly into the appellant's hands.

Another point of law raised, but not argued before us (though we invited argument upon it), related to one Lacey, an inspector of the insurance company who was charged jointly with the appellant and convicted on one count, but acquitted on first appeal. It was submitted that his acquittal went to the root of the case against the appellant and must necessarily lead to his acquittal also. On this point it is sufficient to say that in our view the cases against the two accused were not so linked as to be interdependent, and the innocence of Lacey raised no inference of innocence in the appellant.

The substantial case made for the appellant was really that both courts below were wrong on the facts. Since only issues of law were open to the appellant before us (s. 337 Criminal Procedure Code), an attempt was made to raise one which would allow the facts to be argued generally. Before dealing with that so-called issue of law, we would say that the facts were fully argued before us by leading counsel for the appellant. The consequences of these convictions may be so serious to the appellant, a professional man of previously unblemished reputation, that we thought it desirable to give his counsel a great deal of latitude.

On ground 1 of the memorandum of appeal Mr. Kaplan argued that the learned magistrate was wrong

in considering a witness, N. B. Patel, to be a credible witness, and counsel referred us to various passages in the evidence which contradicted Patel's statement that the third accused, Lacey, had filled in three forms in the car. The learned magistrate had realised that this statement of N. B. Patel could not be true

and had said that the witness was mistaken in making it. It was argued that the magistrate should have referred specifically to the evidence of the second and third accused on this point. We see no reason to suppose that the magistrate did not take their evidence into consideration in concluding that N. B. Patel was mistaken. It was further argued that it was wrong to call N. B. Patel's mis-statement a mistake: it was a deliberate falsehood which should have discredited the whole of his evidence, or else N. B. Patel was drawing on his imagination and was not to be relied on in any respect. The learned magistrate carefully considered the credit which, in view of his mis-statement, should be accorded to N. B. Patel, and carefully considered whether he (the magistrate) would be justified in discarding the whole of N. B. Patel's evidence. He came to the conclusion, for the reasons he gave, that such a course was not justifiable. The learned chief justice also considered this matter at some length and was satisfied that the magistrate had given it proper consideration.

Ground 2 of the memorandum of appeal was not argued before us. A comparison of Dr. Shah's and the appellant's medical reports show that it was unarguable.

With grounds 3, 4, 6, 7 and 8 we have already dealt.

Ground 5 raises an issue of credibility of the witness Luigi Salteralli. That question was carefully considered by both the magistrate and by the learned chief justice and we have no criticism of the way they dealt with it.

Mr. Kaplan stressed the importance to be attached to the fact that the appellant's records were in order and the improbability of a man in the appellant's position risking professional ruin for the sake of a few shillings. There is much weight in these arguments. But these matters were fully considered and weighed by both courts below who, nevertheless, found against the appellant on the facts. Those were findings of fact with which we cannot interfere.

The question of sentence was not before us. It was a lawful sentence and its severity could not be raised (s. 337 Criminal Procedure Code).

The hook of law on which counsel sought to hang his arguments of fact was the decision of this court in *D. R. Pandya v. R.* (1), [1957] E.A. 336 (C.A.). Since other attempts may be made to use that case similarly, it is necessary to consider what it decided. The issue in *Pandya's* case (1) was identification, and the evidence for the Crown was open to the gravest criticism. The judgment of the learned magistrate dealing with that evidence was wholly inadequate and showed plainly that he had overlooked the real weaknesses of the Crown's case. This court described the evidence of the two critical witnesses as a "hotchpotch of prevarication and lies." That was the situation with which the High Court was faced on first appeal. The case made before this court depended on two propositions, first, that on first appeal the appellant is "entitled, as well on questions of fact as on questions of law, to demand the decision" of the appellate court, which must itself weigh conflicting evidence and draw its own conclusions, bearing in mind that it has neither seen nor heard the witnesses. We do not take this to mean that the appellate court should write a judgment in a form appropriate to a court of first instance. It is sufficient on questions of fact if the appellate court, having itself considered and evaluated the evidence, and having tested the conclusions of the court of first instance drawn from the demeanour of witnesses against the whole of their evidence, is satisfied that there was evidence upon which the court of first instance could properly and reasonably find as it did. If the conclusions of the appellate court are merely expressed in terms such as these, that, in itself, is no indication that the appellate court has failed to make a critical evaluation of the evidence. In *Pandya's* case (1) the second proposition was that the first appellate court had failed to

appreciate its duty in this respect, and had in consequence given a merely formal approval of the learned magistrate's findings, instead of a considered evaluation of the facts in the light of the defects shown to exist in the evidence. On this question the court said:

> "With respect, the learned acting judge did not rehear and re-adjudicate as was his obligation in law; he recited what the magistrate had done, ratified his adoption of the watchmen's conversation with Mwansasu as the justification for

> the former's change of attitude towards the investigating authorities, and made no comment on the magistrate's failure to notice the inherent improbabilities of the watchmen's testimony to which we have referred."

and again,

> "In concluding his judgment with the words 'I find no misdirection or no direction in the magistrate's judgment which could be said to have led the magistrate to a wrong conclusion, the learned acting judge did not, in our opinion, cure the fundamental error of which we have spoken; for he had not treated the evidence as a whole to that fresh and exhaustive scrutiny which the appellant was entitled to expect."

In that unusual situation this court had no hesitation in saying that the High Court had erred in law, and that its judgment must be set aside. It is, first, to be observed that this court intervened, not because the first appellate court had made an incorrect decision on the facts, but because it had failed in effect to consider and weigh the evidence. Next, it must be noted that the facts were such that, if the trial court had understood them correctly, it could not possibly have convicted, and, if the High Court had understood them correctly, and made its own findings, it must have reversed the conviction. Thirdly, it is important that the High Court's failure to evaluate the evidence was clearly apparent from the wording of its own judgment. The situation with which this court was faced in *Pandya's* case (1) was certainly not paralleled in the present case. Here, there was evidence to support the findings of the learned magistrate and no sign of any misdirection in his full and carefully reasoned judgment. It was apparent that the learned chief justice had himself considered and evaluated the facts in all aspects before affirming the learned magistrate's findings in respect of the appellant and differing from the magistrate's findings in respect of Lacey. In those circumstances, and in the absence of any misdirection, non-direction or demonstrably wrong inference from the evidence, the correctness of the findings was not open to question in this court. We would add a warning that, if in future attempts are made to raise questions of fact before us on second appeal under the principles of *Pandya's* case (1), we shall, before permitting any general argument on the facts to be addressed to us, require first to be satisfied that those principles are properly applicable to the case in question.

Having heard and carefully considered the arguments in the present case we saw no reason to suppose that the courts below had made any error of law or fact which would justify this court in interfering with the conviction.

Appeal dismissed.

For the appellant:
L Kaplan QC, WJ Lockhart Smith and *BD Dholakia*
Parekhji & Co, Kampala

For the respondent:
JJ Dickie (Crown Counsel, Uganda)
The Attorney-General, Uganda

Lambert Houareau v R
[1957] 1 EA 575 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	31 October 1957
Case Number:	69/1957
Before:	Sir Newnham Worley P, Briggs Ag V-P and Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Seychelles – Lyon, C.J

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[1] Practice – Trial judge taking large part in examination of accused – Whether rule that justice must be seen to be done has been observed.

[2] Judge – Functions at trial – Interventions during examination of witnesses.

Editor's Summary

The appellant had been convicted by the Supreme Court of two contraventions of regulations made under the Unseaworthy Vessels Ordinance and was fined Rs. 700 in respect of each offence.

At the trial, the judge put in all some sixty-eight questions to the appellant and interrupted counsel during his examination-in-chief of the appellant. The memorandum filed on behalf of the appellant raised a number of points of law but the appellate court only found it necessary to deal with two of these points, which were that the record of the trial was incomplete and did not contain all the evidence, and that the trial judge took an undue part in the conduct of the case and, in consequence, the case for the appellant was not properly and fully put before the court. In support of the appeal, an affidavit by the employer of the appellant had been filed in which the employer deposed to his attendance at the trial, when he had taken longhand notes of the proceedings on the last day of the trial approximately verbatim. These notes were annexed to the affidavit and, on inspection by the court, showed that the record before the appellate court was incomplete.

Held–

(i) on the facts disclosed in the record it was impossible for the court to say that there had been a fair trial or that the appellant had a proper opportunity to put his defence to the court;

(ii) if the course of a trial is such that the accused and his counsel are left with a reasonable feeling of grievance of this kind, the trial has been less than satisfactory, and if the grievance is founded on excessive interruptions and interventions by the court the rule that justice must be seen to be done has clearly not been observed.

Appeal allowed.

Cases referred to:

(1) *R. v. Cain*, 25 Cr. App. R. 204.

(2) *R. v. Clewer*, 37 Cr. App. R. 37.

(3) *Jones v. National Coal Board*, [1957] 2 All E.R. 155.

(4) *Yuill v. Yuill*, [1945] 1 All E.R. 183.

October 31. The following judgment was read by direction of the court.

Judgment

On May 2, 1957, the appellant was convicted by the Supreme Court of Seychelles of two contraventions of regulations made under the Unseaworthy Vessels Ordinance (Cap 205) and fined Rs. 700 in respect of each offence. A preliminary judgment staying the execution of the sentences was given by this court on June 24, 1957. The appeal against the convictions and sentences came on for hearing on September 10, 1957, and was allowed. We now give our reasons.

The appellant did not appear in person nor by counsel, but his advocate presented a written statement of his case, supported by the affidavit of one L. S. Khaw. We shall make further reference to this affidavit later. The learned Attorney-General of

Seychelles swore and filed a counter-affidavit and Mrs. Collet, the appellant's advocate, swore and filed an affidavit in reply. At the hearing, Mr. Brookes of the Kenya Crown Law Office appeared for the respondent. Since the admissibility of these affidavits was queried by the respondent at the hearing, we put on record our ruling that there is nothing in the Supreme Court (Record of Evidence) (No. 2) Rules, 1955, which prevents this court from admitting and considering affidavits which supplement the record (as was the case here). It has always been the practice of this court to admit such evidence in a proper case and this practice is now embodied in r. 42 of the Eastern African Court of Appeal Rules, 1954.

In connection with the written statement of the appellant's case and supporting affidavit, we observe that much delay and unnecessary trouble was caused by Mrs. Collet's failure fully to comply with r. 39 (1) which requires five copies of the statement (including of course any supporting affidavit) to be lodged with the Registrar of the Superior Court. One of these copies is intended for service on the respondent, in this case the Attorney-General of Seychelles.

The memorandum of appeal raises a number of points of law, which challenge the validity of the legislation under which the charges were brought and, also, the jurisdiction of the court to try those charges. We found it unnecessary to decide those points and determined the appeal upon the fourth and fifth grounds which read:

> "4. The record is incomplete and does not contain all the evidence given at the trial. Of the evidence given the summary in the judge's notes is inadequate and incomplete.
>
> "5. The learned chief justice took an undue part in the conduct of the case, and in consequence the accused's case was not properly and fully placed before the court."

Before going into the facts relevant to these grounds, it will be convenient to refer to the law. The procedure in trials before the Supreme Court in its summary jurisdiction is enacted in Part VI of the Criminal Procedure Code: it is the normal procedure of British Courts and calls for no special comment. Section 12 of the Evidence Ordinance (Cap. 81) reads:

> "In cases not provided for by this Ordinance or by any other law in force in the colony, the law of England and the practice of the High Court of Justice with regard to evidence and witnesses at trials and to perpetuating testimony shall be taken and held to be, so far as such law and practice are applicable, the law of this colony and the practice of the Supreme Court."

There being nothing to the contrary in any legislation of the colony, English authorities on the mode of trial, the right of the presiding judge to question witnesses, the limitations on that right and the duty to ensure a fair trial are all in point. The three English cases in point, to which we were referred, are *R. v. Cain* (1), 25 Cr. App. R. 204; *R. v. Clewer* (2), 37 Cr. App. R. 37 and *Jones v. National Coal Board* (3), [1957] 2 All E.R. 155. In *Cain's* case (1), the Court of Criminal Appeal said, at p. 205 of the report:

> "It is undesirable that during an examination-in-chief the judge should appear to be not so much assisting the defence as throwing his weight on the side of the prosecution by cross-examining a prisoner. It is obviously undesirable that the examination by his counsel of a witness who is himself accused should be constantly interrupted by cross-examination from the bench. Cross-examination in cases of this kind is usually quite efficiently conducted by counsel for the Crown."

In *Clewer's* case (2), the conviction was quashed, although there was evidence entitling the jury to convict, on the ground of undue interruption by the judge, which made it impossible for defending counsel fairly to present his defence. We quote the following from the judgment of the Court of Criminal Appeal:

". . . the first and most important thing for the administration of the criminal

> law is that it should appear that the prisoner is having a fair trial, and that he should not be left with any sense of injustice on the ground that his case has not been fairly put before the jury. If counsel is constantly interrupted both in cross-examination and examination-in-chief and, more especially, as in this case, during his speech to the jury, his task becomes almost impossible. The more improbable the defence, the more difficult it is for counsel to discharge his duty to his client adequately, and, provided that he keeps within the bounds of fair advocacy – as it is beyond question Mr. Du Cann did here – it is highly desirable that he should be allowed to do his best in presenting his case, leaving it to the judge to deal with, and maybe to demolish, in his summing-up."

Jones v. National Coal Board (3), was a civil case, but the same principles apply as in criminal cases and we cite two passages from the judgment of the Court of Appeal read by Denning, L.J. (as he then was). At p. 159 of the report, he said:

> "It is all very well to paint justice blind, but she does better without a bandage round her eyes. She should be blind indeed to favour or prejudice, but clear to see which way lies the truth: and the less dust there is the better. Let the advocates one after the other put the weights into the scales – the 'nicely calculated less or more" – but the judge at the end decides which way the balance tilts, be it ever so slightly. So firmly is all this established in our law that the judge is not allowed in a civil dispute to call a witness whom he thinks might throw some light on the facts. He must rest content with the witnesses called by the parties: see *Re Enoch & Zaretsky, Bock & Co.* ([1910] 1 K.B. 327). So also it is for the advocates, each in his turn, to examine the witnesses, and not for the judge to take it on himself lest by so doing he appears to favour one side or the other; see *R. v. Cain* ((1936), 25 Cr. App. R. 204); *R. v. Bateman* ((1946), 31 Cr. App. R. 106); and *Harris v. Harris* (Apr. 8, 1952, The Times, Apr. 9, 1952) by Birkett, L.J., especially. And it is for the advocate to state his case as fairly and strongly as he can, without undue interruption, lest the sequence of his argument be lost; see *R. v. Clewer* ((1953) 37 Cr. App. R. 37). The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well."

Again, at p. 160, the court said:

> "Now it cannot, of course, be doubted that a judge is not only entitled but is, indeed, bound to intervene at any stage of a witness's evidence if he feels that, by reason of the technical nature of the evidence or otherwise, it is only by putting questions of his own that he can properly follow and appreciate what the witness is saying. Nevertheless, it is obvious for more than one reason that such interventions should be as infrequent as possible when the witness is under cross-examination. It is only by cross-examination that a witness's evidence can be properly tested, and it loses much of its effectiveness in counsel's hands if the witness is given time to think out the answer to awkward questions; the very gist of cross-examination lies in the unbroken sequence of question and answer. Further than this, cross-examining counsel is at a grave disadvantage if he is prevented from following a preconceived line of inquiry which is, in his view, most likely to elicit admissions from the witness or qualifications of the evidence which he has given in chief. Excessive judicial interruption inevitably weakens the effectiveness of cross-examination in relation to both the aspects which we have mentioned, for at one and the same time it gives a witness valuable time for thought before answering a difficult question, and diverts cross-examining

> counsel from the course which he had intended to pursue, and to which it is by no means easy, sometimes, to return."

There are, also, the well-known dicta of Lord Greene in *Yuill v. Yuill* (4), [1945] 1 All E.R. 183 at p. 189.

With these principles in mind, we have considered the record of the trial in this case and the affidavit of Mr. L. S. Khaw. This gentleman is the employer of the appellant and retained Mrs. Collet to act for the defence. At her request he attended the trial and took longhand notes of the proceedings on the last day of the trial to the best of his ability and approximately verbatim. His notes are included in his affidavit. The accuracy of these notes is not challenged by the learned attorney-general except as to one comparatively minor matter relating to his own conduct.

The learned chief justice's conduct of the trial appears to have been perfectly in order while the prosecution case was being presented. Late in the sitting on April 29, the defence was called on, the appellant elected to give evidence and was examined by his advocate on a few preliminary matters. The court then adjourned till the following morning, when the examination-in-chief of the appellant was continued. The proceedings on that day are recorded in Mr. Khaw's notes in question and answer form. An analysis of these notes shows that the examination began with five questions put by Mrs. Collet and answered by the appellant, these being fully recorded by the judge in his own notes. Then followed twenty-three questions and some interruptions by the judge, the answers to which are recorded in six lines of his notes. Mrs. Collet was then able to put four questions to the witness, the answers being recorded in the judge's notes in seven lines. Twenty-eight questions from the bench then followed, the answers to the first twenty being recorded in six lines of the judge's notes and shown as "in chief", while the last eight are recorded in four lines and shown as "XXD". At this stage the proceedings appear to have become rather confused; the learned attorney-general put four questions to the appellant the answers to which are recorded in one line of the judge's notes, then followed in turn ten questions by the judge, two by the attorney-general, seven from the judge and finally two by the attorney-general. The answers to all these are recorded in eleven lines of the judge's notes. At this stage the learned judge according to Mr. Khaw's note said to the witness "Go and sit behind Mrs. Collet." All this while Mrs. Collet was still standing, having as she alleges and as seems clear to us, had no fair opportunity to bring out the defence by uninterrupted examination of her client. She concedes that owing to the manner in which the bench had taken over the examination of the accused the learned attorney-general may well have thought that her examination had been concluded before he began his cross-examination, and we readily accept the view that the learned attorney-general had no intention of deliberately interfering with the examination-in-chief. It is with the effect of the interruptions and excessive interventions by the presiding judge that we are concerned.

Mrs. Collet has contended, and we are constrained to accept her contention, that on account of the attitude taken by the learned chief justice and on account of his constant interruptions during her examination of her client she was unable to do her duty by him and to present fairly the case for the defence. We think that the facts disclosed in the record before us make it impossible for us to say that here this was a fair trial or that the accused had a proper opportunity to put his defence to the court. Mr. Brookes for the Crown-Respondent submitted that the presiding judge's questions were designed to and had the effect of bringing out the defence. We are unable to agree that that was their purpose and effect; many of them were far more in the nature of a hostile cross-examination. Moreover one cannot overlook the factor of the manner in which questions, however well meant, are put. An accused person under examination by his advocate may well answer questions freely and with confidence because he believes

that the advocate is putting his case to the court in the best possible light, whereas the same questions put to him by the court may be regarded by him with suspicion and answered with hesitation.

Finally, on the question whether justice is seen to have been done, it is apparent

that the appellant's counsel was honestly of the opinion that, through no fault of hers, his case had not been adequately presented, and it seems probable that the appellant himself must have felt the same. If the course of a trial is such that the accused and his counsel are left with a reasonable feeling of grievance of this kind, the trial has been less than satisfactory, and if the grievance is founded on excessive interruptions and interventions by the court the rule that justice must be seen to be done has clearly not been observed.

Appeal allowed.

The appellant did not appear and was not represented but a statement of his case was filed under r. 39 of the Eastern African Court of Appeal Rules, 1954.

For the appellant:
Mrs MC Collet, Victoria, Seychelles

For the respondent:
KC Brookes (Crown Counsel, Kenya)
The Attorney-General, Seychelles

PJN Storm v Central Provision Stores
[1957] 1 EA 579 (SCK)

Division:	HM Supreme Court of Kenya at Eldoret
Date of judgment:	17 May 1957
Case Number:	18/1957
Before:	Connell J
Sourced by:	LawAfrica

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[1] Practice – Appeal from subordinate court – Proper registry in which to file appeal – Meaning of "proceedings commenced" in O. 46 *r.* 1 *and of "may" in O.* 46 *r.* 9 *– Civil Procedure* (*Revised*) *Rules,* 1948 (*K.*)

Editor's Summary

With a view to appeal from a judgment delivered on January 16, 1957, by the Resident Magistrate, Kisii, the advocate for the appellant filed a comprehensive memorandum of appeal at the District Registry, Eldoret, on February 15, 1957, and on the same day despatched the memorandum of appeal and record to the Central Registry, Nairobi, which on February 25, forwarded these to the District Registry, Eldoret. Subsequently, at the hearing of the appeal, the respondent took a preliminary objection to the appeal that it was lodged out of time and contended that the appeal should have been filed either at Kisumu or at the

Central Registry, Nairobi, on or before February 15, 1957. The respondent referred to O. 46 r. 1 of the Civil Procedure (Revised) Rules. For the appellant it was argued that pursuant to the Civil Procedure Ordinance "Suits" means "all civil proceedings commenced in any manner prescribed," that appeals should therefore be treated as suits, and that since under O. 46 r. 1 suits may be instituted either at the Central Office or in the District Registry, appeals may be similarly instituted.

Held–

(i) the legislature intended that appeals from provinces and districts outside Nairobi should be filed and filed timeously in the District Registry of the area in which the subordinate courts are situate;

(ii) the appeal in this case should have been filed in Kisumu, and the District Registry, Eldoret, had no jurisdiction to entertain the appeal.

Preliminary objection upheld. Appeal dismissed.

Cases referred to:

(1) *Kimego arap Sirima v. Sheikh Hassan* (1955), 22 E.A.C.A. 240.

(2) *Harnam Singh Bhogal v. Jadva Karsan* (1953), 20 E.A.C.A. 17.

Judgment

Connell J: The relevant history of the appeal is this: Mr. Ibbetson for the appellant was informed by the Resident Magistrate, Kisii, that judgment would be delivered on January 16, 1957; judgment was so delivered. On January 31, Mr. Ibbetson telegraphed the Resident Magistrate, Kisii, asking for certified copies of judgment and proceedings. These were despatched on February 8. On February 15, Mr. Ibbetson filed a comprehensive memorandum of appeal at Eldoret. The appeal memorandum and record were despatched on February 15, 1957, by Mr. Ibbetson to Nairobi Central Registry and receipt of these was duly acknowledged on February 25, by the Deputy-Registrar, Nairobi; on the same date the Deputy-Registrar despatched the record and memorandum of appeal to Eldoret and it is admitted that so far as the listing of the appeal at Eldoret, apart from the question of "time," there was nothing irregular in that listing.

Mr. C. M. Patel admitted that February 15 was the last day for filing and he also conceded that he would have raised no preliminary objection if the memorandum of appeal had been filed either in Kisumu or in Nairobi on or before February 15, 1957. Mr. Patel submitted however that (1) the appeal was lodged out of time, (2) the appeal should have been lodged either at Kisumu or at least in Nairobi Central Registry on or before February 15, 1957. He relies on O. 46, r. 9

> "An appeal from a decree or order of a subordinate court . . . to the Supreme Court may be filed in the District Registry within the area of which such subordinate court . . . is situate,"

I have dealt with this precise point in a judgment just delivered in Civil Appeal No. 7 of 1956 in which I came to a clear opinion that the word "may" has a particular significance, quoting various passages in Maxwell on The Interpretation of Statutes (9th Edn.), p. 249: the test laid down in Maxwell which appeals to me most is this

> "Where the exercise of an authority is duly applied for by a party interested and having the right to make the application, the exercise depends upon proof of the particular case out of which the power arises."

I would go even further and I would say that where there is an enabling section allowing the exercise of a power or an authority that power or authority must be exercised in the manner contemplated by the statute; the statute in my opinion allows appeals from subordinate courts to be filed in the District Registry within the area of which such subordinate court is situate, which, in the case of Kisii, is the registry of the Resident Magistrate, Kisumu. I stretch a point that in the particular instance Mr. Patel has conceded that he would not have objected if the appeal had been lodged in Nairobi on or before February 15, though I am by no means certain that O. 46, r. 9 in any manner contemplates that an appeal from a subordinate court can be filed in the Central Registry at Nairobi: I do not think it does so contemplate.

Mr. Ibbetson also raised an interesting point that "suits" under the Civil Procedure Ordinance means "all civil proceedings commenced in any manner prescribed." He argued from that that appeals are to be treated as suits and that as suits under O. 46, r. 1 may be instituted at the Central Office or in a District Registry, appeals may be instituted in the Central Office or in a District Registry. I do not agree – I think the words "commenced in any manner prescribed" have reference to the institution or commencement or beginning of proceedings. "Action" in Stroud's Judicial Dictionary is defined:

> "This is a generic term, and means a litigation in a civil court for the recovery of individual right or redress of individual wrong, inclusive, in its proper legal sense, of suits by the Crown . . . "Action, nets outer chose queue loyal demanded de son droit' (Co. Litt. 289a);"

In my judgment suit does not include an appeal.

Mr. Ibbetson strongly relies on *Kimego arap Sirima v. Sheikh Hassan* (1) (1955), 22 E.A.C.A. 240. I do not consider that case assists him; in that appeal the Resident Magistrate, Eldoret, had delivered a judgment on October 6, 1953; from that judgment

Mr. Gautama filed a memorandum of appeal on October 28, 1953, in the Eldoret District Registry. That being so, to quote the Bulletin.

> "it seemed evident to the Court of Appeal that the appellant had done all that lay in his power to comply with O. 46, r. 9 and that the failure of the District Registrar to follow exactly the provisions of the rule could not prejudice the appellant."

I think if anything that is a clear indication by East African Court of Appeal that in appeals from courts within the area of a District Registry the proper course is to file appeals in the appropriate District Registry.

It may be urged that the present appeal was filed in Eldoret under a mistaken view that such a course was permissible. Even if that were so and the opinion were general, that could not validate proceedings otherwise invalid: see the remarks of East African Court of Appeal in *Harnam Singh v. Jadva Karsan* (2) (1953), 20 E.A.C.A. 17. I have no doubt in the instant proceedings that Mr. Ibbetson thought he was doing his best for his client's convenience and to save his client costs of his (Mr. Ibbetson's) proceeding to Kisumu to argue the appeal. But as I have already stated I have come to the firm opinion that O. 46, r. 9 must be construed in the sense that the Legislature intended and that is that appeals from provinces and districts outside Nairobi must be filed and filed timeously in the District Registry of the area in which subordinate courts are situate. The appeal in this case should have been filed in Kisumu and has not been so filed. I do not consider that the District Registry, Eldoret, had jurisdiction to entertain the appeal; if an appeal is filed in a registry which has no jurisdiction to entertain it, then the party must bear the consequences.

On the preliminary points the respondent succeeds and the appeal is dismissed with costs.

Preliminary objection upheld. Appeal dismissed.

For the appellant:
TR Ibbetson
TR Ibbetson, Eldoret

For the respondent:
CM Patel
CM Patel, Eldoret

Pimako Karemira v R
[1957] 1 EA 582 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	18 January 1957
Case Number:	357/1956
Before:	Bennett J
Sourced by:	LawAfrica

[1] Criminal law – Evidence – Mens rea – Whether evidence of intent an ingredient of offence against the Game Ordinance, s. 5 (*U.*).

Editor's Summary

The appellant was convicted in the District Court of Mbarara on counts of killing a buffalo and of being in possession of its hide and horns contrary to s. 5 and s. 11 of the Game Ordinance and sentenced to imprisonment. On appeal against conviction and sentence the main points taken were that the appellant was prejudiced by an amendment of one charge, that there was no evidence that he himself killed the buffalo, that two witnesses for the prosecution were accomplices, that he had not authorised the hunting of the buffalo which had been killed by other men before he arrived on the scene, and that there was no evidence of means rea.

Held–

(i) the particulars of the alleged offence were sufficient to give the appellant notice of the charge against him.

(ii) the evidence accepted by the magistrate established that the appellant had procured other persons to kill the buffalo and pursuant to s. 21 of the Game Ordinance it was therefore proper to convict him of the killing.

(iii) although two of the prosecution witnesses were accomplices, there was corroboration of their evidence.

(iv) means rea is not a constituent of an offence under s. 5 of the Ordinance.

Appeal dismissed. Sentence reduced.

No cases referred to in judgment

Judgment

Bennett J: The appellant was convicted of killing a buffalo contrary to s. 5 of the Game Ordinance, and, on a second count, of being in possession of the hide and horns of the buffalo contrary to s. 11 of the Ordinance. He was sentenced to four months' imprisonment with hard labour on each count, the sentences to run concurrently.

At the hearing of this appeal a number of points have been argued on behalf of the appellant. Firstly, it is said that on count I he was charged under s. 11 of the Ordinance when the charge should have been laid under s. 5. After perusing the charge I am satisfied that it was amended by substituting a reference to s. 5 for whatever reference has been deleted. Even if no such amendment had been made, the particulars of offence alleged in count 1 were sufficient to have given the appellant notice of the offence alleged against him.

Secondly, it is said that there is no evidence that the appellant himself killed the buffalo, and that in the absence of such evidence he cannot be convicted under s. 5. The evidence for the prosecution, which was accepted by the learned magistrate, was that the appellant had procured other persons to kill the buffalo, and in these circumstances it was proper to charge him with and to convict him of killing it by

virtue of s. 21 of the Penal Code.

Thirdly, it was contended that P. 2 and P. 3 were accomplices and that there was no corroboration of their testimony. The learned magistrate did not regard them as accomplices and, consequently, did not look for corroboration. Here I think he was wrong. The fact that they were acting under the instructions of the appellant would have been no defence had they been charged with killing the animal. A soldier who commits an unlawful act on the orders of his superior officer cannot plead the order by way of defence, and the same rule applies to African villagers who act on the orders

of their chief. P. 2 and P. 3 were, in my opinion, accomplices and the learned magistrate should have looked for corroboration. His failure to do so is not fatal to the conviction, since there was in fact corroboration of their evidence to be found in the evidence of the Gombolola Chief P. 1.

The appellant's defence in the District Court was that he had not authorised the hunting of the buffalo or taken part in the hunt, and that it had already been killed when he arrived on the scene. This defence was irreconcilable with the evidence of P. 1 who said that the appellant had reported to him that his men had killed the buffalo while he and his men were trying to drive it away. This admission by the appellant confirmed the evidence of P. 2 and P. 3 to the effect that the appellant took part in the hunt.

Fourthly, it was contended that the appellant ought not to have been convicted in the absence of proof of mens rea. In my opinion mens rea is not a constituent part of the offence created by s. 5 of the Game Ordinance in that no particular intent is required to constitute the offence created by the section.

It was no part of the appellant's defence that the animal was killed under the authority of a valid licence, or in defence of human life (s. 7 of the Ordinance), or in defence of property, crops or domestic animals (s. 62 of the Ordinance); nor was the prosecution evidence consistent with such a defence. In these circumstances there was no burden upon the prosecution to prove that the appellant had ordered the killing of the buffalo with any particular intention.

As regards the second count, it is contended that the appellant ought not to have been convicted of possessing a trophy in that he handed over the hide to the Gombolola Chief. In my opinion, the fact that he handed over the hide to the Gombolola Chief was no defence to a charge under s. 11 of the Ordinance if the animal was killed in contravention of the Ordinance, and as already indicated, in my view, the buffalo was killed in contravention of the Ordinance.

The appeal in so far as it relates to the conviction is dismissed.

With regard to the question of sentence, except in the case of persistent offenders, the punishment for offences against the Game Ordinance should be a fine with imprisonment in default of payment. However that may be, the appellant was released on bail on December 21, pending the hearing of the appeal, having served all but twenty-three days of his sentence. It seems to me undesirable that he should have to return to prison now for a mere twenty-three days. In the circumstances the sentence is reduced to one of three months' imprisonment with hard labour on each count, to run concurrently.

Appeal dismissed. Sentence reduced.

For the appellant:
Sat Pal Singh
Dalal & Singh, Kampala

For the respondent:
MJ Starforth (Crown Counsel, Uganda)
The Attorney-General, Uganda

EMK Mulira and another v The Lukiko

[1957] 1 EA 584 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	17 January 1957
Case Number:	10/1956
Before:	Sheridan J
Sourced by:	LawAfrica

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[1] Native law and custom – Magistrate's jurisdiction – Charge of abusing Kabaka – Whether offence alleged triable by magistrate or by High Court – The Buganda Agreement, 1955, *First Sch., para.* 2 (7) (*a*) *– The Buganda Courts Ordinance* (*Cap.* 77) (*U.*).

Editor's Summary

On August 21, 1956, the appellants were charged in the court of the magistrate Kasangati, Kyaddondo, sitting at Nabweru, with the offence of abusing His Highness the Kabaka contrary to the custom of the country. On September 7 and 8 the evidence of two witnesses was heard and the case was then adjourned to September 11 when the appellants were to cross-examine these witnesses. On September 11 there was a further adjournment and on that day the appellants wrote to the Omulamuzi u.f.s. the magistrate complaining that (*a*) the court at Nabweru had no jurisdiction to try the case; (*b*) that the prosecution ought to have been but had not been authorised by the Katikiro; and (*c*) the case involved the status of the Kabaka and by virtue of para. 2 (7) (*a*) of the First Schedule to the Buganda Agreement, 1955, the case should be enquired into by the High Court. The Omulamuzi referred the letter to three judges of the Principal Court who by an order dated September 24, 1956, rejected the points raised by the appellants in their letter and remitted the case to the magistrate. The appellants then sought to appeal from the order of the Principal Court to the judicial adviser, and on October 27, 1956, the first appellant, in an affidavit in support of an application for leave to appeal to the judicial adviser out of time, alleged that the delay in launching the appeal was due to the negligence of his advocate. On November 1, 1956, the judicial adviser heard arguments on the application for leave to appeal, when it was conceded for the respondents that the application was against the order of the Principal Court acting in its original jurisdiction. The judicial adviser indicated that he would have acceded to the application if he could be satisfied that a right of appeal lay, but held that where an accused objects in the Principal Court to the procedure of a magistrate, the accused is appealing against such procedure, and since the Principal Court in making this order was exercising appellate jurisdiction, under s. 4 of the Buganda Courts Ordinance no further appeal lay. On further appeal it was contended that the appellants had never appealed to the Principal Court, since there was no judgment or order against which to appeal and that the proceedings before the magistrate were at the time and also at the time of the further appeal suspended; that all they had done was to write a letter to the Omulamuzi as Minister of Justice protesting that the magistrate had no jurisdiction and they did not know that he would refer the matter to the Principal Court. It was also contended that the Principal Court did not treat the letter of the appellants as a formal appeal.

Held – the judicial adviser had erred in law in finding that no appeal lay to his court from the order of the Principal Court and the judicial adviser had lost sight of the concession made by counsel for the Lukiko that the application to appeal out of time was against the order of the Principal Court in its original as distinct from its appellate jurisdiction.

Appeal allowed. Case remitted to the judicial adviser for hearing and determination.

Cases referred to in judgment:

(1) *R. v. Sparkes,* 40 Cr. App. R. 83.

Judgment

Sheridan J: This is an appeal from an order of the judicial adviser whereby he rejected an application by the appellants for leave to appeal out of time from an order of the Principal Court.

The proceedings which give rise to this appeal originated in the court of the Magistrate Kasangati, Kyaddondo, sitting in the Gombolola of Mutuba II Kyaddondo at Nabweru. On August 21, 1956, the appellants were charged with abusing His Highness the Kabaka contrary to the custom of the country. On September 7 and 8 the evidence of the two prosecution witnesses, who were also the prosecutors on behalf of the Lukiko, was heard. The case was then adjourned to September 11 for the appellants to cross-examine them. On that date it was further adjourned owing to the number of prisoners on remand; the appellants were on bail. Also on that date the appellants addressed a letter to the Omulamuzi u.f.s. the magistrate in which they complained (*a*) that the court at Nabweru had no jurisdiction to try the case; (*b*) that the prosecution was not authorised by the Katikiro in the terms of the Omulamuzi's Circular No. 20/55 by which, so I am informed, his prior authorisation was required in cases in which it was alleged that the Kabaka had been abused; (*c*) the case involved the Kabaka's status and by virtue of para. 2 (7) (*a*) of the First Schedule to the Buganda Agreement, 1955, it should be inquired into by the High Court.

The Omulamuzi referred the letter to three judges of the Principal Court who by an order dated September 24 rejected the points raised in the letter as being without substance and directed that the case should be transferred back to the magistrate's court at Nabweru. On September 25 the magistrate again adjourned the case on learning that the appellants were appealing to the judicial adviser from the order of the Principal Court. In fact the appeal was not lodged in time and on October 27 the first appellant swore an affidavit in support of an application for leave to appeal out of time. He alleged that the delay was due to the negligence of his advocate. On November 1 the judicial adviser heard arguments by counsel in favour of and against this application. He ruled, quite rightly, that he had first to be satisfied that a right of appeal lay. It is conceded that if the Principal Court was acting in its appellate jurisdiction then by the terms of the warrant establishing the magistrate's court at Nabweru under s. 4 of the Buganda Courts Ordinance (Cap. 7) the decision of the Principal Court was final and no further appeal lay. If on the other hand the Principal Court was acting in its original jurisdiction then under s. 26 (3) of the Ordinance an appeal lay to the judicial adviser and a further appeal lay to this court on a matter of law. In his order the judicial adviser indicated that he would be prepared to accede to the application for leave to appeal out of time if he could be satisfied that a right of appeal lay. He held that where an accused is objecting to the Principal Court against the procedure being adopted by a magistrate's court he is appealing against such procedure and that the Principal Court in making its order was exercising its criminal appellate jurisdiction. With respect there are serious objections to this view and it is a matter for regret that the Lukiko have not seen fit to be legally represented at the hearing of this appeal as they were before the judicial adviser. Mr. Sebowa, the registrar of the Principal Court, has appeared on behalf of the respondent but it is not his fault that he omitted to deal with the forceful submissions of Mr. Kiwanuka on behalf of the appellants and confined himself to repeating the findings of the judicial adviser. The first objection to the order of the judicial adviser is that the appellants never appealed to the Principal Court. There was no judgment or order for them to appeal against. The proceedings before the magistrate's court were and still are in a state of suspended animation. What they did was to write a letter to the Omulamuzi in his capacity as Minister of Justice protesting that the magistrate's court had no jurisdiction to try the case. They did not know that he would refer the matter to the Principal Court for decision. In

England the Home Secretary has power to refer any petition for the exercise of Her Majesty's prerogative of mercy or any representation made by any other person having reference to a conviction or sentence to the Court of Criminal Appeal for determination as in the case of an appeal by a person convicted (s. 19 (*a*) of the Criminal Appeal Act, 1907); *R. v. Sparkes* (1), 40 Cr. App. R.

83, is a recent instance of the exercise of this power. The reference in this case may in some ways be considered to be analagous to this power but with these three important distinctions: (*a*) the power can only be invoked after a conviction has been recorded; (*b*) the Principal Court, unlike the Court of Criminal Appeal, can exercise both original and appellate jurisdiction; (*c*) in the absence of express legislative provision the reference in England would not have been treated as an appeal. There is no such provision in Buganda by legislation or, as far as I am aware, by native customary law. Under (*a*) I emphasise again that the magistrate at Nabweru has not yet come to any decision on the charge against the appellants.

A further objection is that the case file of the Principal Court does not designate the consideration of the appellant's letter as an appeal nor has any number been assigned to it. At best it can be described as an unnumbered miscellaneous application in a criminal matter. Before the judicial adviser, Mr. Troughton, who appeared on behalf of the Lukiko is recorded as saying that there was no point of difference between Mr. Kiwanuka and himself on the question of the right of appeal; as far as they were both concerned it was an application to appeal against the order of the Principal Court in its original jurisdiction. That concession appears to have been lost sight of but in the circumstances it was, in my view, a proper concession to make.

At this stage I am not concerned with the merits of appeal but I am satisfied as a matter of law that the judicial adviser erred in finding that no appeal lay to his court from the order of the Principal Court. I remit the case to him to hear and determine the appeal on its merits.

The appellants will have their costs in this court and before the judicial adviser.

Appeal allowed. Case remitted to the judicial adviser for hearing and determination.

For the appellants:
BKM Kiwanuka
BKM Kiwanuka, Kampala

For the respondent:

B Sebowa (Registrar of Principal Court)

DNG Jakana and another v The Lukiko
[1957] 1 EA 587 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	29 May 1957
Case Number:	3/1957
Before:	Sheridan J
Sourced by:	LawAfrica

[1] Practice – Jurisdiction – Charge of abusing Kabaka – Whether Gombolola Court has jurisdiction unless prosecution authorised by Katikiro pursuant to circular issued by Omulamuzi – The Buganda Courts Ordinance, s. 20 (*U.*).

Editor's Summary

The appellants who had been charged in the Gombolola Court at Nabweru with insulting His Highness the Kabaka, disputed the jurisdiction of the court by a letter to the Omulamuzi. The latter referred the letter to the Principal Court which made an order from which the appellants appealed to the judicial adviser who held he had no jurisdiction to hear the appeal. On further appeal the High Court held that the judicial adviser had jurisdiction and remitted the appeal to him for determination (reported at p. 584). The appellants later sought to appeal from the subsequent decision of the judicial adviser on the ground that, as they had previously contended, the Gombolola Court had no jurisdiction to try the case without first having evidence that the prosecution had been authorised by the Katikiro. In support of this contention the appellants relied on a circular issued by the Omulamuzi in December, 1955. The Buganda Courts Ordinance, s. 20, empowers the Omulamuzi on the advice of the Resident to issue directions regulating the practice and procedure of the Buganda Courts. The judicial adviser had held that the circular did not come within the ambit of s. 20 and had not the force of law, but it was argued that the circular was in any event a lawful order made by a chief within s. 10 (*c*) of the Ordinance. The respondents contended that the circular went far beyond matters of practice and procedure, that it had not been duly promulgated and that in any event its force was spent, in view of events in Buganda subsequent to the issue of the circular.

Held–

(i) the circular went beyond matters of practice and procedure and invaded the field of substantive law; to that extent it was ultra vires the Buganda Courts Ordinance; moreover it had not been duly promulgated.

(ii) the objection taken was at best a technicality which s. 27 of the Ordinance cured.

(iii) the point that it was a lawful order of chief within s. 10 (*c*) of the Ordinance was not raised in the lower courts nor in the memorandum of appeal and since it ought to have been so raised, the court would not consider it.

Appeal dismissed.

No cases referred to in judgment

Judgment

Sheridan J: This is an appeal from a decision of the judicial adviser in his appellate capacity and as such it lies only on a matter of law. The facts are fully set out in his lengthy judgment and I need not rehearse them in any detail. Also this case has already been before me in another context. The short point is whether the Gombolola Court at Nabweru had jurisdiction to try the appellants on a charge of insulting His Highness the Kabaka without first having evidence before it that the prosecution had been authorised by the Katikiro in accordance with a circular which had been issued by the Omulamuzi in December, 1955. Under s. 20 of the Buganda Courts Ordinance the Omulamuzi is empowered on the advice of the Resident to issue directions regulating the practice and procedure of the Buganda Courts. Printed

directions under s. 20 have been issued for the trial of criminal and civil cases. The judicial adviser held that the circular did not come within the provisions of s. 20 and that it did not have the force of law. It certainly did not purport to be made under the section and it did not state that it had been made on the advice

of the Resident. The printed directions refer specifically to the section and although they do not bear the imprimatur of the Resident I am not aware that their validity has ever been challenged. The circular conflicts with directions 3 and 4 of Part I (Criminal Cases) of the Directions, in that it seeks to restrict a person's right to institute criminal proceedings. If it was a valid direction it should have been preceded by some words such as "Notwithstanding the provisions of directions 3 and 4." Also its terms went beyond matters of practice and procedure and invaded the field of substantive law in that in certain cases it was denying persons access to the courts; to that extent it was ultra vires the Ordinance. A further objection to the circular is that it is merely addressed to chiefs and magistrates and so it offends against the principle that in order for a direction to have legal effect it must be duly promulgated. Even if the force of the circular is not spent as the respondents argue on the ground that the troubled conditions which broke out or were threatened on the return of His Highness the Kabaka no longer prevail it is clear that the Lukiko has closely identified itself with this prosecution from the outset. If the circular was a valid direction I would regard the objection to these proceedings as a technicality, which is cured by the saving provisions of s. 27 of the Buganda Courts Ordinance.

Before me Mr. Kiwanuka sought to argue that the circular was a lawful order made by a chief within the meaning of s. 10 (*c*) of the Ordinance which the court was bound to administer. I do not consider this to be so but it is not necessary for me to decide the point as apparently it was not raised in the lower courts and it is not set out as a ground of appeal in the memorandum. An appellate court will not as a general rule entertain matters which could have been raised at an earlier stage.

This appeal is without any merits. It is dismissed with costs and with the effect that the trial before the magistrate at Nabweru can now be resumed.

Appeal dismissed.

For the appellants:
BKM Kiwanuka
BKM Kiwanuka, Kampala

For the respondents:
JFG Troughton
Hunter & Greig, Kampala

The Commissioner of Income Tax v Buhemba Mines Limited
[1957] 1 EA 589 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	17 October 1957
Case Number:	77/1955
Before:	Sir Ronald Sinclair V-P, Bacon and Forbes JJA
Sourced by:	LawAfrica

Appeal from: H.M. High Court of Tanganyika – Lowe, J

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[1] Income Tax – Deduction in computing profits – Expenditure incurred in litigation concerning opposition to petition to wind up company – East African Income Tax (*Management*) *Act,* 1952, *s.* 14.

Editor's Summary

The company had incurred and paid costs amounting to Shs. 96,940/- in successfully resisting a petition filed by certain shareholders to wind up the company. The company sought to deduct these costs from its total income for the year 1952, but the Regional Commissioner of Income Tax, Tanganyika, refused to allow them. The company successfully appealed to the High Court and the commissioner appealed from that decision. It was common ground that the costs had been incurred and paid and it was conceded for the commissioner that the costs constituted income expenses. The question argued on the second appeal was whether the costs were "expenses wholly and exclusively incurred . . . in the production of the income" of the company within s. 14 of the East African Income Tax (Management) Act, 1952, and as such deductible in ascertaining the total income of the company.

Held – the costs were not "expenses wholly and exclusively incurred . . . in the production of the income" of the company and the assessment of the Regional Commissioner was correct.

Appeal allowed.

Cases referred to:

(1) *Ward & Co. Ltd. v. Commissioner of Taxes,* [1923] A.C. 145.

(2) *Morgan v. Tate & Lyle Ltd.,* [1953] 2 All E.R. 162 (C.A.) and [1954] 2 All E.R. 413 (H.L.), 35 T.C. 367.

(3) *British Insulated & Helsby Cables Ltd. v. Atherton,* [1926] A.C. 205.

(4) *Commissioner of Income Tax v. Chitnavis,* 6 I.T.C. 453.

(5) *Dilworth v. Commissioner of Stamps,* [1899] A.C. 99.

(6) *Strong & Co. of Romsey Ltd. v. Woodifield,* [1906] A.C. 448; 5 T.C. 215.

October 17. The following judgments were read by direction of the court:

Judgment

Forbes JA: This is an appeal from a judgment of the High Court of Tanganyika allowing an appeal by the respondent company against a refusal by the Regional Commissioner of Income Tax, Tanganyika, acting on behalf of the appellant, to allow a deduction of Shs. 96,940/- in the ascertainment of the respondent company's total income for the year of income, 1952, for the purpose of the assessment of tax payable by the respondent company, such sum being legal costs incurred and paid by the respondent company in resisting a petition to wind up the company.

It was not disputed that the respondent company had in fact incurred and paid legal costs amounting to Shs. 96,940/- in successfully resisting a winding-up petition filed by certain shareholders of the

company; and, for the purposes of this case only, it was conceded by the appellant both in the High Court and in this court that these

costs constituted income expenses. The whole issue is whether the costs were "expenses wholly and exclusively incurred . . . in the production of the income" of the respondent company within the meaning of those words as used in s. 14 of the East African Income Tax (Management) Act, 1952, (hereinafter referred to as the East African Act) and, as such, deductible for the purpose of ascertaining the total income of the respondent company for the year in question.

Ten grounds of appeal are set out in the memorandum of appeal, and of these the first eight and part of the ninth relate to this issue. The latter part of the ninth ground is concerned with the correction of an apparent misunderstanding on the part of the learned judge in stating in his judgment that counsel for the appellant agreed that the decision in the case of *Ward & Co. Ltd. v. Commissioner of Taxes* (1), [1923] A.C. 145 was not binding on the court; and the tenth ground seeks to correct an error on the record whereby an agreed amendment to para. 6 of the respondent's Statement of Facts was not noted. Neither of these matters is in dispute and they do not affect the real substance of the appeal.

Section 14 (1) of the East African Act commences as follows:

> "14(1) For the purpose of ascertaining the total income of any person there shall be deducted all outgoings and expenses wholly and exclusively incurred during the year of income by such person in the production of the income, including–;"

and thereafter there are set out fourteen specific items of expenditure. The costs in issue in this case do not fall within any of the specific items, but the items are relevant in that certain of them are clearly outside the meaning of the words "expenses wholly and exclusively incurred . . . in the production of the income" if those words are strictly interpreted; from which it is argued for the respondent company that the words must be given an extended meaning.

Section 15 of the East African Act is also relevant to the extent that it provides that:

> "Except where otherwise expressly provided in this Act, for the purpose of ascertaining the total income of any person, no deduction shall be allowed in respect of–
>
> . . . . . .
>
> "(*b*) any item of expenditure or of charge except so far as it is attributable to, and incurred for, the purpose of acquiring the income;"

It will be necessary to refer to comparable provisions of English, New Zealand and Indian Income Tax legislation, and it is convenient to set these out now. The relevant English provision is contained in the rules applicable to Cases I and II in Sch. D to the Income Tax Act, 1918, and reads as follows:

> "Rule 1 (1). The tax shall be charged without any other deduction than is by this Act allowed."
>
> "Rule 3 (*a*). In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of – (*a*) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade . . ."

The New Zealand provision is s. 86 (1) of the Land and Income Tax Act, 1916, the material part of which reads:

> "86(1) In calculating the assessable income derived by any person from any source no deduction shall be made in respect of any of the following sums or matters:
>
> "(*a*) Expenditure or loss of any kind not exclusively incurred in the production of the assessable income derived from that source . . ."

And finally, the Indian provision appears in s. 10 of the Indian Income Tax Act the material part of which

is as follows:

> "(1) The tax shall be payable by the assessee in respect of profits or gains of any business, profession or vocation carried on by him.
>
> "(2) Such profits or gains shall be computed after making the following allowances, namely:
>
> "(xv) any expenditure (not being in the nature of capital expenditure or personal expenses of the assessee) laid out or expended wholly and exclusively for the purpose of such business, profession or vocation."

It is to be noted, first, that while the English and New Zealand provisions are framed in the negative, the Indian and East African Acts make positive provision for the deduction of expenses; and secondly, that while under the English and Indian provisions expenses wholly and exclusively laid out or expended for the purposes of the trade (or in India, for the purpose of the business, profession or vocation), are deductible, in New Zealand and East Africa the deductible expenses are those exclusively (or wholly and exclusively) incurred in the production of the income.

At first sight, and although one is framed in the negative and the other in the positive, the New Zealand and East African provisions appear substantially the same, and appear more restrictive than the English and Indian provisions. The appellant concedes that if the English provision applied the costs which are the subject of this appeal would be deductible, but his contention is that the East African provision is in fact more restrictive than the English provision and that, to fall within it, an expense must be shown to have been incurred directly for the purpose of producing profits; and it is argued that the costs of resisting a winding-up petition, though no doubt expended for the purpose of saving the company from extinction and thereby preserving its profit earning capacity, are not an expense directly incurred for the purpose of producing profit.

In support of his contention the appellant relies strongly on the judgment of the Privy *Council in Ward & Co. Ltd. v. Commissioner of Taxes* (1), [1923] A.C. 145. That case was an appeal from the Court of Appeal in New Zealand in which it was held that, under the New Zealand provision cited above, expenses incurred by a brewery company in financing a campaign to persuade the public to vote against "prohibition" in a forthcoming plebiscite was not a deductible expense. The following passage (at p. 149) from the judgment of the judicial committee is relevant to this case:

> "The conclusion of the Court of Appeal upon this point is contained in the following passage in the judgment of that court: 'The question, therefore, is: Was the expenditure under consideration exclusively incurred in the production of the assessable income, for unless it was so, the Act expressly prohibits its deduction from such income. This question must, we think, be answered in the negative. We find it quite impossible to hold that the expenditure was incurred exclusively, or at all, in the production of the assessable income. It was incurred not for the production of income, but for the purpose of preventing the extinction of the business from which the income was derived, which is quite a different thing. It was contended by the company that it was illogical that while legitimate expenses incurred in the production of the income are deductible, similar expenses incurred for the much more important purpose of keeping the profit-making business alive are not deductible, and, further, that it was inequitable that the Legislature should, on the one hand, force a certain class of traders into a struggle for their very existence, and, on the other hand, treat the reasonable expenses incurred in connection with such struggle as part of the profits assessable to income tax. These aspects of the matter are clearly and forcibly set out in the contentions of the company as embodied in the correspondence with the commissioner contained in the case, but they raise questions which can only be dealt with appropriately by the Legislature. This court, however, cannot be influenced by such considerations, being concerned only with the interpretation and application of the law as it stands.'
>
> "Their lordships agree with this reasoning. The expenditure in question was

> not necessary for the production of profit, nor was it in fact incurred for that purpose. It was a voluntary expense incurred with a view to influencing public opinion against taking a step which would have depreciated and partly destroyed the profit-bearing thing. The expense may have been wisely undertaken, and may properly find a place, either in the balance sheet or in the profit-and-loss account of the appellants; but this is not enough to take it out of the prohibition in s. 86, sub-s. 1 (*a*), of the Act. For that purpose it must have been incurred for the direct purpose of producing profits. The conclusion may appear to bear hardly upon the appellants; but, if so, a remedy must be found in an amendment of the law, the terms of which are reasonably clear.
>
> "It is only necessary to add that the decisions on the English Income Tax Acts, the language of which is different from that of the New Zealand Act, have no real bearing upon the question now under decision."

The judgment in the *Ward* case (1) was considered in relation to the English law in *Morgan v. Tate & Lyle Ltd*. (2), 35 T.C. 367, first by the Court of Appeal and subsequently by the House of Lords, and the following extracts are relevant. In delivering judgment in the Court of Appeal Jenkins, L.J. said (at p. 403 of the report):

> "I have only to add, with respect to the Privy Council case of *Ward & Co. Ltd. v. Commissioner of Taxes* (1), [1923] A.C. 145, that while the expenditure in question affords a closer parallel to the disputed expenditure in the present case than is to be found in any of the other cases of which I am aware, the language of the material New Zealand enactment which prohibited the deduction of expenditure 'not exclusively incurred in the production of the assessable income' was so markedly different from, and so much narrower than, the language of the enactment governing the present case that I cannot regard it as providing any authority against the conclusion to which I have come."

Similarly, in his judgment (at p. 404) Hodson, L.J. said:

> "I do not think that the decision on the narrower words of the New Zealand Act is of great assistance here."

This view received confirmation in the House of Lords. Lord Morton (at p. 412 of the report) said:

> "In my view, this case (i.e. the *Ward case* (1)) is of no assistance to the Crown, having regard to the difference in language which is pointed out by the board in the last sentence just quoted. The language of the New Zealand statute is much narrower than that of r. 3 (*a*), and I think that if the board had been applying r. 3 (*a*) to the facts in the New Zealand case its decision might have been to the opposite effect. It is noteworthy that Lord Cave, L.C., in delivering the judgment of the board, said that in order to take the expense in question out of the prohibition in s. 86 (1) (*a*) of the New Zealand Act, 'it must have been incurred for the direct purpose of producing profits.' With this observation should be contrasted the observation of Lord Cave, L.C., only three years later, in regard to r. 3 (*a*) in *British Insulated and Helsby Cables Ltd. v. Atherton* (3), [1926] A.C. 205, at p. 211 ad fin: 'It was made clear in . . . *Usher's Wiltshire Brewery v. Bruce and Smith v. Incorporated Council of Law Reporting of England and Wales* that a sum of money expended, not of necessity and with a view to a direct and immediate benefit to the trade, but voluntarily and on the grounds of commercial expediency, and in order indirectly to facilitate the carrying on of the business, may yet be expended wholly and exclusively for the purposes of the trade; and it appears to me that the findings of the commissioners in the present case bring the payment in question within that description.' "

Lord Reid (at p. 418) also took the view that owing to the difference in language the *Ward* case (1) had no real bearing on the case then before their lordships.

It is sufficiently clear from the passages I have cited that it has been held by the judicial committee and confirmed by the House of Lords that the words of the New

Zealand Act "not exclusively incurred in the production of the assessable income" bear a meaning different from and narrower than the words of the English rule "not . . . wholly and exclusively laid out or expended for the purposes of trade." As I have already pointed out, the words of the East African Act are strikingly similar to the words of the New Zealand Act, and unless it can be shown that in the East African Act a different and wider meaning must be attached to the words used, I consider that the decision in the *Ward* case (1) would be binding and would conclude the matter. Costs incurred in resisting a winding-up petition are certainly not incurred for the direct purpose of producing income, and therefore, on the basis of that decision, could not be said to be "exclusively incurred" in the production of the income.

In the court below the learned judge sought to distinguish the *Ward* case (1) from the instant one on the basis that in the *Ward* case (1) the payment was a "voluntary" one, while in the instant case the company was in duty bound to resist the petition. With the greatest respect, I do not think the decision in the *Ward* case (1) rested on the basis of the payment being a voluntary one. It is true that in the course of the judgment of the judicial committee Lord Cave, L.C., said:

> "The expenditure in question was not necessary for the production of profit, nor was it in fact incurred for that purpose. It was a voluntary expense incurred with a view to influencing public opinion against taking a step which would have depreciated and partly destroyed the profit-bearing thing."

The precise sense in which the word "voluntary" is used is not entirely clear to me, as, in one sense, virtually all payments made by a company may be said to be voluntary. It would appear to be used in contradistinction to the words "necessary for the production of profit." However, I consider it is clear from the judgment that the "voluntary" nature of the payment, in whatever sense the word was used, was only a subsidiary ground for the conclusion reached by their lordships. The main ground, which is quite independent of the question whether or not the payment was "voluntary," is set out in the passage from the judgment of the New Zealand Court of Appeal which was adopted by their lordships, and is that the expenditure in question was incurred

> "not for the production of the income, but for the purpose of preventing the extinction of the business from which the income was derived, which is quite a different thing."

I am quite unable to distinguish the *Ward* case (1) from the instant one on the ground that the payment in the *Ward* case (1) was a voluntary one.

I return to the question whether the words used in the East African Act bear a different meaning from the similar words used in the New Zealand Act. *Prima facie* I do not see any obvious reason why the words should be distinguished. The phrase "exclusively incurred in the production of the (assessable) income" appears to me to be substantially identical with the phrase "wholly and exclusively incurred in the production of the (total) income."

Counsel for the respondent company has, however, argued that there is no true comparison between s. 14 of the East African Act and the New Zealand provision. He submitted that the true comparison should be between s. 15 of the East African Act and the New Zealand provision; that both the English and New Zealand provisions are in the negative and subject to the general rule stated at p. 201 of Vol. 2 of Simon's Income Tax (2nd Edn.)

> "that an item of expense can be deducted in computing the profit of a trade if its deduction would be justified on business and accountancy principles, but that, if a particular kind of deduction is statutorily prohibited, the deduction cannot be made even though it would be proper to make it from the point of view of commercial accountancy;"

that while under the New Zealand Act there is such a statutory prohibition which is susceptible of interpretation without reference to other parts of the section, as was in fact done in the *Ward* case (1), s. 14 of the East African Act makes a positive

allowance which must be considered in its general context; that s. 14 first states a general principle and then sets out "examples" included in this general principle; that the meaning to be attached to the general principle must be wide enough to cover all the "examples" set out; that from the nature of some of the examples it must follow that the general words extend to include not only the production of income but also the prevention of the extinction of the source of income; and counsel cited the Indian Income Tax Act as an example of a positive approach and referred to the commentary on s. 10 of that Act at p. 464 of Kanga and Palkhivala, The Law and Practice of Income Tax (3rd Edn.) where it is stated that the list of allowances set out in s. 10 is not exhaustive, and *Commissioner of Income Tax v. Chitnavis* (4), 6 I.T.C. 453 is cited as an authority for that proposition.

I am, however, unable to accept the approach to the interpretation of s. 14 for which counsel for the respondent company contends. As regards the Indian Income Tax Act, this, in effect, permits deduction of expenses incurred for the purpose of the trade, i.e. on the face of it, the wording approximates to the English rule and permits deductions corresponding to those allowable in England, and therefore I do not consider that it is of much value as a guide in the present case. So far as it goes, however, I accept that the list of specific expenses set out in s. 14 of the East African Act is not exhaustive. The list is clearly not intended to enumerate every item of expense falling within the expression

> "all outgoings and expenses wholly and exclusively incurred in the production of the income,"

and it has not been contended that it does. I cannot agree, however, that the effect of the inclusion in the list of some items of expenditure which do not fall within the strict meaning of that expression has the effect of enlarging the meaning of the expression for all purposes. I do not regard the setting out of certain items of expenditure in s. 14 following the word "including" as the setting out of "examples" intended to illustrate and enlarge the meaning of the preceding words.

> " 'Include' is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used, these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include."

(*Dilworth v. Commissioner of Stamps* (5), [1899] A.C. at pp. 105–106). But this is not to say that because a word or phrase is declared by the legislature to include certain matters not within its normal import, it is to be construed as including other matters not specifically declared and which are also outside its normal import. To do so would involve very speculative enlargement of the express provisions of the statute. In my view the word "including" in s. 14 is used in precisely the same manner as in an interpretation clause, and the items following it are set out, in some cases for the avoidance of doubt, and in others for the inclusion of specific items not within the normal import of the preceding words. But I cannot think that there was any intention to enlarge the normal meaning of the earlier words beyond the items expressly enumerated. I am strengthened in this view by the fact that there is express provision in para. (*o*) of s. 14 enabling additional deduction items to be prescribed, which plainly indicates an intention to make specific provision where any enlargement of the normal meaning of the general words is deemed desirable. Such a provision would have been quite unnecessary had the items (*a*) to (*n*) been intended as "examples" to show the meaning to be attached to the general words at the beginning of the section. I would add that, in seeking to give an extended meaning to the general words, the learned judge in the court below was in fact led into speculation as to the intention of the legislature and sought to draw inferences as to that intention from the nature of certain items included in the Second Schedule to the East African Act. With respect, I consider that such speculation undertaken for the purpose of justifying

an enlargement of the plain meaning of the words used in the section is neither necessary nor justifiable.

I conclude therefore that the words

> "outgoings and expenses wholly and exclusively incurred . . . in the production of the income"

in s. 14 are to be construed according to their normal meaning; and I am unable to see why a different meaning should attach to the words if the section is framed in the positive from that attaching if the section is framed in the negative. In either case the words are intended to draw the line between deductible and non-deductible expenses. In the one case expenses falling to one side of the lines are expressed to be deductible; in the other case expenses falling on the other side of the line are expressed to be non-deductible. But I am unable to infer any intention to move the line defined by the words from the mere fact that a positive instead of a negative phrasing has been used.

Counsel for the respondent company also contended that the words "in the production of the income" ought to be equated with the words in the English rule "for the purposes of the trade." This argument was based on a passage from the judgment of Lord Davey in *Strong & Co. of Romsey, Ltd. v. Woodifield* (6), 5 T.C. 215 at p. 220 and the comments on that passage in Lord Morton's judgment in the *Tate & Lyle* case (2). The relevant passage in Lord Morton's judgment (35 T.C. at p. 410) is as follows:

> "The same result follows if I apply to the present case the oft-quoted observation of Lord Davey in *Strong & Co. of Romsey, Ltd. v. Woodifield* (6), [1906] A.C. 448, at p. 453, in regard to the words 'for the purposes of such trade' in the corresponding provision of the Income Tax Act, 1842. 'These words,' said Lord Davey, 'are used in other rules, and appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade, etc. I think the disbursements permitted are such as are made for that purpose. It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits.' The last sentence of this observation has sometimes been quoted in isolation, but it cannot be supposed that in this one short passage Lord Davey intended to ascribe two different meanings to the words in question which is contained in the first sentence."

Counsel argued that "in the production of the income" was synonymous with "for the purpose of earning the profits," and that it followed from the passage cited that it must also be synonymous with "carry on and earn profits in the trade." The learned judge in the court below accepted this argument. At p. 14 of his judgment he cites the following passage from Lord Reid's judgment in the *Tate & Lyle* case (2):

> "Lord Davey used the two expressions 'for the purpose of enabling a person to carry on and earn profits' and 'for the purpose of earning profits' in close juxtaposition and he cannot have intended them to mean different things . . . and I am satisfied that "purposes of the trade" in r. 3 (*a*) has a wider meaning than purposes directly related to the earning of profits. Defending or preserving a profit-earning asset of a business is within the purposes of the trade and that must apply equally to a single asset or a collection of assets."

And at p. 29 of his judgment the learned judge says:

> "I do not think it can be doubted, following the dicta in the *Tate & Lyle* case (2) to which I have already referred, that the word 'trade' in the English section has the same significance as the words 'the production of income' for income is of course the basis of trade. I do not find any great difference between the English section and s. 14, each, in their permissive form."

I would hesitate to accept the proposition that the words "in the production of income" mean the same as the words "for the purpose of earning profits." The latter words appear to me to be capable of a wider construction than the former. Apart from

this, however, I consider with respect that there is a fallacy in counsel's argument, and that the learned judge erred, in seeking to draw a conclusion as to the general meaning of a phrase from dicta attributing a special meaning to that phrase in the particular context in which it was used. This emerges very clearly if the whole passage from Lord Reid's judgment relied on by the learned judge is considered, and not merely the portion cited in his judgment which I have set out above. The whole passage reads as follows:

> "I have referred to a good many cases in which phrases like 'money spent to earn profits' have been used by high authorities in referring to sums which are deductible. The solicitor-general argued that these phrases accurately express the meaning of r. 3 (*a*), and that as the expenditure in this case cannot be directly related to the earning of profit it is therefore not deductible. I do not think that this argument is well founded. Lord Davey used the two expressions' for the purpose of earning the profits' in close juxtaposition and he cannot have intended them to mean different thing. He obviously intended the former to be the more accurate phrase because that is what he said he thought the words of the rule meant. Similarly Lord Simonds, in the passages I have quoted from his speech in *Smith's Potato Estates,* first quoted the former phrase of Lord Davey and later referred to 'money spent to enable the trader to earn profit,' and he also cannot have intended these phrases to have different meanings. I doubt whether in any case the shorter phrase was intended to be an accurate definition, and I am satisfied that 'purposes of the trade' in r. 3 (*a*) has a wider meaning than purposes directly related to the earning of profits. Defending or preserving a profit-earning asset of the business is within the purposes of the trade and that must apply equally to a single asset or a collection of assets."

It is in my opinion clear that neither Lord Morton nor Lord Reid sought to say that the words "carry on and earn profits in the trade" mean exactly the same as the words "for the purpose of earning profits," but merely that the use of the latter words was not, in the context in which they were used by Lord Davey, intended to qualify or restrict the meaning of the former words. And it is abundantly clear from the passages cited earlier in this judgment that their lordships accepted that the words of the New Zealand statute were in fact narrower than the words of the English rule.

I have rejected the argument that the inclusion of specific items of expenditure allowable as deductions in s. 14 must be taken to confer any special and extended meaning on the words "wholly and exclusively incurred in the production of the income." As I have already stated, I am unable to find any substantial difference between those words and the words of the New Zealand Act which were considered in the *Ward* case (1). In the *Ward* case (1) the judicial committee held that the words of the New Zealand Act meant that an expense to be deductible "must have been incurred for the direct purpose of producing profits," and I am of the opinion that the same meaning must be attached to the words used in the East African Act.

It was argued that regard should be had to s. 15 (*b*) of the East African Act in considering the construction to be placed on s. 14, and that it was para. (*b*) of s. 15 which set the limit to what should be included by the words of s. 14. I find reference to s. 15 unnecessary in that I cannot see that s. 15 can in any way extend the meaning of the words used in s. 14. It was conceded by counsel for the respondent company that s. 14, read as a whole, is exhaustive; and s. 15 is expressed to be subject to other express provisions of the Act. In any case, if regard were had to para. (*b*) of s. 15 I should be of the opinion that the same result followed. It is true that words different from s. 14 are used in para. 15 (*b*), but it appears to me that the words "attributable to, and incurred for, the purpose of acquiring income" in fact also limit deductions to expenses incurred for the direct purpose of producing income.

In the result I think this appeal should succeed. I have not dealt individually with the grounds of appeal set out in the memorandum but I think these are sufficiently covered in my judgment. I would order that the appeal be allowed with costs in this

court and the court below, and that the assessment of tax on the respondent company raised by the Regional Commissioner in respect of the year 1952 be restored.

Sir Ronald Sinclair V-P: I have read the judgment prepared by my brother Forbes and I am in entire agreement with his conclusions. An order will be made in the terms proposed.

Briggs JA: I also agree.

Appeal allowed.

For the appellant:
CD Newbold QC and *JC Hooton* (Legal Secretary and Deputy Legal Secretary East Africa High Commission)
The Legal Secretary, East Africa High Commission

For the respondent:
K Bechgaard
K Bechgaard, Nairobi

Abdul Kaderbhoy Assabwalla v Abdul Aziz Saeed
[1957] 1 EA 597 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	14 May 1957
Case Number:	86/1956
Before:	Sir Newnham Worley P, Sir Ronald Sinclair V-P and Bacon JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Aden – Campbell, C.J

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[1] Appeal – Appeal as of right – Value of subject matter – Landlord's appeal – Calculation of value – Appeals to the Court of Appeal Ordinance, s. 6 (*A.*).

[2] Practice – Appeal – Preliminary objection – Reasonable notice – Eastern African Court of Appeal Rules, 1954, *r.* 70.

Editor's Summary

The appellant had sued the respondent for possession of certain premises and in his plaint stated for the purpose of jurisdiction the value of the premises to be Shs. 1,001/-. The suit was dismissed by the Supreme Court and the appellant on appeal filed a memorandum of appeal which included a statement that the subject matter of the appeal was:

"respecting property of the value of more than Shs. 3,000/-, therefore this appeal lies as a matter of right."

The appeals to the Court of Appeal Ordinance, s. 6 provides that an appeal shall lie as of right where the appeal involves a claim or question of the value of Shs. 3,000/- or upwards. In all other cases leave to appeal is necessary and leave in this case had not been obtained. Two days before the hearing of the appeal the respondent gave notice to the appellant of his intention to take the preliminary point that the appeal was incompetent for want of leave to appeal, and at the hearing it was contended that having declared the value of the subject matter of the suit to be Shs. 1,001/- in his plaint, the appellant could not increase the value for the purpose of an appeal without evidence in support, of which there was none.

Held–

(i) since the Supreme Court of Aden has unlimited and concurrent jurisdiction and since in any event by para. (4) of the Schedule to the Civil Courts Ordinance suits for possession of immovable property are not within the cognisance of the Court of Small Causes, it was not necessary to state any value in the plaint and the averment of value therein was surplusage and insufficient to support the objection;

(ii) as the appeal was by the landlord, the capital value of the property possession of which he was claiming was the determining factor, and since the annual rent of

the property which was controlled was Shs. 495/- it was most improbable that the capital value could be less than Shs. 3,000/-;

(iii) where, as in Aden, appeals as of right depend upon a monetary limit, the memorandum of appeal should contain sufficient averments to show that the appeal is *prima facie* competent;

(iv) since the respondent had had three months in which to raise his objection to what he alleged was an apparent defect on the face of the record, the two days notice given to the appellant was utterly unreasonable.

Preliminary objection overruled.

Cases referred to in judgment:

(1) *Meghji Lakhamshi & Brothers v. Furniture Workshops,* [1954] A.C. 80; [1954] 1 All E.R. 273.

Judgment

Sir Ronald Sinclair V-P: read the following judgment of the court: On this appeal from a judgment of the Supreme Court of Aden the respondent took a preliminary objection that the appeal was incompetent on the ground that leave to appeal was necessary and had not been obtained.

The appellant sued the respondent for possession of certain premises in Street No. 1, Crater which had been let by him to the respondent. In the plaint the value of the subject-matter of the suit was stated to be Shs. 1,001/- for the purpose of jurisdiction. The suit having been dismissed by the Supreme Court, the appellant appealed to this court. In the memorandum of appeal it is stated that

> "the subject-matter of this appeal involves appellant's right of possession respecting property of the value of more than Shs. 3,000/-, therefore this appeal lies as a matter of right."

The right of appeal is governed by s. 6 of the appeals to the Court of Appeal Ordinance (Cap. 7) which provides that an appeal shall lie as of right

> "from any final judgment of the Supreme Court where the appeal involves, directly or indirectly, some claim or question respecting property or some civil right, of the value of three thousand shillings or upwards."

In all other cases leave to appeal is necessary. The respondent contends that, having declared the value of the subject-matter of the suit to be Shs. 1,001/-, the appellant cannot increase the value for the purpose of an appeal unless there is evidence to support the increased valuation and there is none in this case. The appellant submits that since, as appears from the record, the annual rent of the property was Shs. 495/-, which would be a return of 16½% on a capital value of Shs. 3,000/-, it is most unlikely that the capital value of the property could be less than Shs. 3,000/-. If that submission is not accepted, he asks for an adjournment to submit evidence by affidavit as to the value.

We are at a loss to understand why a valuation was given in the plaint for the purpose of jurisdiction, and counsel were unable to enlighten us. Rule 70 of the Rules of Court, which apply to all civil courts, provides that the plaint shall contain among other particulars a statement of the value of the subject-matter of the suit for the purposes of jurisdiction. But the Supreme Court has unlimited and concurrent jurisdiction and para. (4) of the Schedule to the Civil Courts Ordinance excepts suits for possession of immovable property from the cognisance of the Court of Small Causes. For the purpose of jurisdiction, therefore, it was not necessary to state any value in the plaint. Nor had it any relevance to

the computation of the court fee, since in a suit for the recovery of immovable property from a tenant the fee is computed according to the amount of the annual rent of the property: see s. 3 (XI) (*d*) of the Court-Fees Ordinance (Cap. 37). In the circumstances we think that the statement in the plaint that the value of the subject-matter of the suit is Shs. 1,001/- was mere surplusage and is not sufficient to support the objection in the present case. The respondent relied solely on that statement and did not otherwise contend that the

value stated in the memorandum is incorrect. We can see no reason to doubt the valuation of the property as stated in the memorandum. As this is a landlord's appeal, it is the capital value of the property, possession of which he is claiming, which is the determining factor under s. 6 of the Appeals to the Court of Appeal Ordinance: see *Meghji Lakhamshi & Brothers v. Furniture Workshop* (1), [1954] A.C. 80. Since rents in Aden are controlled and an annual rent of Shs. 495/- would be a return of 16½% on a capital value of Shs. 3,000/-, it is most improbable that the capital value could be less than Shs. 3,000/-.

Had we not been able to come to this conclusion, we would have allowed the appellant an adjournment to enable him to submit evidence by affidavit as to the value of the property. Although the memorandum and record were filed on December 7, 1956, notice of this preliminary objection was not given until March 4, 1957, two days before the appeal was listed for hearing on March 6. It was then too late for the appellant to file affidavits before the hearing.

We draw attention to Practice Note 4 of 1955 by virtue of which every memorandum of appeal should contain sufficient averments to show that the appeal is *prima facie* a competent one. Where, as in Aden, a monetary limit is set on appeals as of right, it should be shown in the memorandum that the limitation does not apply. Under r. 70 of the Eastern African Court of Appeal Rules, 1954, a respondent who intends to take a preliminary objection to the competence of the appeal is required to give reasonable notice thereof to the court and to the opposite party or parties, unless it is impracticable to do so. As the respondent in the present case had three months in which to take his objection, but failed to do so until two days before the hearing, and as the alleged defect was apparent on the face of the record, we think the notice given was utterly unreasonable.

The preliminary objection is therefore over ruled and the appeal will proceed. The costs of and arising out of the preliminary objection will be the appellant's in any event.

Preliminary objection overruled.

For the appellant:
Chanan Singh
HM Handa, Aden

For the respondent:
SM Akram
Mahmood A Lugman, Aden

Trikamlal Vallabhdas Bhimjani v Rambhai Mathurbhai Patel
[1957] 1 EA 600 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	10 July 1957
Case Number:	18/1957
Before:	Sir Newnham Worley P, Sir Ronald Sinclair V-P and Bacon JA

Sourced by: LawAfrica

Appeal from: H.M. High Court of Uganda – Sheridan, J

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[1] Rent restriction – Arrears of rent paid into court – Omission from legislation of provision that order for possession should be made if such order reasonable – Whether Rent Restriction Ordinance, s. 6 (1) *and* (2) (*U.*) *confers discretionary powers upon court.*

[2] Rent restriction – Equity – Doctrine of relief against forfeiture – Whether doctrine applicable to statutory tenant.

Editor's Summary

In 1947 the appellant became one of the tenants of a dwelling house at Kampala which was controlled by the Rent Restriction Ordinance. In 1950 the respondent purchased the premises. There was then a head tenant who was not a resident but there were several sub-tenants including the appellant. In 1951 the respondent let the whole premises to the appellant by an agreement which contained an undertaking by the appellant against assignment or sub-letting and that only one family should occupy the premises. Certain sub-tenants remained in possession after this agreement was concluded from whom the appellant accepted rent. When the agreement expired in December, 1952, the appellant held over and paid the full rent until June, 1953, after which he paid nothing more until proceedings were begun by the respondent when he paid into court rather more than the arrears then due. There was then one sub-tenant still in occupation. The respondent's suit against the appellant was for possession of the premises, arrears of rent and mesne profits, and at the trial the respondent contended that the arrears had not accumulated because of any bona fide dispute as to occupation of part of the premises by a sub-tenant. The appellant's case was that he did not pay the rent because the respondent had undertaken but failed to give the appellant possession of the entire premises. The respondent relied on the clause in the agreement as to occupation by one family. The trial judge was asked but refused to exercise his discretion not to make an order for possession since the arrears of rent had been paid into court and gave judgment for the respondent for the arrears of rent, for mesne profits and for possession. On appeal it was conceded for the parties that the attention of the trial judge had been drawn neither to his wide discretionary powers under s. 6 (2) of the Ordinance, nor to the fact that the usual provision in rent restriction legislation that no order for possession is to be made except if the court considers it reasonable, had been omitted from the Ordinance; and in addition that there had been no argument as to the true interpretation of sub-s. (1) of s. 6 when read in conjunction with sub-s. (2) of s. 6.

Held–

(i) the equitable doctrine of relief against forfeiture in the case of a contractual tenancy is not applicable to a statutory tenancy;

(ii) sub-s. (2) of s. 6 of the Rent Restriction Ordinance when read in conjunction with sub-s. (1) confers on the court discretionary powers the exercise of which involves considerations similar to the principles on which the equitable doctrine of relief is founded;

(iii) the discretion which the trial judge exercised did not flow from a correct appreciation of the law.

Appeal allowed in part. Case remitted to trial judge for fresh consideration according to law of the question how he should exercise his discretion.

Cases referred to:

(1) *Sanders v. Pope* (1806), 12 Ves. 282; 33 E.R. 108.

(2) *Brewer v. Jacobs*, [1923] 1 K.B. 528.

(3) *Dellenty v. Pellow*, [1951] 2 K.B. 858; [1951] 2 All E.R. 716.

(4) *Feyereisel v. Turnidge*, [1952] 2 Q.B. 29; [1952] 2 All E.R. 728.

(5) *Haymills Houses Ltd. v. Blake*, [1955] 1 All E.R. 592.

(6) *Chiverton v. Ede*, [1921] 2 K.B. 30.

(7) *Cumming v. Danson*, [1942] 2 All E.R. 653.

(8) *Scott v. Bamforth* (1923), 13 L.J.C.C.R. 4; (Blundell's Rent Restriction Cases No. 944).

(9) *Shrimpton v. Rabbits* (1924), 131 L.T. 478.

(10) *Bell London & Provincial Properties Ltd. v. Reuben*, [1946] 2 All E.R. 547; [1947] 1 K.B. 157.

(11) *Briddon v. George*, [1946] 1 All E.R. 609.

(12) *Thaker Dass v. Mawji Gangdas Patel* (1954), 21 E.A.C.A. 90.

(13) *Cresswell v. Hodgson*, [1951] 2 K.B. 92; [1951] 1 All E.R. 710.

(14) *Grimshaw v. Dunbar*, [1953] 1 All E.R. 350.

(15) *Yelland v. Taylor*, [1957] 1 All E.R. 627.

July 10. The following judgments were read by direction of the court:

Judgment

Bacon JA: This is a tenant's appeal against a decree of the High Court of Uganda whereby it was ordered that judgment be entered for the present respondent for Shs. 15,805/- arrears of rent, for certain mesne profits, interest and costs, and for possession of a dwelling-house controlled by the Rent Restriction Ordinance (Cap. 115). The notice of appeal stated the intention to appeal against the whole of the decision on which the decree was founded but there is no dispute as to any part of it except the order for possession.

The premises concerned are those on plot number twelve, Clement Hill Road, Kampala. The appellant began to reside there in about 1947, occupying part of the premises at a monthly rental of Shs. 450/-. In September, 1950, the respondent landlord purchased the premises. At the time of that purchase one Mathabhai Nagalbhai was the head tenant, but was not in occupation; sub-tenants, including the appellant, were occupying various parts of the premises. The respondent commenced proceedings for possession against the head tenant, the appellant and the three other persons there residing, including one Jashabhai Patel. It appears that the respondent discontinued the proceedings on the strength of an agreement between himself and the appellant which was made in writing on August 16, 1951. By that agreement the respondent let the whole of the premises to the appellant for sixteen months as from September 1, 1951, at a rental of Shs. 545/- per month payable monthly in arrears. By cl. 4 of that agreement it was provided that

> "The tenant agrees not to assign or sub-let the said premises and that the same shall be occupied by one

family only."

The respondent testified that cl. 4 was inserted in order to comply with his Crown lease which allowed only one family to occupy the premises at any one time. But his evidence did not stop there, for, according to him, the practical arrangements between himself and the appellant do not appear on the face of the agreement at all. It may well be that in that connection he was permitted, strictly speaking, to give inadmissible evidence of an alleged oral term of his agreement with the appellant which was inconsistent with the written lease. Moreover by his plaint he had pleaded the agreement in writing alone – not an agreement partly in writing and partly oral; and in any event he could not have relied on an agreement embodying mutually contradictory provisions, for that would have been tantamount to an assertion that the parties were not ad idem. But I think that his evidence relating to cl. 4 was admissible as, and must be taken to have amounted to, an assertion that it was understood between the parties from the beginning that, vis-à-vis the appellant, he

would waive his right to initiate any claim based on a breach by the appellant of the covenant which forbade sub-letting. The respondent further said, in effect, that that understanding accorded with the general practice in Kampala of sub-letting "when the rent is very high," that the appellant had undertaken the responsibility of collecting rent from sub-tenants and remained under an obligation to him (the respondent) to pay the full rent, that it was accordingly understood that the appellant would be given possession of the premises but not vacant possession of the whole premises, and that those arrangements were in fact carried out.

The appellant, on the other hand, relied on the clause as an undertaking that he would be given vacant possession of the entire premises – an undertaking which, if given, the respondent was apparently in law unable to fulfil (though he may well have thought he could), for the sub-tenants in occupation in August, 1951, were in a position to invoke the protection of the Rent Restriction Ordinance so long as they so remained. However that may be, the appellant's contention appears from the following extracts from his evidence.

> "I didn't pay the plaintiff any rent because he didn't give me vacant possession of the whole house as per the agreement . . . (The agreement) was for sixteen months. It was understood I could remain a tenant for as long as I wished. The agreement shows it was for the whole premises. It was understood that the other tenants had to vacate. It was plaintiff's lookout to get rid of the other tenants . . . The agreement was for the whole of the premises. I realized that I was not getting possession. Then Jashabhai (Patel) vacated and after two months Manubhai (Patel) went in. The plaintiff had defrauded me . . . Manubhai (Patel) came in November, 1951. How can I recognize him as my sub-tenant? I had no conversation with him. If he had asked I would not have given him the premises."

In fact there were two sub-tenants in August, 1951, each of whom remained in possession of a part of the premises after the agreement of the 16th of that month was executed, namely one Somabhai Patel and the aforementioned Jashabhai Patel. On the appellant's own admissions at the trial, the learned judge found that the appellant accepted rent from Somabhai and also from one Ramanbhai Amin who succeeded to the occupation of Somabhai's rooms in May, 1955. It is clear that, at any rate to that extent, the arrangement as to the collection of rent alleged by the respondent to have been made in August, 1951, was carried out by the appellant.

When the term of the tenancy created by the agreement of August, 1951, expired on December 31, 1952, the appellant held over and he has done so to this day. For present purposes his period of occupation as from September 1, 1951, may be conveniently summarized as follows. Within a few weeks Jashabhai Patel vacated his rooms and one Manubhai Patel went into possession. The latter has so remained ever since. The appellant paid the full rent due for the sixteen months covered by the written agreement, after some faint show of protest at one stage. He also eventually paid the full rent up to June, 1953, and agreed in cross-examination that he paid it without any objection. Until the filing of the suit out of which this appeal arises he paid nothing more. On the plaint being filed he paid into court somewhat more than the arrears then due.

As appears from his evidence already quoted, the appellant's case, as pleaded and as submitted at the trial, was that the discretion of the court should be exercised in his favour as regards the claim for possession since he had withheld rent solely because of a bona fide contention on his part that the respondent had never given him the vacant possession of the entire premises to which he had been entitled since September 1, 1951, and indeed had consistently refused to do so. The appellant maintained in particular that the occupation by Manubhai Patel of his rooms by way of succession to Jashabhai Patel had been engineered by the respondent without his (the appellant's) consent and contrary to the written

agreement. The respondent has always rested on his contention that the appellant was well aware that he would not in fact get vacant possession of the entire premises; his case was that the appellant

had trumped up his complaint at a late stage in order to afford an excuse for his failure to comply with the several specific demands for the arrears of rent which the respondent undoubtedly made in early 1955.

The learned trial judge found the following further facts which have a direct bearing on the issue as to whether there was such a bona fide dispute between the parties; that question is, of course, one of the matters to be taken into account in deciding whether an order for possession should in this instance be made or refused.

Manubhai Patel (who testified on the respondent's behalf) said that he had paid Shs. 2,500/- to the appellant, describing it as "key money which included rent up to December." A payment of that sum was proved to have been made by Manubhai Patel at the end of August, 1951, but the learned judge found that, in accordance with the appellant's evidence, it was paid, not to him, but to Jashabhai Patel and (by implication) that it did not include any rent. For he also found that Manubhai Patel "paid no rent until September 10, 1952" when a cheque for Shs. 999/- drawn in favour of the appellant by Manubhai Patel's employers representing Manubhai Patel's rent for the sixteen months' term covered by the written agreement (less certain allowances calculated on Ext. F, and plus Shs. 100/- debited by reason of an arithmetical error) was tendered by the latter to the appellant. The appellant, however, declined to cash it – perhaps (as Manubhai said) to avoid creating any evidence of a breach of the Crown lease, or perhaps (as the appellant said) because he did not acknowledge Manubhai as his sub-tenant. The learned judge does not appear to have decided for which reason the cheque was refused. Having mentioned, however, that during the five years which had elapsed since Manubhai Patel had gone into possession of his rooms the appellant had taken no steps to eject him or to sue him or the respondent for damages, that the appellant had admittedly paid the full rent without objection or deduction as from the expiry of the agreement up to June, 1953, and that during that period Manubhai Patel had been representing himself as the appellant's subtenant but the latter had made no formal disclaimer, the learned judge expressed his conclusion as to Manubhai Patel's position as follows:

> "I find that Manubhai was not in possession against the will of the defendant" (viz. the appellant).

That is the crucial finding on that particular issue. As I understand it, the learned judge avoided a decision as to whether Manubhai Patel was in law the appellant's sub-tenant or the respondent's tenant, but did decide that there was never a bona fide dispute between the parties as to his occupation of part of the premises. By implication – but only by implication, for there is no further reference to the point in the judgment – the learned judge appears to have rejected the appellant's contention that cl. 4 of the agreement afforded good ground for a sincere objection by the appellant to Manubhai Patel as an occupier of part of the premises.

I am unable to accept the submission made by Mr. Wilkinson for the appellant that the learned trial judge, having found that the appellant did not in fact receive from Manubhai Patel a premium or key-money when the latter entered into possession, and did not at any time accept rent from him, failed to appreciate that the respondent's case was thus destroyed. Looking at the evidence as a whole there was still material on which the learned judge could base his conclusion that the real reason for the withholding of rent by the appellant since June, 1953 (but, be it noted, not in respect of the previous nineteen months or so, throughout which Manubhai Patel was in occupation) was not a bona fide objection to Manubhai's presence. It would serve no useful purpose to speculate as to what the true reason was; for Manubhai's succession to Jashabhai Patel in November, 1951, is the real ground upon which, according to his case as presented, the appellant can say that he justifiably took his stand. I am not

prepared to differ from the learned judge as regards his finding that the arrears of rent did not remain unpaid on account of a bona fide dispute as to Manubhai's residence in place of Jashabhai.

There remains the question of the relevant law. The learned trial judge dealt with that question as follows. He first said this:

> "The plaintiff seeks an order for possession under s. 6 (1) (*a*) of the Rent Restriction Ordinance for non-payment of rent. I am asked to exercise my discretion in defendant's favour not to make an order as the arrears have now been paid into court."

He then commented on the facts, and continued:

> "I appreciate that I must consider the question of reasonableness and I would be reluctant to make an order if I thought there was any bona fide dispute whether Manubhai was the defendant's sub-tenant. In *Thaker Dass v. Mawji Gangdas Patel,* E.A.C.A. Civil Appeal No. 8 of 1953, it was held (1) In considering the question of reasonableness one must take into account all relevant circumstances as they exist at the date of the hearing in a broad commonsense way as a man of the world, and this demands consideration of the past record of both parties so far as is relevant. (2) Certain minimum standards are required of a statutory tenant including that he should not fail to pay such sums as the law awards to his landlord, and unless failure to pay the same is exceptional and accidental it is always reasonable to evict on this ground. Applying that test to this case I decline to exercise my discretion in the defendant's favour."

With respect, we thought at the hearing that the learned trial judge must have been under a mis-apprehension when he wrote that passage, and our view was strengthened by our being informed by the advocates (who had appeared at the trial and were also before us) that the learned judge's attention had not been drawn to the various matters with which I shall presently deal. We took the precaution of inquiring of the learned judge himself, whereupon our suspicion was confirmed.

In the first place, the learned judge was not reminded that he had wide discretionary powers under sub-s. (2) of s. 6, and he did not direct his mind to that sub-section when giving judgment; four days later, however, when an application for suspension of the possession order was made on behalf of the appellant-defendant the learned judge did apply the sub-section and suspended the order for two months.

Secondly, it was not brought to the learned judge's notice that the provision to the effect that no order for possession is to be made unless the court considers it "reasonable" to make the order, which provision is commonly found in "rent restriction" legislation, has been omitted from this particular Ordinance of Uganda.

Thirdly, there was no argument at the trial as to the true construction of sub-s. (1) of s. 6 of the Uganda Ordinance, when read, as of course it must be, in conjunction with sub-s. (2), but shorn of the "reasonableness" provision. Accordingly the learned judge never considered that matter. It must therefore be said, with respect, that the discretion which the learned trial judge exercised did not flow from a correct appreciation of the law. In my view the following are the true legal principles to be applied to the case of a claim under this particular Ordinance for possession for non-payment of rent.

In the first place it is convenient to deal with the question as to whether the equitable doctrine of relief against forfeiture for non-payment of rent is applicable to a claim in respect of premises controlled by this Ordinance, which question was raised in argument before this court. Equity gave this relief to a contractual tenant – a tenant in the full and proper sense. This intervention on his behalf was described by Lord Erskine, L.C., in *Sanders v. Pope* (1) (1806), 12 Ves. 282 at p. 289 in these words:

> "In that case equity is in the constant course of relieving the tenant, paying the rent and all expenses, and placing his landlord in exactly the same situation: and in that case, it is not necessary, that the failure in paying the rent should arise from accident, the miscarriage of a letter with a remittance, insolvency, or disease: but even against negligence, the tenant being solvent, and not prevented by any accidental circumstance, equity interferes; and upon payment of the rent and all expenses will not permit the tenant to be turned out of possession; considering, that in the one case frequently great hardship might be the

consequence; in the other, the party being placed in the same situation, there is in general no hardship."

This doctrine has never, I believe, been applied – nor, so far as I am aware, is there any reported case in which it was submitted that it should apply – to a claim under any "rent restriction" enactment containing the "reasonableness" provision. No doubt one good explanation of that is that any such provision is from the tenant's point of view sufficient in itself, for the burden is then on the landlord to show that in the circumstances relating both to the tenant and to himself it is "reasonable," that is to say just and equitable that an order for possession be made. I do not, however, think that the converse proposition – that the absence of the "reasonableness" provision imports the equitable doctrine – is correct. The doctrine is, I think, peculiarly apt to a contractual relationship and only to that; for in the case of non-controlled premises it has never been of any avail to a tenant whose contractual rights have come to an end for any reason independent of the rent dispute itself. A statutory tenant, so-called for convenience, is no tenant at all, but a person whose contractual relationship with the landlord is a thing of the past, or, for example in the case of a deceased statutory tenant's widow, a person who has never been in any such relationship. It has been held that under English law a statutory tenant cannot rely on either s. 212 of the Common Law Procedure Act, 1852 or s. 14 of the Conveyancing Act, 1881, (*Brewer v. Jacobs* (2), [1923] 1 K.B. 528; *Dellenty v. Pellow* (3), [1951] 2 K.B. 858) on the ground that those provisions empowered the court to relieve "against the forfeiture of an existing term," whereas a statutory tenant stands "in a position wholly different from that of a tenant occupying under a subsisting lease." The statutory tenant, it was said (per Bailhache, J., at p. 531),

> "must find his protection, if any, within the (Rent Restriction) Act, and other Acts do not apply at all."

By parity of reasoning, in my view the equitable doctrine is inapplicable to a "rent restriction" case; there does not seem to be any true principle upon which it could be applied. So far, then, as relief against forfeiture is concerned, the simple question is this: does the Ordinance itself afford discretionary relief against the automatic eviction of a statutory tenant who did not prior to the filing of a suit against him pay all the rent which was due?

I now turn to sub-s. (1) and sub-s. (2) of s. 6. Sub-s. (1) provides that

> "No order for the recovery of possession . . . or for the ejectment of a tenant . . . shall be made by any court unless"

one of the requisite matters is proved. That provision is negatively, not positively, mandatory: it does not in terms impose on the court an absolute obligation to grant possession in any given circumstances. Where, then, is the latitude thereby apparently granted to the court defined? The answer is to be found in sub-s. (2). This expressly confers a fourfold discretion: either to adjourn the hearing of the claim for possession; or, once it is decided that an order should be made, to stay or to suspend execution or to postpone the date on which possession is to be given; thirdly, where an order is made, to make it subject to conditions as prescribed; and, fourthly, if there has eventually been compliance with the conditions laid down by the court, to discharge or to rescind the order. Those powers are given in every case where possession is sought under the Ordinance, and it is of course intended that they should be present in the mind of the trial judge "at the time of the application for or the making of" any such order, so that any exercise of a discretion thereby conferred (apart from the discretion to adjourn) should be embodied in the judgment.

It seems to me that, reading those two sub-sections together, despite the absence of the "reasonableness" provision the Ordinance must be construed as still containing the very essence of all "rent restriction" legislation. The intention and effect (for present purposes) of such legislation is now to curtail the landlord's enforcement of his right to evict.

> "The guiding light through the darkness of the Rent Acts is to remember that they confer personal security on a tenant in respect of his home"

(per Denning, L.J., in *Feyereisel v. Turnidge* (4), [1952] 2 Q.B. 29 at p. 37). The

Ordinance, like all other legislation of its kind, was enacted primarily for the creation of the status of statutory tenant – one who has, in a multitude of cases, the personal right of irremoveability – and for his protection. There are no circumstances in which the court is obliged to evict this creature of statute. There is nothing in the Ordinance which exposes him to a greater risk of forfeiture than a contractual tenant has to face. The powers (conferred by sub-s. (2) of s. 6) to adjourn without making an order at all, or eventually to discharge or to rescind a conditional order which has been made, or even to superimpose one or more conditional orders on a previous absolute order and eventually to discharge or to rescind the absolute order where the conditions of the most recent order have been complied with (*Haymills Houses Ltd. v. Blake* (5), [1955] 1 All E.R. 592) – all those powers show that there is but one obligation on the court in these possession cases, and that is to exercise judicial discretion for the statutory tenant's protection without injustice to the landlord. It may, I think, truly be said that in such a case as the instant one, although the equitable doctrine as such is inapplicable, the proper application of the Ordinance itself involves, *inter alia*, considerations virtually indistinguishable from those propounded by Lord Erskine, L.C., in the passage which I have quoted.

I have deliberately not said that those are the only relevant matters to be borne in mind when exercising the discretion – which brings me to the third and last matter of law upon which the courts must take a stand. The question here is: what is to be done about the omission from the Ordinance of the "reasonableness" provision? Its absence is, in my view, an unfortunate feature from the points of view of both the court and the parties, for where the provision exists it is an over-riding requirement and there is an authoritative body of judicial decisions which afford clear guidance as to its operation. Some of the more important principles which have been laid down are as follows. The court must exercise its discretion

> "in a judicial manner having regard on the one hand to the general scheme and purpose of the enactment, and on the other to the special conditions, including to a large extent matters of a domestic and social character"

(per McCardie, J., in *Chiverton v. Ede* (6), [1921] 2 K.B. 30 at p. 44), taking into account

> "all relevant circumstances as they exist at the date of the hearing . . . in a broad common-sense way as a man of the world . . ."

(per Lord Greene, M.R., in *Cumming v. Danson* (7), [1942] 2 All E.R. 653 at p. 655; if the hearing is adjourned, the relevant date is when the court finally disposes of the matter (*Scott v. Bamforth* (8), (1923), 13 L.J.C.C.R. 4); and the court must consider, not whether the landlord's desire for possession is reasonable, but whether it is reasonable to make an order for possession, for

> "because a wish is reasonable it does not follow that it is reasonable in a court to gratify it".

(per Acton, J., in *Shrimpton v. Rabbits* (9) (1924), 131 L.T. 478 at p. 479). Moreover, probable future events should be considered, such as whether the tenant intends to persist in a breach of covenant (*Bell London & Provincial Properties Ltd. v. Reuben* (10), [1947] 1 K.B. 157 at pp. 165–166). The burden under this head of reasonableness is on the landlord, and it may be that the burden is lighter in a case where alternative accommodation is offered than in one where it is not (per Scott, L.J., in *Cumming v. Danson* (7), at p. 657), though this comparative weight of the burden appears to be open to argument (see per Morton, L.J., in *Briddon v. George* (11), [1946] 1 All E.R. 609 at p. 614).

It seems to me that those decisions so truly reflect the underlying intention of the Ordinance, even as it is, that if in the exercise of the discretion the courts are guided by them they will not go for wrong. They could not strictly be said to be binding unless (happily, as I think) the "reasonableness" provision

were introduced by way of amendment. But to adopt them as guidance would seem for the time being to

afford the best means – justifiable in law and salutary in practice – of avoiding the throwing back of the whole matter into the melting pot of forensic discussion.

Incidental to this question is the omission from the Ordinance of another usual provision, one to the effect that the statutory tenant is to be regarded as bound by the same terms and conditions as those which ensured for the benefit of the landlord when the contractual relationship existed. It appears that the discretion as to granting possession must inevitably be exercised on the footing that the statutory tenant is so bound, for the Ordinance says nothing to the contrary and the statutory tenant's obligations would otherwise be in vacuo. It would, I think, be more satisfactory if this gap also were filled by amendment.

Finally I revert to the passage already quoted from the learned trial judge's judgment in which he referred to and founded himself on *Thaker Dass v. Mawji Gangdas Patel* (12) (1954), 21 E.A.C.A. 90. It was a Kenya case, where the relevant Ordinance contains the usual "reasonableness" provision. In the first place that passage seems to me to provide yet another of the many examples to be found of the danger of removing a dictum from its context and treating it as of universal application; for in *Thaker Dass's* case (12) the facts were materially different in at least one important respect: there the statutory tenant had not paid into court the arrears of rent. Secondly I think, with respect, that it clearly appears that the learned judge was in any event influenced by that case to an unjustifiable extent. The dictum which he applied as the "test" upon which to found his decision contained in its original form the expression "exceptional and, as it were, accidental," but the learned judge omitted the words "as it were." Incidentally the headnote of the report of the case (21 E.A.C.A. 90) contains the same error. Those words seem to me not by any means to be negligible. Without them the dictum might be understood (as I think it was understood in the instant case) as tending to fetter the discretion or even as a proposition which conflicted with the settled trend of judicial authority on the subject. Of course it was not intended that any such result should follow. With respect, I think that in effect the learned trial judge here read the dictum (as mis-quoted) as stating that whenever a landlord seeks possession of controlled premises on the ground of non-payment of rent he is entitled to an order on bare proof of non-payment unless the tenant can show that it was due to exceptional circumstances and to an accident that he did not pay. That, of course, is not the law and this court has not said that it is; courts applying "rent restriction" legislation are constantly declining to grant possession where the with-holding of rent has been deliberate but excusable in all the material circumstances.

In all kinds of possession cases brought under such legislation it has been said over and over again that the discretion is unrestricted and that the trial judge must have regard to all matters affecting the interests of the parties and of any others who will be directly affected by the decision, as for example persons living in the tenant's premises with him. In *Cresswell v. Hodgson* (13), [1951] 2 K.B. 92 at p. 95 Somervell, L.J. said:

> "I do not see how it is possible to consider whether it is reasonable to make an order unless you consider its effect on landlord and tenant, firstly, if you make it, and secondly if you do not. I do not think we should say anything which restricts the circumstances which the county court judge should take into consideration."

Two cases directly in point on this appeal are the following. *Dellenty v. Pellow* (3), was a tenant's appeal where an order for possession had been made on the ground of non-payment of rent. It is unnecessary to recite the particular facts of that case. The judgment of the Court of Appeal was delivered by Jenkins, L.J. The relevant passage ([1951] 2 K.B. at p. 860) is this:

> "Where the landlord shows that at the beginning of the proceedings there was rent in arrear, then jurisdiction arises . . . The only effect in such a case of payment of rent into court before judgment is that ordinarily it

would not then be reasonable for the judge to make the order."

It was then held that in the particular circumstances of that case there were grounds on which the judge could properly make the order. The words "before judgment" are noteworthy: the learned Lord Justice did not even restrict the application of the general proposition to cases in which the whole arrears are paid into court immediately after proceedings are commenced, as was done in the instant case but not in *Dellenty v.Pellow* (3).

In *Grimshaw v. Dunbar* (14), [1953] 1 All E.R. 350 the Court of Appeal expressly applied the proposition enunciated in *Dellenty v. Pellow* (3): see per Morris, L.J., at p. 356, where he said:

> "That being so, on the facts of this case, as the rent was paid into court, *prima facie* it would not be reasonable to make an order for possession."

and see per Roxburgh, J., at p. 357:

> "As has already been pointed out, on the authority of *Dellenty v. Pellow* (where, as in this case, the rent was paid into court before the hearing) *prima facie* there must have been a case to be tried, because it would rest upon the landlord to prove that in the particular circumstances of this case that *prima facie* rule should be departed from."

In *Grimshaw v. Dunbar* (14), a new trial was ordered.

I return, then, to the dictum which the learned trial judge took as his "test" in the instant case. It does not, in my view, mean what I conceive that the learned judge thought it meant. The question is what meaning is to be attributed to the phrase "unless failure to pay . . . is exceptional and, as it were, accidental."

On the face of it, the word "exceptional" in that context may mean either that the failure to pay was occasioned by exceptional circumstances or that the fact of non-payment was not in accordance with the tenant's usual conduct. Considering the factual background in *Thaker Dass's* case (12) against which the dictum must be examined, I am satisfied that it was the latter meaning which was intended. The stress was meant to be laid on the hypothetical fact that the tenant concerned is not an inveterate avoider of his obligation to pay rent. The same point was made per Jenkins, L.J., in *Dellenty v. Pellow* (3), [1951] 2 K.B. at p. 859 where he said:

> "But in this case the evidence showed that there had been a long history of default on the part of the tenant, and that time after time it had been necessary to issue a summons against him before the rent could be extracted."

(In the instant case it clearly appears that such was not the case. Both the respondent as regards the rent and the appellant as regards the sub-rents were not in the habit of insisting on anything like monthly payments but were content to receive considerable sums in respect of many months at a time.)

Then comes the phrase "and, as it were, accidental." As I have said, I do not think that the words "as it were" can properly be overlooked. On the contrary, it seems to me that they indicate an intention to use the word "accidental" in its meaning (see the Oxford Dictionary) of incidental. So read, the expression was intended to postulate a case in which the fact of non-payment is relatively unimportant as compared with other circumstances having a direct bearing on the issue.

To summarize my understanding of the dictum in *Thaker Dass's* case (12), I would say this: it was not pronounced in a case where the tenant had paid any arrears into court, and it should not be extracted from its context and used as though designed as a rule of law whereby the discretion in any and every possession case is to be restricted; for in any event it was intended merely to draw attention to the general

trend of judicial thought that a landlord who can show that his statutory tenant is habitually and inexcusably in breach of his obligation to pay rent, and that the non-payment which constitutes the ground on which possession is claimed is not a mere incident of minor significance in the circumstances as a whole but once again the outward and visible sign of the tenant's irresponsibility, is always in a strong position. Speaking for myself I am satisfied that that is what was meant and, I need hardly add, that it is the true view of the matter.

Accordingly I would allow this appeal in part, remitting the case to the learned trial judge for fresh consideration according to law of the one issue only, namely as to how the discretion should be exercised. From the decree of the High Court of Uganda the word "possession" and the whole of the second paragraph should be struck out.

I would add that the learned trial judge should not take into account that part of the respondent-plaintiff's evidence in which he said that he desired to occupy the premises for his personal or family use; this was not pleaded as a ground on which possession should be granted; as an afterthought it should not be given any consideration. On the other hand the trial court should, I think, consider whether there should be taken into account, on either or both sides of the scales, the giving, by or on behalf of one party or the other, of false evidence, by analogy with *Yelland v. Taylor* (15), [1957] 1 All E.R. 627 where it was held that it was not improper to give weight to such matters where the issue was under the "reasonableness" provision.

I would leave to the discretion of the learned trial judge the incidence of all the Supreme Court costs, and order that the appellant have half his taxed costs of this appeal.

Sir Newnham Worley P: I have had the advantage of reading the judgment prepared by the learned Justice of Appeal and entirely agree with it. As I was a member of the court in the case of *Thaker Dass v. Mawji Gangdas Patel* (12), now reported in (1954) 21 E.A.C.A. 90, I think it well to state that, in particular, I agree with the construction put upon the dictum of Briggs, J.A., in that case.

Sir Ronald Sinclair V-P: I also agree and have nothing to add.

Appeal allowed in part. Case remitted to trial judge for fresh consideration according to law of the question how he should exercise his discretion.

For the appellant:
PJ Wilkinson
PJ Wilkinson, Kampala

For the respondent:
AD Patel
AD Patel, Kampala

Puran Singh v Bishen Singh Chadah
[1957] 1 EA 610 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	13 December 1957
Case Number:	82/1956
Before:	Briggs Ag V-P
Sourced by:	LawAfrica

(Reference on taxation under r. 6 (2) of East African Court of Appeal Rules from the Taxing Officer's decision.)

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[1] Costs – Reference on taxation – Instructions fee – Objection as to quantum allowed by taxing officer – Certificate for two counsel given – Both counsel members of the same firm – Whether separate instructions fee can be claimed for each of them.

Editor's Summary

A certificate for two counsel was given to the respondent, who was represented by two members of the same firm. The respondent's bill of costs claimed Shs. 6,000/- as instructions fee for the leader and Shs. 4,000/- for the junior. The taxing officer considered that if only one advocate had been concerned a reasonable instructions fee would have been Shs. 2,500/-. He increased this by a further sum of Shs. 500/- in view of the certificate for two counsel and allowed Shs. 3,000/- for the leader and no instructions fee for the junior. The respondent being dissatisfied applied for a reference to a judge in chambers.

Held – the taxing officer acted on a wrong principle in that where two counsel are concerned and a certificate has been given an instructions fee (in whatever form) is clearly payable to each of them.

No cases referred to in judgment

Judgment

Briggs Ag V-P: This is a reference on taxation. A certificate for two counsel was given to the respondent, who in this case was represented by two members of the same firm. The respondent's bill of costs did not therefore claim as disbursement a brief fee for the leader, but charged an instruction fee and hearing fee for each advocate as profit costs of the firm. As regards the hearing fees no point arises. A normal sum of 400/- was allowed for the leader for one full day's hearing and two-thirds of this for the junior. It is not disputed that this was correct. The only question raised before me is as to the instruction fees, on which Shs. 6,000/- was claimed for the leader and Shs. 4,000/- for the junior. The learned registrar considered that if only one advocate had been concerned a reasonable instructions fee would have been Shs. 2,500/-, and added

> "This must be appropriately increased in view of the certificate for two counsel and I would add a figure of Shs. 500/- making a total instructions fee of Shs. 3,000/-."

He thereupon allowed Shs. 3,000/- for the leader and no instructions fee at all for the junior. In my opinion this was an error of principle, in that where two counsel are concerned and a certificate has been given an instructions fee (in whatever form) is clearly payable to each of them. It would not, I think, be disputed that, if a brief fee had been paid to an outside leader, a substantial instructions fee would have been payable to the junior. They should be no worse off when the bill is filed in this form. This principle was hardly disputed.

As regards the assessment of the leader's fees, in these circumstances I think the correct approach is to inquire what would be an appropriate brief fee to be paid to an outside leader. In this case the leader on the other side received a brief fee of £250. This is very substantial, but the case was a heavy one and I think the full amount might have been allowed on taxation. I do not consider that it was excessive.

As the learned taxing master had acted on a wrong principle, counsel were agreed that his assessment

of quantum could not be relied upon. In the ordinary way this would have involved remitting the matter for re-assessment ab initio by another taxing

master, but the parties were agreed in requesting me to act as taxing master for this purpose and make my own assessment. Considering the matter as I think the taxing master should have done, I decided that a total fee of Shs. 4,400/-, i.e. Shs. 4,000/- instructions and Shs. 400/- hearing fees, represented suitable remuneration for the leader. I therefore allow Shs. 4,000/- on the instructions fee as against the Shs. 6,000/- claimed. As regards the junior, I think it is appropriate to remember that the "solicitor's" work falls on him. This varies in extent but is usually not heavy on appeals. I think, taking this into account, the two-thirds rule is a good general guide to the appropriate fee for instructions for the junior, where the leader and he are in the same firm. I do not say it should always be followed, but I propose to follow it in this case. I accordingly allow Shs. 2,300/- for the instructions for the junior out of the Shs. 4,000/- claimed. The total of the bill will therefore be increased by Shs. 3,700/-, making Shs. 7,740/- in all. The costs of the reference, which I assess at Shs. 100/-, plus disbursements, must be paid by the appellant.

For the applicant:
DN Khanna
DN & RN Khanna, Nairobi

For the respondent:
SC Gautama
Shah & Gautama, Nairobi

Haja Arjabu Kasule v FT Kawesa
[1957] 1 EA 611 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	17 October 1957
Case Number:	641/1957
Before:	Keatinge J
Sourced by:	LawAfrica

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[1] Practice – Plaint – Summary procedure – Claim for interest included with a claim for liquidated amount – Whether interest is a liquidated claim within O. 33 *– Civil Procedure Rules, O.* 33 (*U.*).

Editor's Summary

The plaintiff had instituted this suit by summary procedure under O. 33 of the Civil Procedure Rules and had claimed Shs. 2,500/- on an agreement, and also claimed interest at six per cent from the date of filing the plaint. It was argued on behalf of the defendant that the claim for interest was not a liquidated claim within the meaning of O. 33 since there was no provision for interest in the agreement and that the suit should be dismissed or alternatively the court should grant leave to the defendant to appear and defend

the suit.

Held–

(i) the plaint was irregularly presented under O. 33. *E.M. Cornwell & Co., Ltd. v. Mrs. Shantaguari Dahyabhai Desai and Others* (1941), 6 U.L.R. 103 and *Wilks v. Wood* (1892), 1 Q.B. 684, applied.

(ii) the defendant should have leave to appear and defend the suit.

Order accordingly.

Cases referred to:

(1) *E. M. Cornwell & Co., Ltd. v. Mrs. Shantaguari Dahyabhai Desai and Others* (1941), 6 U.L.R. 103.

(2) *Wilks v. Wood* (1892), 1 Q.B. 684.

(3) *Uganda Transport Co., Ltd. v. Count de la Pasture* (1954), 21 E.A.C.A. 163.

Judgment

Keatinge J: The plaintiff's claim is:–

(1) For Shs. 2,500/- on an agreement; and

(2) Interest at six per cent. from date of filing this plaint.

The plaintiff instituted the suit by summary procedure under O. 33 on August 24 1957.

Mr. Pinto for defendant now applies to the court:–

(*a*) To dismiss the suit; or alternatively

(*b*) To grant leave to appear and defend.

As regards the dismissal of the suit Mr. Pinto argues that the claim for interest is not a liquidated claim within the meaning of O. 33, there being no provision for interest under the agreement. It is a fact that the agreement attached to the plaint does not provide for interest. This very point was considered by this court in *E. M. Cornwell & Co., Ltd. v. Mrs. Shantaguari Dahyabhai Desal and Others* (1) (1941), 6 U.L.R. 103, and it was held (*inter alia*) that interest cannot be claimed in a suit under O. 33 unless based on an agreement for interest in the document sued on or on Statute. It was also held that s. 26 (2) of the Civil Procedure Ordinance could not be invoked for the purpose of claiming interest on statutory grounds. I would also refer to the following passage in the judgment of Lord Esher, M.R., in *Wilks v. Wood* (2) (1892), 1 Q.B. 684 at p. 686 when considering the English Order 3, r. 6 as it was in 1892, from which it seems probable O. 33, r. 2 was taken:

> "All I can say is that the word 'only' in the rule means 'only' and that if any-thing else is added to the liquidated demand, the writ does not come within the definition of a specially endorsed writ."

On these authorities I hold that the plaint presented in this case was irregularly presented under O. 33.

In my opinion the defendant has raised this objection at the earliest opportunity and the question remains what are his rights in the circumstances. This issue was considered in *Uganda Transport Co., Ltd. v. Count de la Pasture* (3) (1954), 21 E.A.C.A. 163, and it was held, *inter alia*:

(*a*) a judge has no discretion to allow a claim to be brought summarily if it is not precisely within the terms of O. 33, r. 2, Civil Procedure Rules; and

(*b*) where a plaint endorsed for summary procedure contains claims correctly endorsed and other claims, the court may, by O. 33, r. 3 to r. 7 and r. 10, deal with the claims correctly specially endorsed as if no other claim had been included therein and allow the action to proceed as respects the residue of the claim, the court having no power under O. 33 to strike out any part of the claim but being unable to give summary judgment for any relief not within the scope of O. 33, r. 2 aforesaid.

It seems to me that while the claim for interest cannot be brought summarily the court may deal with the claim for Shs. 2,500/- on the agreement which has been properly specially endorsed. However, in his affidavit defendant would appear to have a defence to the greater part of the claim for Shs. 2,500/- and should be allowed to file a written statement of defence. Thus, it seems to me the institution of this suit under O. 33 has been entirely abortive.

If this action is now dismissed the effect would be to make plaintiff begin again. This would put him to further expense and in my opinion nothing would be gained. In all the circumstances it is ordered:–

(1) defendant will have leave to appear and defend – written statement of defence to be filed within

fourteen days; and

(2) defendant will have his costs on this application in any event.

Order accordingly.

For the plaintiff:
BKM Kiwanuka
BKM Kiwanuka, Kampala

For the defendant:
SA Pinto
SA Pinto, Kampala

Arthur Tisdale-Jones v Edward Sargent
[1957] 1 EA 613 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	20 December 1957
Case Number:	7/1957
Before:	Sir Kenneth O'Connor P, Briggs and Forbes JJA
Sourced by:	LawAfrica

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[1] Practice – Leave to appeal to Privy Council subject to a conditional order – Failure to comply with a condition of the order – Application for extension of time for preparation and certification of record – East African (*Appeal to Privy Council*) *Order in Council*, 1951, *s.* 5 (*b*).

Editor's Summary

The appellant had obtained a conditional order giving him leave to appeal to the Privy Council and one condition imposed was that under s. 5 (*b*) of the East African (Appeal to Privy Council) Order in Council the record should be prepared and certified within sixty days from the date of the conditional order. The record was not prepared within the time prescribed and an application was made to the court for an extension of time a week after the time limit had expired. This application came before a single judge, when it was opposed by the respondent on the merits and also on the ground that once the time limit limited by the conditional order for the preparation of the record had elapsed, the court was functus officio and had no power to grant more time. The judge referred the matter to the full court. It was argued on behalf of the applicant that the court had power to extend the time for complying with a condition imposed under s. 5 (*b*).

Held–

(i) there is a discretion in the court to extend the time for preparation of the record beyond that limited by a conditional order made under s. 5 (*b*) of the East African (Appeal to Privy Council) Order in

Council, 1951.

Fazal Kassim Velji v. M. Takim & Co. (1955), 22 E.A.C.A. 53 applied.

(ii) no just cause had been shown for the exercise of the discretion of the court in favour of the applicant in this case.

Application dismissed.

Cases referred to:

(1) *Fazal Kassim Velji v. M. Takim & Co*. (1955), 22 E.A.C.A. 53.

(2) *Gatti v. Shoosmith*, [1939] 3 All E.R. 916.

(3) *Barker v. Palmer* (1881), 8 Q.B.D. 9.

(4) *Sheikh Fazal Elahi v. Ebrahimji & Others* (1950), 17 E.A.C.A. 45.

(5) *M.K. Shah v. Jethbhai Oil Mills & Soap Factory Ltd*. (1955), 22 E.A.C.A. 305.

(6) *Ismail Mohamed Chogley v. Jagat Singh Bains* (1955), 22 E.A.C.A. 62.

(7) *Wood v. Manchester Corporation* (referred to in *Gatti v. Shoosmith* above).

December 20. The following judgments were read:

Judgment

Sir Kenneth O'Connor P: This is an application for an extension of time for the preparation and certification of the record for appeal to the Privy Council. The matter arises in this way.

On September 12, 1957, the applicant (who was respondent in the appeal to this court) obtained a conditional order giving him leave to appeal to the Privy Council and staying execution of a judgment of this court dated August 2, 1957, made on appeal from the Supreme Court of Kenya. The conditional order was made under s. 3, s. 5 and s. 7 of the East African (Appeal to Privy Council) Order, 1951. One of the conditions to which the conditional order was made subject, was that the record should be prepared and certified within sixty days from the date of the conditional order. That period would expire on November 12, 1957. That condition was imposed under s. 5 (*b*) of the Order in Council.

The conditional order contained a para. (1) (*f*) stating that the applicant "shall have liberty to apply for extension of the times aforesaid for just cause."

The advocates for the applicant did not draft the conditional order and send it to the respondent's advocates until September 25, 1957 – a delay of thirteen days. An amended draft was sent two days later. The respondent's advocates then made their own draft of the order and sent it to the applicant's advocates who sent both drafts to the registrar. The conditional order was finally settled and issued by this court on October 9, 1957.

On October 16, the applicant's advocates wrote to the registrar asking for a date to settle the record. The record was settled on October 24 and, on the same day, the security required by another condition of the order was furnished.

The respondent to the present application had been the appellant on the appeal to this court. In order to facilitate preparation of the record for the Privy Council, his advocates agreed to try to obtain the original wax stencils which had been used for that appeal. Apparently the request to them to do this was not made by the applicant's advocates till, at earliest, September 12 and possibly not till October 24. The typing of the record was put in hand in the office of the applicant's advocates. It does not appear that any typing was done prior to October 24, though, clearly, it would not be necessary to wait for the formal settlement of the record before putting some of the typing in hand. It must have been obvious as regards a part, at least, of the proceedings that they must be included. Thus, when the typing of the record commenced on October 24, or thereabouts, more than half the time limited for the preparation of the record had already elapsed. It is said, by way of explanation of this delay, that the applicant's advocates were hoping to get the wax stencils. That being so, one would have expected that they would, at latest on or about August 19, when they served the respondent's advocates with notice of their application for leave to appeal, have requested that the wax stencils be preserved. In fact, when, much later, the applicant's advocates asked for the stencils, they could not be traced. The applicant's advocates were informed of this about November 1. There were then about twelve days left in which to prepare and settle the record which consists of about two thousand folios. Realizing that their office staff could not complete the typing in time, the balance of the record then remaining to be typed was put in the hands of a typing agency. The agency said that they could not finish the work under thirty days. Notwithstanding this intimation, no application was then made to this court to extend the time. The time limited by the conditional order was allowed to elapse. A week after the time limit had elapsed, that is on November 19, the typing agency were instructed to use special expedition notwithstanding the extra expense involved, and an application was made to this court to extend time. That application came before a single judge on December 7, 1957, when it was opposed by the respondent on the merits and also on the ground that once the time limited by the conditional order for the preparation of the record had elapsed, this court had no power to grant more time. The judge referred the matter to the full court.

Mr. Bechgaard, for the applicant, argued that the court had power to extend the time for complying with a condition imposed under s. 5 (*b*) of the Order in Council. He relied on *Fazal Kassam Velji v. M. Takim and Co.* (1) (1955), 22 E.A.C.A. 53; and *Gatti v. Shoosmith* (2), [1939] 3 All E.R. 916, and drew attention to s. 11 and s. 15 of the Order in Council and to para. (1) (*f*) of the conditional order mentioned above.

Mr. Khanna, for the respondent, conceded that under para. (1) (*f*) the court could have extended the time if the application for extension had been made within the time limited for settling and preparation of the record; but contended that, once the time limited for complying with the condition had expired, the

court was functus officio and had no power to enlarge the period. He relied on *Barker v. Palmer* (3) (1881), 8 Q.B.D. 9; *Sheikh Fazal Elahi v. Ebrahimji and Others* (4) (1950), 17 E.A.C.A. 45; and *M. K. Shah v. Jethabhai Oil Mills & Soap Factory Ltd*. (5) (1955), 22 E.A.C.A. 305. He argued that in *Velji's* case (1) the court had relied on Indian decisions, the reports of which were not available, made on extracts from Indian Acts the full texts of which

were also not available in Kenya. He submitted, on the merits, that the applicant had been far from diligent and he relied on *Ismail Mohamed Chogley v. Jagat Singh Bains* (6) (1955), 22 E.A.C.A. 62 for the proposition that the time for the preparation of the record will not ordinarily be extended unless the applicant can show that he has acted with real diligence.

Fazal Kassim Velji v. M. Takim & Co. (1) is the only case to which we have been referred in which s. 5 of the Order in Council was under consideration. In that case the applicant had failed to comply with a conditional order made under para. (*a*) of s. 5 requiring him to furnish security satisfactory to the court within a certain period. Section 5 (*a*) expressly requires the security to be furnished within a period to be fixed by the court

> "not exceeding ninety days from the date of the hearing of the application for leave to appeal."

Notwithstanding that the applicant in *Velji's* case (1) had made his application after the expiry of the time limited for furnishing the security, it was held that the terms of s. 5 (*a*) are directory and not mandatory, and the term of ninety days beyond which security cannot ordinarily be furnished is not intended in any rigorous or exact sense and can, for cogent reason, be extended. This court, in *Velji's* case (1), carefully examined the Indian authorities to the extent that they were available and applicable, and came to the conclusion that notwithstanding the express words of s. 5 (*a*) limiting the period, the court had a discretion to extend the time for furnishing security. That discretion was exercised in favour of the applicant in a case in which, as already mentioned, the applicant had allowed the time to expire before making his application. If *Velji's* case (1) was rightly decided, there is a fortiori a discretion in the court to extend the period for preparing the record under para. (*b*) of s. 5, which paragraph, in itself, contains no limit of time (as does para. (*a*)) but leaves it to the unfettered discretion of the court to fix a reasonable period. To differ from *Velji's* case (1) would involve this court in giving opposite decisions on two paragraphs of the same section of the Order in Council. Mr. Khanna suggested that M. K. Shah's case (5) (another decision of this court) was in conflict with *Velji's* case (1) and that we should, therefore, be justified in refusing to follow *Velji's* case (1). Shah's case (5), however, was decided on different sections of the Order in Council: the applicant there was not represented by counsel and *Velji's* case (1) was not brought to the notice of the court.

Barker v. Palmer (3), on which Mr. Khanna relied, was decided on the wording of an English rule which is very different from the section of the Order in Council now under consideration, and was decided in 1881. As was said by Scrutton and Atkin, L.JJ., in *Wood v. Manchester Corporation* (7), cited with approval in *Gatti v. Shoosmith* (2) ([1939] 3 All E.R. at p. 919).

> "the time for appealing is now constantly extended in cases where twenty years ago it would not have been."

In *Fazal Ilahi v. Ibrahim* (4) it was held that the deputy registrar had no power under the rules as they then existed, to entertain an application for leave to appeal once the applicant had allowed the time to expire, but that the full court had such power.

I think that *Velji's* case (1) should govern our decision. It is true that not all the Indian Acts and authorities were available to this court in *Velji's* case (1): but I am satisfied that I should not differ from it. I am not persuaded that it was wrongly decided. It is as already mentioned, a decision on the same section of the Order in Council.

I would, accordingly, hold that there is a discretion in the court to extend the time for preparation of the record beyond that limited by a conditional order made under s. 5 (*b*).

The question now arises whether that discretion should be exercised in favour of the applicant in the present case. In *Ismail Mohamed Chogley v. Jagat Singh Bains*

(6) this court gave warning that it would in future hold applicants strictly to the conditions laid down in orders for conditional leave to appeal. The court said further that the time for preparation of the record would not ordinarily be extended unless the applicant could show that he had acted with real diligence. In my opinion, a scrutiny of the history of this case does not lead to a conclusion that the applicant's advocates acted with real diligence.

A legal mistake on the part of an applicant's advisers leading to a delay in filing an appeal does not preclude a court from exercising a discretion in the applicant's favour (*Gatti v. Shoosmith* (2)). The facts of the present case, however, are very different from those in *Gatti v. Shoosmith* (2). I do not think that "just cause" within para. 1 (*f*) of the conditional order, has here been shown, or that the court's discretion should be exercised in favour of the applicant in this case.

I would dismiss the application with costs. Vigilantibus non dormientibus lex succurrit.

Briggs V-P: I agree.

Forbes JA: I also agree.

Application dismissed.

For the applicant:
K Bechgaard and *RDC Wilcock*
Archer & Wilcock, Nairobi

For the respondent:
DN Khanna
DN & RN Khanna, Nairobi

The Trustees of "The Sheikh Fazal Ilahi Noordin Charitable Trust" v The Commissioner of Income Tax

[1957] 1 EA 616 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	9 August 1957
Case Number:	72/1956
Before:	Sir Newnham Worley P, Sir Ronald Sinclair V-P and Bacon JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Forbes, J

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[1] Income tax – Public character of trust – Surpluses on sale of investments – Penalties for delay in rendering returns – Income Tax Ordinance (*Cap.* 254), *s.* 10 (1) (*i*) (*K.*) – *Trustees Ordinance* (*Cap.* 36),

s. 15 (*K.*) – *East African Income Tax* (*Management*) *Act,* 1952, *s.* 40 *and s.* 59.

Editor's Summary

The Supreme Court having found *inter alia* that the objects of a trust were only ostensibly charitable and that the class of beneficiaries was not sufficiently defined, dismissed an appeal by the trustees against tax assessments for the period 1942 to 1953. The grounds of appeal against that decision were that the objects of the trust were charitable within the meaning of the Income Tax Ordinance s. 10 (1) (i) and therefore its income for the years 1942 to 1951 was exempt from tax, that surpluses arising from sale of certain trust properties were not profits from trading transactions but tax free capital accretions, and that penalties imposed by the Commissioner for delay by the trustees in submitting returns were excessive.

Held–

(i) as the class of beneficiaries was ascertainable and as the construction to be placed on the words of the settlement was consistent with the ostensible public

character of the trust, the trust was one of a public character within the meaning of the ordinance, and accordingly was exempt from tax for the years 1942 to 1951;

(ii) surpluses on the sales of properties which had been transferred to the trust by the settlor for a consideration less than their market value were an increase of the capital of the trust and not income;

(iii) the sale of certain hotels which had been purchased by the trust was not for the purpose of making a profit but through force of circumstances, and the Supreme Court's finding to the contrary was inconsistent with and contrary to the evidence;

(iv) as the default in making returns applied only to the years 1951 to 1953 and there was no question of fraud the case was not so bad as to require the imposition of the maximum penalty.

Appeal allowed in part. Order that the assessments for the years 1942 to 1951 inclusive be annulled, that the assessments for the years 1951 to 1953 be reduced by the amount of tax calculated on the surpluses in question, and that the penalties be reduced to double the basic tax.

Cases referred to:

(1) *Income Tax Special Purposes Commissioners v. Pemsel*, [1891] A.C. 531.

(2) *Verge v. Somerville*, [1924] A.C. 496.

(3) *Oppenheim v. Tobacco Securities Trust Co. Ltd*., [1951] 1 All E.R. 31.

(4) *Re Compton*, [1945] 1 All E.R. 198.

(5) *William's Trustees v. Commissioner of Inland Revenue*, [1947] 1 All E.R. 513; 27 T.C. 409.

(6) *Keren Kayemeth Le Jisroel Ltd. v. Commissioners of Inland Revenue*, 17 T.C. 27.

(7) *In re Robinson*, [1931] 2 Ch. 122.

(8) *Mary Clark Home* (*Trustees*) *v. Anderson*, [1904] 2 K.B. 645.

(9) *Wilkinson v. Malin* (1832), 2 Tyr. 544; 149 E.R. 268.

(10) *Attorney-General v. Duke of Northumberland* (1877), 7 Ch. D. 745.

(11) *Re Macduff*, [1896] 2 Ch. 451.

(12) *Dunne v. Byrne*, [1912] A.C. 407.

(13) *Re Hummeltenberg*, [1923] 1 Ch. 237.

(14) *Re Davis*, [1923] 1 Ch. 225.

(15) *Cooksey and Bibbey v. Rednall* (Inspector of Taxes), 30 T.C. 514.

(16) *Mandavia v. Commissioner of Income Tax* (1956), 23 E.A.C.A. 303.

August 9. The following judgments were read:

Judgment

Sir Ronald Sinclair V-P: This is an appeal by the taxpayers from a decision of the Supreme Court of Kenya dismissing their appeals against certain assessments to income tax.

The appeal concerns eighteen assessments raised against the trustees of the "Sheikh Fazal Ilahi Noordin Charitable Trust." This trust was constituted by Sheikh Fazal Ilahi (hereinafter referred to as "the Settlor") by a deed dated November 16, 1942. Fifteen of the assessments were made under the Income Tax Ordinance (Cap. 254) hereinafter referred to as "the Ordinance") and are in respect of the years of assessment 1942 to 1951 inclusive. The remaining three assessments were made under the East African Income Tax (Management) Act, 1952 (hereinafter referred to as "the Act") and are in respect of the years of income 1951 to 1953 inclusive.

The first ground of appeal is that the income of the trust in respect of the years of assessment 1942 to 1951 inclusive is exempt from tax under s. 10 (1) (*i*) of the ordinance which provides that there shall be exempt from tax:

> "the income of an ecclesiastical, charitable or educational institution of a public character in as far as such income is not derived from a trade or business carried on by such institution, and the income of trusts of a public character."

For the appellants it was contended that the trust is a trust of a public character. The trust deed of November 16, 1942 vests the "Trust Fund" and the net rents and profits and income thereof in the trustees:

> "UPON TRUST to apply the said net rents profits and income thereof in perpetuity for such charitable trusts or charitable objects as the settlor shall from time to time or at any time hereafter by any deed or deeds revocable or irrevocable or by will or codicil appoint AND in default of and subject to any such appointment UPON TRUST to apply the said net rents profits and income thereof in perpetuity for the benefit or towards the relief of poor and needy Muslims in Mecca and/or Medina (Saudi Arabia)."

No appointment has been made under this clause and the sole trust which falls to be considered is that

> "for the benefit or towards the relief of poor and needy Muslims in Mecca and/or Medina."

The trust is a perpetual one. A perpetual trust is void unless it is also charitable. If, then, this trust is not charitable it is void. In that event there would, no doubt, be a resulting trust in favour of the settlor, but that would not, of course, be a trust of a public character entitled to exemption under s. 10 (1) (*i*) of the Ordinance.

The first question to be decided, therefore, is whether the trust is charitable. It is common ground that in deciding that question it is English law which must be applied, though its application may be conditioned by local circumstances. It is also common ground that the character of the trust must be determined by the terms of the trust deed and that the manner in which the trust may have been operated since its establishment is irrelevant for this purpose.

The purposes which the law considers to be charitable were grouped by Lord Macnaghten in *Income Tax Special Purposes Commissioners v. Pemsel* (1), [1891] A.C. 531 at p. 583, under the following heads:

(1) relief of poverty;

(2) advancement of education;

(3) advancement of religion; and

(4) other purposes beneficial to the community, not falling under any of the preceding heads.

It is clearly established principle that a purpose is not charitable unless it is directed to the public benefit. To satisfy this test the purpose must benefit the community or an appreciably important class of the community: *Verge v. Somerville* (2), [1924] A.C. 496. Referring to this principle, Lord Simonds said in *Oppenheim v. Tobacco Securities Trust Co. Ltd*. (3), [1951] 1 All E.R. 31 at p. 33:

> "With a single exception, to which I shall refer, this applies to all charities. We are apt now to classify them by reference to Lord Macnaghten's division in *Income Tax Special Purposes Commissioners v. Pemsel*, and, as I have elsewhere pointed out, it was at one time suggested that the element of public benefit was not essential except for charities falling within the fourth class, 'other purposes beneficial to the community.' This is certainly wrong except in the anomalous case of trusts for the relief of poverty with which I must specifically deal."

And in *Re Compton* (4), [1945] 1 All E.R. 198 at p. 200, Lord Greene, M.R. said:

> "The fundamental requirement of a charitable gift is, in my opinion, correctly stated in the following passage in Tudor on Charities, (5th Edn.) at p. 11: 'In the first place it may be laid down as a universal rule that the law recognises no purpose as charitable unless it is of a public character. That is to say, a purpose must, in order to be charitable, be directed to the community or a section of the community.' Authority for this proposition is to be found in numerous cases."

It is apparent that the expressions “for the public benefit,” “directed to the public benefit” and “of a public character,” when used in relation to the purpose or object of a trust, all have the same meaning. I can see no reason to give a different meaning

to the words "trusts of a public character" in s. 10 (1) (i) of the ordinance. In my view, therefore, if a trust is a valid charitable trust, then with the one exception to which Lord Simonds referred in *Oppenheim's* case (3), it must be a trust of a public character within the meaning of s. 10 (1) (i). But it does not follow that a trust of a public character is necessarily charitable: *William's Trustees v. Commissioner of Inland Revenue* (5), 27 T.C. 409. It is not, however, necessary on this appeal to decide whether a non-charitable trust of a public character not infringing the rule against perpetuities is exempt from tax under s. 10 (1) (i).

Certain trusts for the relief of poverty, the so-called "poor relations" cases (the exception to which Lord Simonds referred in *Oppenheim's* case (3)), constitute an anomalous class of charity in which the existence of a personal element in the qualification is disregarded. The element of public benefit may perhaps not be lacking in such cases, for in *Re Compton* (4) Lord Greene, M.R., observed ([1945] 1 All E.R. at p. 206):

> "There may perhaps be some special quality in gifts for the relief of poverty which places them in a class by themselves. It may, for instance, be that the relief of poverty is to be regarded as in itself so beneficial to the community that the fact that the gift is confined to a specified family can be disregarded."

In the present case, however, as the Supreme Court found, there is clearly no personal element in the qualification required, and therefore the question as to whether a trust for the relief of poverty in which such a personal element exists is a trust of a public character does not arise.

The learned judge held that the trust is neither a valid charitable trust nor a trust of a public character on two grounds: first, that the class of beneficiaries designated in the trust deed is not sufficiently precise; and, secondly, that cl. 16 of the trust deed is not consistent with the trust being one of a public character in that it would enable the settlor to direct to himself profits and other moneys belonging to the trust without being liable to account for them. As to the need for the beneficiaries to comprise a sufficiently defined and identifiable section of the community he referred to a passage from the judgment of Lawrence, L.J., in the Court of Appeal in *William's Trustees v. Commissioner of Inland Revenue* (5), (27 T.C. at p. 418) of the report which is as follows:

> "It is clear from the authorities cited by Lord Greene, M.R., *in re Compton, Powell v. Compton* (1945) 1 Ch. 123, and from the speeches in the House of Lords in *Keren v. Commissioners of Inland Revenue*, 17 T.C. 27, that the law recognises no purpose as charitable unless it is of a public character, that is to say, for the benefit of the community or an appreciably important section of the community, and not merely for the benefit of private individuals or a fluctuating body of private individuals, and unless the section of the community is sufficiently defined and identifiable by some common quality of a public nature. These principles apply not only to the fourth class in Lord Macnaghten's statement in *Pemsel's* case (1891) A.C. 531, at p. 583; 3 T.C. 53, at p. 96, but to all charitable gifts.
>
> "The first question in this case is whether the beneficiaries designated in the trust deed of October 12, 1937, constitute a sufficiently defined class of the community, or are a fluctuating body of private individuals. There is, perhaps, an ambiguity in the phrase, a fluctuating body of private individuals, for, in one sense, the freemen of Saltash, or the inhabitants of Falkirk, or the native inhabitants of Dacca, or the school children of Turton, might have been said to be a fluctuating body of private individuals. But in each case they possessed the common quality of living in or being freemen of a specified place, and were, therefore, an easily indentifiable section of the public as opposed to the classes of private individuals concerned in *Compton's* case (1945) 1 Ch. 123; In *re Drummond*, (1914) 2 Ch. 90, and in *Wernher's Trust v. Commissioner of Inland Revenue*, 21 T.C. 137.

> "In the present case, there is, in my opinion, no such common quality in the class sought to be benefited, nor is the class easily identifiable. The speech of Lord Tomlin in the House of Lords in *Keren v. Commissioners of Inland Revenue*, 17 T.C., at p. 56, in which the other noble Lords concurred, makes it clear that the class must be sufficiently defined and that, if its definition is vague, it cannot be the object of a charitable trust."

The learned judge also relied on the following passage from the speech of Lord Thankerton in *Keren Kayemeth Le Jisroel Ltd. v. Commissioners of Inland Revenue* (6), 17 T.C. 27 at p. 57.

> "It seems to me that 'community' predicates the existence of some political or economic body settled in a particular territorial area and that the trust must be for that political or economic unit or a particular class within that particular political or economic unit."

Applying those tests, he was of the opinion that although the class designated in the trust deed, namely "poor and needy Muslims in Mecca and/or Medina" is not a fluctuating body of private individuals in the sense in which that phrase is used in *Compton's* case (4), it is not sufficiently precise in that

> "it is not related to any body settled in a particular area. It is an indeterminate class drawn from all over the world and subject to infinite fluctuation. Further the uncertainty in the description of the class of beneficiaries designated is increased by the use of the expression 'Mecca and/or Medina.'"

With respect, I am unable to agree with that conclusion. In my view, the class of beneficiaries is sufficiently defined by the three common qualities which they must have:

(1) adherence to the Muslim religion;

(2) geographical location, whether temporary or permanent, in Mecca or Medina; and

(3) poverty.

I find no difficulty in invisaging the poor and needy to be found in Mecca or Medina at any one time as a section of the community. Gifts for the relief of the poor of a particular parish, town or other place, and even for the relief of the poor generally, have been held to be good charitable gifts; see 4 Halsbury's Laws (3rd Edn.) p. 214. No case has been cited to us in which a class or section of the community so described has been held to be insufficiently defined. It is obvious that in any case, and particularly when the gift is for the relief of the poor generally, the body of persons to be benefited must fluctuate from time to time. The fact that Mecca and Medina are centres to which Muslim pilgrims resort from many parts of the world, thus causing seasonal fluctuations, is not in my view an adequate reason for saying the class is too indefinite. I think, too, the learned judge misdirected himself by taking into account the existence of "different sects and sub-sects of the Muslim religion." We can, I think, take judicial notice of the fact that Mecca and Medina are holy cities into which none but Muslims are permitted to enter. The beneficiaries of the trust are therefore, in effect, the poor to be found in either city at any time. It is a matter within the discretion of the trustees whether the trust funds will be used for the relief of the poor and needy in Mecca or in Medina or in both places. Moreover, the fact that the community to be benefited is wholly outside Kenya does not invalidate the trust: In *re Robinson* (7), [1931] 2 Ch. 122.

The facts of the *Keren* case (6) were widely different from those of the present one. In the *Keren* case (6) the attempt to show that the trust was for the relief of poverty or for the advancement of religion failed, and the appellant fell back on the argument that the trust was within the fourth class as being beneficial to the community. It was only when they came to consider this class that their lordships referred to the difficulty in identifying the community to be benefited. It was uncertain whether the community was the community of all the Jews throughout the world or only the Jews in the

prescribed area; it was uncertain whether the word "Jews" was confined to persons practising the Jewish religion, which might include persons not of Jewish race; or whether it extended to persons wholly or partly of Jewish race who were not members of that religious communion; and the prescribed area was indefinite in that there was no political or economic homogeneity between the various parts of the area. Lord Thankerton's dictum related to that set of facts and I think there was no justification for applying it to a trust for the relief of poverty. As to *William's Trustees v. Commissioners of Inland Revenue* (5) the facts again were widely different from those of the present case, but I am unable to find anything in the passage from the judgment of Lawrence, L.J., cited above which conflicts with the view I have taken.

I turn now to the question whether cl. 16 of the trust deed is inconsistent with the trust being one of a public character. That clause reads:

> "16. Notwithstanding anything to the contrary herein contained or by any law in default of express declaration provided the settlor shall be free to deal personally and beneficially with the trustees and the trust fund in like manner in all respects as if he were not a trustee and no sale lease loan mortgage or charge by the trustees to the settlor or by the settlor to the trustees shall be void or voidable merely by reason of the fact that the settlor is one of the trustees."

It was argued that that clause enabled the settlor (now deceased) to make a profit for himself out of the trust property without being liable to account for it and that such a power indicated that, although the object of the trust was ostensibly charitable, it was not so in reality, and that accordingly the trust was not a trust of a public character. The object of the trust is expressed to be the relief of poverty, but a trust deed may confer extensive powers, which, although purporting to be secondary to the object expressed to be the main object, may nevertheless themselves be objects for which the trust is established: see Simon's Income Tax (2nd Edn.) Vol. I, p. 409. In the *Keren* case (6) Lord Tomlin stated the position as follows (17 T.C. at p. 55):

> "There are a great number of objects in this memorandum. They are all expressed to be ancillary to the main object and I well appreciate the argument which says that if you once find the main object is charitable you cannot destroy the charitable character of the main object because the ancillary powers, which are incidental to it, are, some of them, in themselves not charitable. That argument may indeed be well founded, but when the question is whether the primary object is itself charitable, it is legitimate, in reaching a conclusion upon that head, to consider the effect of the incidental powers, and it may well be that the incidental powers are such as to indicate or give some indication that the primary object is not itself charitable."

In my view if cl. 16 did empower the settlor to deal with the trust property so as to make a profit for himself out of it such a power would be inconsistent with the ostensible object of the trust and destroy its public character. As the learned judge observed, the trust could then be used as an instrument of private gain. I am, however, unable to put that construction on cl. 16. Generally, a trustee cannot purchase the trust property from the trustees (33 Halsbury's Laws (2nd Edn.), para. 498), or sell his own property to the trust for value (Lewin on Trusts, (15th Edn.) p. 385). I think the object of cl. 16 was merely to enable the settlor, in view of his special relation to the trust and his expressed intention to transfer to the trust the properties in the second schedule to the trust deed and possibly other properties, to enter into transactions of sale and purchase and like transactions with the trustees, notwithstanding the fact that he was one of the trustees. The clause must be read in the context of the deed as a whole and when so read its purpose was clearly to authorise transactions by the settlor which might otherwise have been void or voidable, but not to relieve him of his duties and responsibilities as a trustee in other respects. The real purpose of the clause is contained in the words "merely by reason of the fact that the settlor is one of the trustees." If the settlor had been sued for a breach of

trust in respect of a transaction as between himself and the trustees, these words would have provided him with a partial shield which would not otherwise have been available to him, however bona fide the transaction. Furthermore, the settlor could not have acted alone in transactions of sale authorised by the clause. Section 15 of the Trustees Ordinance (Cap. 36) provides:

> "15(1) The receipt in writing of a trustee for any money, securities, or other movable property or effects payable, transferable, or deliverable to him under any trust or power shall be a sufficient discharge to the person paying, transferring, or delivering the same and shall effectually exonerate him from seeing to the application or being answerable for any loss or misapplication thereof.
>
> "(2) This section does not, except where the trustee is a trust corporation, enable a sole trustee to give a valid receipt for the proceeds of sale or other capital money arising under a disposition on trust for sale of land.
>
> "(3) This section applies notwithstanding anything to the contrary in the instrument, if any, creating the trust."

The Settlor's co-trustee would have been bound to see that there was no improper dealing with the trust property and that all transactions were for the benefit of the trust. My conclusion therefore is that cl. 16 does not affect the charitable nature of the trust.

It was also contended on behalf of the respondent that the words "benefit" and "relief" occurring in the phrase

> "for the benefit or towards the relief of poor and needy Muslims in Mecca and/or Medina"

must be read disjunctively, that "benefit" has a much wider meaning than "relief" and authorises the application of the trust fund for non-charitable purposes such as benevolent or philanthropic purposes and, accordingly, that the trust is void for uncertainty on that ground also. In my view there is no substance in this contention. It is of course well settled that a trust is void if it comprises both charitable objects and objects which are not in the legal sense charitable.

> "To constitute a good charitable trust the application of the funds for charitable purposes must be obligatory. If the trustees are allowed an alternative as to whether the purposes to which they apply the subject-matter of a gift are to be charitable or something else, the trust cannot be maintained."

4 Halsbury's Laws (3rd Edn.) p. 269. It is also clear that benevolent or philanthropic purposes are not necessarily charitable. But it seems clear on the authorities that the application of funds for the benefit of the poor must result in the relief of the poor. "Poor" is a relative term not confined to the destitute (*May Clark Home* (*Trustees*) *v. Anderson* (8) [1904] 2 K.B. 645) and relief is not restricted to providing the bare necessities of life. *In Wilkinson v. Malin* (9) (1832), 2 Tyr. 544, a trust "for the relief of the poor" was construed to authorise an application of the funds to the building of a schoolhouse, and the education of the poor of the parish. If any further authority is needed for the conclusion to which I have come it is to be found in *Attorney-General v. Duke of Northumberland* (10) (1877), 7 Ch. D. 745. In that case a bequest of a sum "for the use and benefit" of the poorest of the testator's kindred was held to be a good charitable bequest.

As a corollary to the last point Mr. Newbold for the respondent submitted that the trust is not sufficiently certain to enable the court to administer it: in support of his submission he referred us to *Re Macduff* (11), [1896] 2 Ch. 451, the *Keren* case (6), *Dunne v. Byrne* (12), [1912] A.C. 407, *Re Hummeltenberg* (13), [1923] 1 Ch. 237 and Re Davis (14), [1923] 1 Ch. 225. The principle to be extracted from those cases is that a trust must be sufficiently certain to enable the court to superintend

and give effect to it according to its terms. I have already said that neither the object nor the subject of this trust is uncertain and I can see no reason why the trust is not capable of administration by the court. It must also be borne in mind that where a general

charitable intention has been found, the court will not allow the gift to fail for uncertainty; then the cy-pres doctrine will be applied.

I am therefore of opinion that the trust is a valid charitable trust and was accordingly exempt from tax as a trust of a public character under s. 10 (1) (i) of the Ordinance in respect of the years of assessment 1942 to 1951 inclusive.

The next point taken by the appellants was that the trial judge was wrong in treating as income certain surpluses from the sales of property vested in the trust. The relevant property transactions fall into four categories:

(*a*) the properties specified in the First Schedule to the trust deed which were outright gifts to the trust upon trust for sale;

(*b*) the properties specified in the Second Schedule to the trust deed and other properties subsequently transferred to the trust which were transferred to the trust by the settlor for value;

(*c*) properties, other than hotel properties, purchased by the trust from persons other than the settlor; and

(*d*) hotel properties.

Of the fifty odd properties acquired by the trust, between thirty and forty were disposed of during the relevant period. The learned judge found that the trustees were carrying on a general scheme of profit-making out of property transactions. He then went on to consider whether each of the four categories of property fell within that general scheme. As to the properties included in category (*a*), he held, and it was conceded by the respondent, that as they comprised the original property vested by the settlor in the trustees, they must be regarded as forming part of the capital of the trust and that no part of the moneys realised on the sale of those properties was taxable as income. As to the profits made from the sale of properties included in the other categories, he held that they were liable to tax on the ground that the transactions were all part of the general profit-making scheme carried on by the trustees.

With regard to the property transactions in category (*b*) the learned judge said:

> "The evidence was to the effect that these properties were purchased from time to time by the settlor and later transferred to the trustees for value, the value fixed showing a profit to the settlor but being less than the full market value of the property. Mr. Bechgaard submitted that these properties also must be regarded as outside any business scheme, but I am unable to accept this submission. It appears to me that these transactions all formed part of the scheme of business carried on by the trustees. The settlor realised a profit on the transactions and the fact that he might or might not have realised a larger profit had he sold to someone else appears to me beside the point. I am unable to regard the possible additional profit which he might have made as being in the nature of money settled on the trust. In my opinion these transactions must be regarded as ordinary business transactions (authorised by cl. 16 of the Trust Deed) and any profits realised by the trust on the disposal of the properties is, in my opinion, liable to tax."

Mr. Borneman submitted that as these properties were transferred by the settlor to the trust in pursuance of the trust deed and for a consideration less than their market value, they must be treated on the same basis as those in category (*a*). They were, he contended, in the nature of gifts for a consideration, a conception known to Muslim law as "hiba-bil-iwaz." In my view that submission must be accepted. I think, with respect, that the learned judge misdirected himself on two aspects of this matter in coming to the conclusion that these were ordinary business transactions authorised by cl. 16 of the trust deed. In the first place, he seems to have been influenced by the fact that the settlor himself realised a profit on the transfers from himself to the trust: this seems to me to be wholly irrelevant. In the second place, I think he failed to take into consideration the fact that these transactions were made in fulfilment of the

intentions of the settlor as expressed in the trust deed and were *prima facie* intended

to be accretions to the trust fund. Once it is accepted that category (*b*) properties were gifts for a consideration, there seems no good reason for distinguishing between them and the properties in category (*a*). I think we are justified in regarding this as a question of mixed law and fact dependent not merely on the actual facts of the transactions, but also to some extent on the proper construction of the relevant provisions of the trust deed.

As to category (*c*), Mr. Borneman intimated during the hearing of the appeal that since there was evidence on which the trial judge could find as he did, he was precluded from attacking that finding.

Category (*d*) comprises the hotel properties. Six hotel properties were acquired by the trust as follows:

Palace Hotel, Kampala in 1946.

Salisbury Hotel, Nairobi in 1946

Nakuru Hotel, Nakuru in 1946

Ibis Hotel, Jinja in 1947

Queen's Hotel, Nairobi in 1948

Azania Hotel, Mombasa in 1948.

The Palace Hotel was sold in 1950 and the Nakuru Hotel in 1953. The surplus realised on the sale of the Palace Hotel falls within the year of assessment 1951 and I have held that the income of the trust for that year is exempt from tax. But in case I am wrong in that, I propose to consider whether that surplus was income, as well as the surplus realised on the sale of the Nakuru Hotel. By sub-s. (5) of s. 78 of the Act the onus of proving that the surpluses were not taxable was on the appellants and the learned judge held that the appellants had not discharged that onus; the was not satisfied that the hotel properties represented bona fide investments of trust capital outside the general scheme of profit-making pursued by the trustees. Mr. Borneman contended that that conclusion is insupportable on the evidence. The question whether the hotel properties were investments or trading stock is one of fact. In a limited appeal such as this we cannot interfere with a finding of fact unless there is no evidence to support it or unless the finding is unreasonable having regard to the evidence. Applying that test to the facts of the present case, I can see only one true and reasonable conclusion and that is that the hotel properties were bought and held as investments. In those circumstances when the Palace Hotel and the Nakuru Hotel were sold, they were still sold as investments and the profits are not assessable to income tax. There was uncontradicted evidence that when the trustees bought the hotels they intended to hold them for the income which they were capable of producing and not as stock to be turned over at a profit in the course of trade. The assets of the trust were insufficient to finance the purchase of the hotels and a large sum was borrowed, most of it from the Diamond Jubilee Trust at a rate of interest below the current market rate. That circumstance by itself would not justify a finding that these were purchases of trading stock: *Cooksey and Bibbey v. Rednall* (*Inspector of Taxes*) (15), 30 T.C. 514. The loan was for three years but there was a gentleman's agreement that it need not be repaid for ten years. At the end of three years, however, the trustees were called on to repay the balance of the loan amounting to nearly Shs. 1,000,000/-. As a result, various properties, though not the hotels, were put up for sale in order to raise the necessary money. The market was disappointing, only a portion of the loan was repaid, and the trustees were granted an extension of time for a year. At the end of that year the trustees were again pressed for payment and the Palace Hotel was then sold. Pressure continued and eventually the trustees were compelled to sell the Nakuru Hotel. Both the hotels which were sold required a considerable amount spent on them to modernise them. It is apparent that they were sold, not for the purpose of making a profit, but through force of circumstances.

There was evidence, again uncontradicted, that the trustees refused an offer for the Salisbury Hotel which would have shown a handsome profit and that they also declined to sell the Queen's Hotel. In my view the evidence was inconsistent with and contradictory to the finding of the learned judge and it should not be allowed to stand.

The only remaining ground of appeal which was pursued related to the penalties, Sub-section (1) of s. 59 of the Act provides:

> "The Commissioner may, by notice in writing, require any person to furnish him within a reasonable time, not being less than thirty days from the date of service of such notice, with a return of income and such particulars as may be required for the purpose of this Act with respect to the income upon which such person appears to be chargeable."

Sub-section (1) of s. 40 provides *inter alia* that any person who makes default in furnishing a return of income in respect of any year of income shall be chargeable for such year of income with treble the amount of tax for which he is liable for that year. Sub-section (2) so far as material reads:

> "(2) If the Commissioner is satisfied that the default in rendering the return . . . was not due to any fraud or gross or wilful neglect, he shall remit the whole of the said treble tax and in any other case may remit such part or all of the said treble tax as he may think fit."

Section 60 and s. 61 empower the Commissioner to call for further returns and for deeds, books and accounts. There are similar provisions in the Ordinance.

The Commissioner first became aware of the existence of the trust in or about 1947 and certain correspondence between the Commissioner and the appellants then ensued. On October 1, 1948, the appellants' advocates wrote to the Income Tax Department stating that it appeared the appellants were exempt from tax under the provisions of s. 10 (1) (i) of the Ordinance. After further correspondence and requests for returns and information, the Commissioner gave formal notice to the appellants to furnish returns in respect of the years of assessment 1942 to 1948 by November 21, 1949. In April, 1952, returns for the years of assessment 1943 to 1946 were furnished by the appellants. In the words of the trial judge these proved to be hopelessly inaccurate. On October 1, 1952, the department asked for returns for the years of assessment 1947 to 1951 inclusive and for a balance sheet for each year from 1943. A further request was also made for the trust deed which had been originally demanded by letter of October 26, 1948. The trust deed was produced in October, 1953, but despite further pressure no balance sheets were supplied. Balance sheets were produced for the first time on the second or third day of the hearing of the appeal to the Supreme Court which commenced on May 21, 1956. No further returns of income were ever furnished.

Each of the eighteen assessments includes a penalty amounting to treble the tax. The trial judge was of the opinion that it was difficult to imagine a worse case of wilful neglect and that the Commissioner was fully justified in refusing to reduce the treble penalty imposed by law. For the appellants it was conceded that they were guilty of wilful neglect, but it was submitted that the learned judge misdirected himself in two respects: first, in failing to consider that this was not a case of fraud and that a lessor penalty should be imposed for wilful neglect and, secondly, in failing to have regard, or sufficient regard, to the fact that the appellants had a bona fide belief that the income of the trust was exempt from tax. I do not think it necessary to consider whether he did so misdirect himself. As he held that the income of the trust was chargeable from the year of assessment 1942 to the year of income 1953, the basis on which he reached his conclusion that the maximum penalty should not be remitted was that the appellant had been guilty of wilful neglect in respect of all those years. But as I have held that the income of the trust was exempt from tax prior to the year of income 1951, the only wilful neglect which now falls to be considered is that in respect of the years of income 1951 to 1953.

Under para. 6 of head A of the Third Schedule to the Act the income of an irrecoverable trust of a public character established for charitable purposes is exempt from tax in the circumstances set out

therein. The appellants' liability for some tax in respect of the years of income 1951 to 1953 is not now disputed, but a fresh consideration of the penalties imposed for those years is necessary and, in the

circumstances, I think it is open to us to determine whether they should be confirmed or remitted either wholly or in part. This was the course adopted by this court as regards part of the penalties imposed by the Commissioner and confirmed by the Supreme Court of Kenya in *Mandavia v. Commissioner of Income Tax* (16), (1956) 23 E.A.C.A. 303.

Before the Supreme Court the appellants gave the following reasons for their default in furnishing returns:

(1) throughout they held the bona fide belief that as trustees of a charitable trust they were not liable to tax; and

(2) in practice it was not possible to make returns earlier by reason–

(*a*) of the illness of the settlor;

(*b*) of the difficulty of securing the services of an accountant capable of preparing accounts from the books of the trust which had been kept in Urdu.

The learned judge found that there was no substance in the appellant's plea that it was not possible to make returns earlier because of the illness of the settlor and the difficulty in obtaining the services of an Urdu-speaking accountant. No complaint has been made of that finding and I see no reason to disagree with it. As to the appellants' claim that they bona fide believed they were not liable to tax, I cannot see how they could have held such a belief in respect of the years of income 1951 to 1953. In view of the provisions of para. 6 of head A of the Third Schedule to the Act it must have been plain to them that at least some of the income for those years was chargeable. In my view this was a bad case of wilful neglect as from the end of 1951 onwards, though not so bad as to require the imposition of the maximum penalty. Inasmuch as no returns for the years of income 1951 to 1953 were ever furnished, I would, while reducing the penalty, still impose a severe one, namely an amount equal to double the basic tax for which the appellants are liable in respect of each of those three years.

In the result I would order:

(*a*) that the assessments in respect of the years of assessment 1942 to 1951 inclusive be annulled;

(*b*) that in respect of the assessments for the years of income 1951 to 1953 as varied by the Supreme Court–

(i) the basic tax be reduced by the amount of the tax charged on the surpluses realized from the sale of category (*b*) and category (*d*) properties;

(ii) the penalties imposed be reduced to double the basic tax as so ascertained.

As the appellants have not wholly succeeded, I would order that the respondents should pay only three-quarters of the appellants' costs of this appeal. I would set aside the order of the Supreme Court as to costs and similarly order that the respondents should pay only three-quarters of the appellants' costs of the first appeal, the costs of that appeal to be taxed on the higher scale and allowed for two counsel. I would also allow the costs of two counsel in this court.

Sir Newnham Worley P: I have had the advantage of reading before-hand the judgment prepared by the learned vice-president. I entirely agree with it and an order will be made in the terms proposed in that judgment.

Bacon JA: I also have had that advantage and agree.

Appeal allowed in part. Order that the assessments for the years 1942 *to* 1951 *inclusive be annulled,*

that the assessments for the years 1951 *to* 1953 *be reduced by the amount of tax calculated on the surpluses in question, and that the penalties be reduced to double the basic tax.*

For the appellants:
RE Borneman QC (of the English Bar) and *K Bechgaard*
K Bechgaard, Nairobi

For the respondent:
CD Newbold QC and *HB Livingstone* (Legal Secretary and Senior Assistant Legal Secretary, East Africa High Commission)
The Legal Secretary, East Africa High Commission

John Baptist Marcus D'Sa v R Prabhudas Becharbhai Chawhan v R
[1957] 1 EA 627 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	29 July 1957
Case Number:	123 and 139/1957 (consolidated)
Before:	McKisack CJ
Sourced by:	LawAfrica

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[1] Evidence – Admissibility of secondary evidence of documents – Evidence Ordinance (*Cap.* 9), *s.* 62 *and s.* 63 (*g*) (*U.*) *– Evidence* (*Bankers' Books*) *Ordinance* (*Cap.* 10) (*U.*).

[2] Evidence – Admissibility of unproved documentary exhibits.

Editor's Summary

Two bank clerks, the present appellants, were jointly tried and convicted before the district court of Mengo of fraudulent false accounting and of stealing from their employer. At the trial a bank inspector gave evidence for the Crown of his searches in books of accounts of the bank, and the magistrate in his judgment made reference to an unproved documentary exhibit. The appellants' consolidated appeals against conviction were principally on the grounds that contrary to the Evidence (Bankers' Books) Ordinance (Cap. 10) neither the original accounts referred to in the inspector's evidence nor copies were produced and accordingly the inspector's evidence being secondary were inadmissible, and that the unproved exhibit to which the magistrate referred was also inadmissible.

Held–

(i) s. 63 of the Evidence Ordinance (Cap. 9) sets out exceptions to the general provision in s. 62 which requires documents to be proved by primary evidence; the subject matter of the inspector's evidence, its purpose, and his capacity fulfilled the requirements of s. 63 (*g*) and accordingly this secondary evidence was rightly admitted.

(ii) it was clear from the magistrate's judgment that the case for neither appellant turned on the unproved documentary exhibit, but on the cumulative effect of the prosecution evidence.

Appeal dismissed.

Judgment

McKisack CJ: These two appeals (which have been consolidated) are against the convictions and sentences passed upon the two appellants at a joint trial in the District Court of Mengo. There were five counts. Court 1 charged the two appellants jointly with stealing Shs. 6,000/- from Barclays Bank, by whom they were employed as clerks. Counts 2, 3 and 4 charged the appellant D'Sa with fraudulent false accounting, the particulars in each case being that he made a false entry in a "teller's sheet" purporting to show that a sum of money had been paid out to the holder of a savings bank account. The sums specified in counts 2, 3 and 4 are Shs. 1,000/-, Shs. 500/- and Shs. 1,500/- respectively, making a total of Shs. 3,000/-. Count 5 charged the appellant Chawhan with fraudulent false accounting, the particulars being that he made a false entry in a tellers' sheet purporting to show that Shs. 3,000/- had been paid out to the holder of a current account. The date of all the offences was laid as May 28, 1954.

The learned trial magistrate convicted the appellants on all the counts with which they were charged. He found that the appellant D'Sa made the three false entries relating to savings bank accounts in exhibit 3. This exhibit is a document kept by a teller showing his dealings with cash and is called a tellers' sheet. It was proved that exhibit 3 was kept by this appellant on May 28, 1954, when he was performing the duties of paying and receiving cash in respect of customers' savings bank accounts. The final three items in this sheet are for the sums of Shs. 1,000/-, Shs. 500/- and

Shs. 1,500/-, and it is to these three items that counts 2, 3 and 4 relate. The tellers' sheet contains, in addition to columns for the cash payments or receipts, a column for entering particulars of the customers' accounts to which they relate. It is apparently the practice to enter in this column the number of the savings bank account concerned, but not the whole of that number. The numbers of these accounts are of six digits and only the last three digits are entered in the "particulars" column. This has apparently been done in the case of the three items which are the subject of counts 2, 3 and 4, the respective entries in the "particulars" column being (as the magistrate read them – I myself find some difficulty in deciphering them) 042, 752 and 647. This last set of digits appears to have been originally written as 642 and then altered to 647.

The magistrate found that there were no ledger entries corresponding to these three entries in the tellers' sheet. He also found that there were no savings bank accounts bearing numbers terminating in any of the three sets of digits in question which showed any withdrawals on May 28, 1954; and he found that another bank book, which contains a daily record of all debits and credits in respect of savings bank accounts, and is called the "savings bank detail book," did not contain any entries identifiable with the ones in question. On this evidence he found that the three entries in the tellers' sheet (exhibit 3) were false.

There was somewhat similar evidence in respect of count 5, in which the appellant Chawhan was charged with making a false entry in respect of a sum of Shs. 3,000/-. Here also a tellers' sheet (exhibit 5) was produced in respect of May 28, 1954, and proved to have been kept by this appellant, who on that day was performing the duty of making and receiving payments in respect of customers' current accounts. The last item in the "cash out" column shows a payment of Shs. 3,000/-. The entry in the "particulars" column in respect of that payment is not clearly written but was found by the magistrate, after comparison with other similar entries elsewhere, to be "R. M. Spares," an abbreviation for a firm called "Reliance Motor Spares." That entry is, as I have said, the final entry in the "cash out" column, but the eleventh entry in that column, – there were twenty-four in all – is also a payment out of Shs. 3,000/- in respect of "R. M. Spares." If, therefore, the tellers' sheet is correct in respect of those two items it shows that two cheques drawn by R.M. Spares, each for Shs. 3,000/-, were cashed on the same day by the same teller.

The magistrate found that only one such cheque was cashed on that day and that the entry made by the appellant Chawhan was therefore false. Evidence on this matter was given by P. 1 (a bank inspector, who was the principal prosecution witness at the trial); this witness had examined the relevant current accounts ledger and found no corresponding entry in respect of a second cheque for Shs. 3,000/-. He had also examined all the entries for Shs. 3,000/- on the day in question in the relevant books and found them all accounted for except the one which is the subject of the charge.

The magistrate further found that there was evidence that the appellant D'Sa had on May 28, 1954, compiled exhibit 4. This document is entitled a "waste sheet" and contains a summary of all the entries which passed through the bank's books relating to the "Bills Department" on May 28, 1954. It comprises six pages. The figures have been added up at the foot of each page, without carrying forward the total from the previous page, and on the last page those six totals have been written out and the grand total has been set down. There is a discrepancy, on both credit and debit side, of Shs. 6,000/- as between the grand total and the sum of the totals on each of the six pages. That sum is the amount specified in count 1 as having been stolen by the two appellants, and it is also the total of the amounts specified in counts 2, 3, 4 and 5. The evidence of the bank inspector (P. 1) shows that this device would help to cover up the theft

of Shs. 3,000/- by each of the two appellants, if this money had in fact been stolen. There was also evidence by this witness that the amount credited on May 28, 1954, in one of the bank's books entitled "Interest received – Current account and loans" is Shs. 6,000/- less than the totals of the amounts entered in the ledgers as credits to that account. But it was not alleged that either of the appellants was the keeper of that account or those ledgers.

On the foregoing evidence the magistrate found that the false entries made by the two appellants in the two tellers' sheets (exhibits 3 and 5) were made fraudulently, since they enabled each of the appellants to abstract Shs. 3,000/- from the bank's till; and that they did, between them, steal Shs. 6,000/- from the till on the day on which the false entries were made.

At the trial the appellants said they were unable to recollect anything about entries in the documents exhibited and the magistrate accepted that a cashier would not be likely to remember, after three years, routine matters of book-keeping if they were performed in the ordinary course of his duties.

The main question raised by this appeal on behalf of both appellants is whether certain evidence adduced in proof of the falsity of the entries in the tellers' sheets (exhibits 3 and 5) was admissible. Mr. Wilkinson says that oral evidence was given by P. 1 as to the account of Reliance Motor Spares with the bank but that neither that account, nor a copy of it, complying with the Evidence (Bankers' Books) Ordinance (Cap. 10) was produced to the court; and, similarly, that evidence was given by P. 1 as to the contents of savings bank accounts bearing identifying numbers ending in the three sets of digits specified in counts 2, 3 and 4 respectively, but that neither those accounts (nor a copy of them complying with Cap. 10) was put in evidence. Thus, Mr. Wilkinson says, there was only secondary evidence of these documents, and secondary evidence ought not to have been admitted. For the Crown it is argued that secondary evidence was admissible under s. 63 of the Evidence ordinance (Cap. 9), which sets out exceptions to the general provision in s. 62 that documents must be proved by primary evidence, and the relevant portions of which are as follows:–

> "63. Secondary evidence may be given of the existence, condition or contents of a document in the following cases:–
>
> . . . . . .
>
> (*g*) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection.
>
> . . . . . .
>
> "In case (*g*) evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents."

The evidence given by P. 1 (as recorded by the trial magistrate) in respect of the contents of documents relating to the entries in exhibit 3 which form the subject of counts 2, 3 and 4 was as follows:–

> "I compared all the entries for savings bank withdrawals on this sheet" (i.e. exhibit 3) "with the record made each day of all debits and credits of savings accounts-from which records the ledgers are checked at the end of each day – that record is called the 'savings bank detail book.' I could not find the three entries recorded in the detail book. I have also examined all the savings accounts ledger sheets in the bank both still open and of those closed since 1953, and I have looked to see whether any accounts terminating in the digits which described the entries showed any withdrawals of these amounts on this day. None. . . . I have checked all the entries in the 'detail book' (an integral part of the bank balancing system) and have found no corresponding entries appearing for the sums of 1,000/-, 500/- and 1,500/-, not otherwise accounted for."

For this evidence to be admissible under s. 63 of the Evidence Ordinance, the following requirements had to be satisfied:–

(1) the witness had to be skilled in examination of the documents in question;

(2) the witness must himself have examined the documents;

(3) the documents must consist of numerous accounts or other kinds of documents, not capable of being

conveniently examined in court;

(4) the secondary evidence must be for the purpose of proving the general result of the whole collection.

The first two of the above requirements were clearly satisfied, and were not in dispute. For the purposes of the third and fourth requirements one must consider precisely what the original documents were. The witness spoke of the savings bank detail book and also of

> "all the savings account ledger sheets in the bank both still open and of those closed since 1953"

terminating in the three relevant sets of digits. The result of his researches, the witness said, was that he could find no entries in those documents corresponding to the three entries in the tellers' sheet which the prosecution alleged to be false.

I think it quite clear that requirement No. 4 was satisfied. As to requirement No. 3, it is argued that the accounts were not "numerous." In particular it is said that the number of savings bank accounts bearing an identifying number ending in the same three figures could not be large. On this point there was no precise evidence beyond the witness's statement that he examined "all" such accounts. But, from what the witness had said I think the magistrate was justified in finding that the accounts in question were at least too numerous to make it convenient to carry out an examination of them – for the purpose of proving the non-existence of particular items – in court. Accordingly I think that the requirements of s. 63 were satisfied and that the secondary evidence was admissible.

I have next to consider whether secondary evidence was rightly admitted in connection with count 5, in which the appellant Chawhan was alleged to have made a false entry concerning a payment of Shs. 3,000/-. It seems to me that there is even less room for argument as to the admissibility of the evidence on this point. The evidence was given by the same witness (P. 1) and the relevant part of it (as recorded by the magistrate) is as follows:–

> "I have endeavoured to trace this entry in the current account ledgers and I can't find it. I have examined all the entries for Shs. 3,000/- on that day and I have accounted for them all except this particular item . . . I see the words R.M. Spares further up on the sheet (i.e. exhibit 5) " – this entry does refer to Reliance Motor Spares and on looking into all the books I find the sum properly accounted for (Shs. 3,000/-)."

On the face of it, the accounts referred to in this passage are certainly too numerous to be capable of convenient examination in court. But it is argued for the appellant that the only relevant account was the current account of R.M. Spares, since the magistrate found as a fact that the entry did relate to that firm; alternatively, as I understand the argument, it is said that, even if other accounts were also relevant, the original account of R.M. Spares (or a copy complying with Cap. 10) could and should have been produced and oral evidence thereof ought not to have been admitted. I do not think that those arguments are sound. As Mr. Starforth has said, the prosecution was seeking to prove, not merely that there was no reference to this Shs. 3,000/- in the account of R.M. Spares, but also that there was no mention of it in any other accounts. It was the purpose for which the secondary evidence was tendered that was material in relation to s. 63, not the magistrate's subsequent finding of fact. Nor do I consider that, where numerous accounts include one or more which have specifically been named, secondary evidence is not admissible in respect of the general result of an examination of all those accounts but only of the ones which have not been so named. It is, of course, open to counsel to cross-examine the witness in relation to the named accounts and to take steps to make them available for scrutiny by the court (as is pointed out in Woodroffe's Law of Evidence (9th Edn.), p. 543, where s. 65 (*g*) in the Indian Evidence Act is commented upon).

I am of opinion, therefore, that this ground of appeal fails in respect of both appellants. It was also said, on behalf of the appellant Chawhan, that the "waste sheet" and "waste summary" (see para. 2 of his memorandum of appeal) were not admissible. This contention was not developed in argument, but if the

“waste summary” referred to is exhibit 1, it is quite correct that this document was not properly proved and Mr. Starforth conceded that. But the case against neither appellant turned

on that document, as is clear from the magistrate's judgment and from what I have said above. If the document referred to is not exhibit 1, but exhibit 2, which, though headed "waste sheet," is referred to in P. 1's evidence as a "waste summary," that is a document which, like the other waste sheet, exhibit 4, shows an alteration in the total of the figures added up. It was not suggested by the Crown that the alterations had in fact been made by the appellant Chawhan, and the magistrate, after considering possible explanations for the alterations, wrote in his judgment (p. 14 of the typescript) as follows:–

> "The alterations are quite meaningless from a banker's point of view and I am satisfied that they were done to make the 'books balance' and to cover a removal of Shs. 6,000/- of the bank's cash. It appears that the false entries made by accused 1 on his tellers' sheet amount only to Shs. 3,000/-. Then why deductions amounting to Shs. 6,000/- on the waste sheet? Is it pure coincidence that there are two series of false entries of Shs. 3,000/- each made on the same day by two colleagues – and then a compensating alteration in the waste sheet (through which all the relevant entries must pass) amounting to Shs. 6,000/-? I think that this cannot be. I am satisfied that the court must draw the inference that the alterations in the waste must have been made to hide the falsity of the other entries made by accused 1 and 2. There is no evidence that accused 2 had anything to do with the waste sheet but I am of the opinion that the inference is irresistible that he concurred in the alterations in the waste to cover his own false entry of Shs. 3,000/-. In these exceptional circumstances I consider that the 'waste sheet' can be regarded as evidence against both accused. It should be noted that the necessary compensation has also been introduced into the final waste summary (exhibit 2) by some unknown person."

It was in this limited sense that the magistrate regarded the document in question as evidence against Chawhan, and I understand him to mean no more than that the evidence as a whole proved that Chawhan had arranged with another person to cover up, by adjustment of figures, his own part in the theft. I do not consider that this was an error on the part of the magistrate.

The other grounds of appeal are questions of fact. It is said that, if there was a loss to the bank of Shs. 6,000/- it could have been the work of others, not the appellants. This possibility was considered by the magistrate and rejected. The cumulative effect of the prosecution evidence pointed, in his opinion, irresistibly to the conclusion that the appellants were the persons responsible. It is further pointed out that there have been audits of the bank accounts since May 28, 1954, and they did not disclose any loss. This may show a lack of effectiveness of the audit in relation to the subject matter of the trial, but I do not see how it negatives fraud on the part of the appellants – indeed it could be regarded as a tribute to the skill with which the fraud was concealed. Similarly, certain of the exhibits which the prosecution have put in evidence were apparently passed as correct by some other officer of the bank. This certainly suggests that this officer apparently failed to query the alterations on which the prosecution relies, and I agree with Mr. Wilkinson to the extent that it would have been better if the officer had been a witness. But I do not consider this omission was fatal to the prosecution case. The trial magistrate has not failed to consider this question (see p. 7 of the typescript) as well as other facts or possibilities which have been pointed to as weaknesses in the prosecution case, but I do not consider that there are any sufficient grounds upon which an appellate court could interfere with his findings of fact.

The appeals against the convictions are dismissed. No arguments have been addressed to me in respect of the sentences, and they do not appear to me to be other than proper ones. The appellant Chawhan had recently been convicted of another offence of fraudulent false accounting, but, since that conviction took place after the offences which are the subject of the present appeal had been committed, the magistrate rightly regarded that conviction as no ground for enhancing the sentences in

respect of those other offences. The appeals against sentences are accordingly dismissed.

Appeal dismissed.

For the appellants:
PJ Wilkinson
PJ Wilkinson, Kampala

For the respondent:
MJ Starforth (Crown Counsel, Uganda)
The Attorney-General, Uganda

Natubhai Bapubhai Thakor v R
[1957] 1 EA 632 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	5 April 1957
Case Number:	8/1957
Before:	Sir Kenneth O'Connor CJ and Forbes J
Sourced by:	LawAfrica

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[1] Criminal law – Fraudulent false accounting – Documents purporting to be copies – Proof of theft as charged.

Editor's Summary

The appellant was convicted of fraudulent false accounting contrary to s. 325 (*b*) of the Penal Code and of theft by a servant contrary to s. 276, and sentenced to a total of two years' imprisonment with hard labour. He appealed against conviction and sentence principally on the grounds that certain duplicate receipts he had fabricated were not false documents and that theft of the sums charged on the dates specified had not been proved.

Held–

(i) the duplicates in question were not wholly written as they purported to be by duplicating from the originals by means of carbon paper; the dates on the originals and related duplicates were entered separately and were different; and in representing to be duplicates of other documents they were false;

(ii) as there was ample evidence to show that the appellant received the sums charged, and that he without explanation failed in the course of his duty to account for them on the proper dates or at

all, the magistrate rightly drew the inference that the appellant stole the sums charged on or about the dates mentioned;

(iii) the sentences were by no means excessive.

Appeal dismissed.

No cases referred to in judgment

Judgment

Sir Kenneth O'Connor CJ: read the following judgment of the court: On March 18, 1957, we dismissed this appeal. We now give our reasons.

The appellant was convicted on December 19, 1956, on five charges of theft by a servant contrary to s. 276 of the Penal Code and on two counts of fraudulent false accounting contrary to s. 325 (*b*) of the Penal Code. On each of the first five charges the appellant was sentenced to concurrent sentences of twelve months' imprisonment with hard labour and on the last two counts he was sentenced to concurrent sentences of twelve months' imprisonment with hard labour to be served consecutively to the sentences on the first five charges. Against these convictions and sentences the appellant appeals.

The appellant was a cashier employed by Dalgety & Co. We take the following statement of his circumstances and duties from the judgment of the learned magistrate.

> "The accused, Natubhai Bapubhai Thakor, was at the relevant dates a cashier employed by Dalgety & Co. at their premises in Eliot Street, on the ground floor. He had been doing this work for about six years. The accused worked on a counter on the ground floor and it was part of his duties to receive moneys from members of the public who made purchases for cash or cheques in the showrooms of Dalgety & Co. These he put through a cash register.
>
> "Dalgety & Co. are also the agents for Kenya Co-operative Creameries, who supply milk wholesale to dealers in the African locations. The wholesale dealers in milk come in and settle their accounts periodically with Dalgety & Co. and it was another part of the accused's duties to receive these payments which were nearly always in cash for quite large sums and generally included a considerable amount of money in silver and copper coins, and to issue receipts for these for which purpose the accused kept the triplicate receipt book produced (exhibit 13). It was also part of the accused's duties to balance the cash sales in the shop every morning, during the morning, and to record the payments received by credit slips to the various departments. These he had to bring to Miss Filmer, the cashier upstairs (P.W. 5), and, having checked the cash and cheques he brought, she would issue receipts to the accused. He would bring the credit slips in duplicate. She would initial the duplicate and return it to him and retain the original to go in with her banking on the next day.
>
> "With regard to the Kenya Co-operative Creameries money which the accused received, he would make out a receipt in triplicate. The top copy would be handed to the payer of the money, the duplicate the accused would bring to Miss Filmer with the money and the triplicate would remain in the book (exhibit 13). Miss Filmer would check the money with the duplicate receipts the accused brought her and use these receipts for banking. She did not see the triplicate receipts until September 28, 1956, after which date, on instructions from Mr. Wilkinson (P.W. 10) and thereafter, she used to initial the triplicate copies of the receipts in exhibit 13 also and date them with her date stamp which shows when she received the money. As she did not work in the afternoon, the accused had to bring her his takings and receipts for that morning and the previous day by 12 noon."

Briefly, the case for the prosecution, which the learned magistrate found to be established beyond reasonable doubt, was that the accused received the sums of money mentioned in the various charges, on the dates mentioned, on behalf of his employers: that, contrary to an office regulation, he issued temporary receipts for them alleging reasons some of which were proved to be false: that he never accounted for these specific sums: that he fabricated certain duplicate receipts to make it appear that he had issued the originals about three weeks later than he had, in fact, issued them, his reason for so doing being that it gave him time to collect more moneys and to pay them in place of the earlier collections which he had fraudulently converted to his own use. When the matter came to light, an investigation showed that the appellant had never accounted for Shs. 7,491/48 on temporary receipts and that there was a total deficiency of Shs. 19,999/54.

The appellant did not give evidence or make an unsworn statement or call evidence.

On the appeal, Mr. O'Brien Kelly, for the appellant, argued with reference to the charges of fraudulent false accounting that the duplicate receipts were not false documents. He argued that a document, to satisfy the charge, must be inherently false and that it was not false merely because it purported to show that some other document was made or dated on a date other that that on which it was made or dated. We think that there is nothing in this argument. Each duplicate receipt purported to be, and should have been, a duplicate of the original. The whole of the duplicate receipt was not written by duplicating from the original by means of carbon paper. The dates on the original and duplicate were entered separately and a later date was entered on the duplicate.

The appellant thus deliberately fabricated the duplicate so as to make it not a duplicate. It told a lie about itself, that is to say it falsely represented that it was a duplicate of another document, which it was not: and it represented that money had been received on a date on which it had not been received. The duplicate receipts mentioned in counts 6 and 7 were clearly false documents: the dates entered on them were entered falsely, and the appellant was rightly convicted on these counts.

As to the counts charging theft, Mr. O'Brien Kelly argued that the Crown could have charged a general deficiency, but did not do so: the Crown must, therefore, prove that the specific sums charged were stolen by the appellant on the specific dates mentioned. This, Mr. O'Brien Kelly submitted, had not been proved, and the facts were consistent with the appellant having paid these specific sums to the cashier in respect of some other transaction, and the fact that there was a general deficiency in excess of the total represented by temporary receipts tended to show that this was what the appellant had done. It is a novel argument (and one to which we do not subscribe) that sums of money belonging to an employer which are paid to the employer by a dishonest employee for the purpose of covering up previous defalcations and upon misrepresentations as to the dates when they were received are not fraudulently converted to the use of the employee. The evidence showed, and the learned magistrate found, that it was the duty of the appellant to account for sums received by him in the course of his duties on the day after he received them and that he never at any time accounted for the sums mentioned in counts 1 to 5, though the evidence showed that he had received those sums. The relevant passage in the learned magistrate's judgment is as follows:

> "It has been proved that the accused received each and every one of the sums of money on the dates alleged in the course of his duties and for and on behalf of his employers. It was the duty of the accused to account for all moneys received by him in the course of his duties on the day after he received them. It has been conclusively proved by Miss Filmer and Mr. Wilkinson that the accused never at any time accounted for the specific sums mentioned in each and every one of the first, second, third, fourth and fifth counts and none of these sums appear in the bank statements of Dalgety & Co. as having been paid into their bank account.
>
> "The accused was, by a regulation, prohibited from issuing any receipts except on the proper forms supplied by the company for that purpose and the explanations he gave to the persons to whom he issued the temporary receipts (exhibits 3, 4, 5, 6 and 11) have been demonstrated by Mr. Wilkinson's evidence to have been false and on one occasion the accused having issued one of these temporary receipts to the witness Wambugu s/o Gichuki (P.W. 2) after telling him that he had no proper receipt forms available immediately after that issued a proper receipt form to the witness Lily Kiragu (P.W. 1).
>
> "There is also evidence that when the accused learned that P.W. 2 had handed the temporary receipts (exhibits 3, 4, 5 and 6 to an European, he showed alarm and annoyance and asked Wambugu to help him if that matter went on. If the accused had accounted honestly for the moneys referred to in these exhibits there was no conceivable reason for him to be afraid of any investigation which might take place, about the temporary receipts.
>
> "A general deficiency of money has been proved against the accused but the court is not taking this into account in any way in determining whether or not the accused stole the sums of money alleged in the first, second, third, fourth and fifth counts which he received on behalf of Dalgety & Co. in the course of his employment with them. The court is relying for the proof of the offences charged in the above counts purely on the fact that the accused undoubtedly received these moneys from the persons concerned, that he issued phoney receipts for them which he never showed to Miss Filmer and that he never accounted for these specific sums either on the date on which they were received or on any other date and that none of these specific sums of money appear in the company's bank statements as ever having been paid into the bank."

On consideration of the whole of the evidence adduced by the prosecution, the learned magistrate came to the conclusion that the appellant stole the sums mentioned in the first five counts on or about the dates mentioned in the charges. We see no reason to differ from this inference which was based on ample evidence.

The appeals against the convictions were dismissed. The sentences are by no means excessive. The appeals against sentence were also dismissed.

Appeal dismissed.

For the appellant:
J O'Brien Kelly
J O'Brien Kelly, Nairobi

For the respondent:
JP Webber (Crown Counsel, Kenya)
The Attorney-General, Kenya

Harbans Singh Isher v R
[1957] 1 EA 635 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	29 April 1957
Case Number:	70/1957
Before:	Rudd and Pelly-Murphy JJ
Sourced by:	LawAfrica

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[1] Criminal law – Pleading to charges – Equivocal plea – Duplicity of counts.

Editor's Summary

The appellant was served with a summons charging him with five offences under the Traffic Rules and the Traffic Ordinance, 1953. He marked the reverse of the summons with the words, "Plead guilty," appended his signature, and returned the summons to the magistrate at Machakos who found him "guilty on plea" and imposed fines totalling Shs. 1,820/-. The principal grounds of appeal were that the plea was equivocal, two of the charges were bad for duplicity, and that the sentence was excessive.

Held–

(i) in view of the direction on the face of the summons it was impossible to believe that had the appellant wished to defend any one or more counts he would have adopted the course he did; the

appellant must be considered to have entered an unequivocal plea of guilty to each and all of the charges;

(ii) the third and fourth counts were bad for uncertainty in that each charged an offence under both the Ordinance and the Traffic Rules; and as an offence under one should not be joined in the same count with an offence under the other, these convictions were quashed;

(iii) the sentences were not excessive but as Crown Counsel had erroneously conceded that the maximum sentence the magistrate could impose on any one count was Shs. 1,000/- and the court had inadvertently agreed and reduced the fine on the second count from Shs. 1,500/- to Shs. 1,000/-, the sentence would be reduced by that amount and by a refund of the fines imposed in respect to the third and fourth counts.

Order accordingly.

No cases referred to in judgment

Judgment

Rudd Ag CJ: read the following judgment of the court: The appellant was charged before the magistrate, Machakos, with the following offences:

(1) Careless driving contrary to s. 47 (1) of the Traffic Ordinance, 1953.

Harban Singh Isher at about 10.30 a.m. on January 9, 1957, at Machakos in the Southern Province, did drive a Ford V-8 Pick-up Reg. No. KBU 666 in Hassanali St., Machakos Township in a careless manner by running into the rear of stationary motor omnibus Reg. No. KAA 26.

(2) Being the owner of a motor vehicle being used on a road and did fail to maintain the vehicle in such a condition that it was not likely to be a danger to other users of the road contrary to s. 52 (1) of the Traffic Ordinance, 1953.

Harban Singh Isher at about 10.30 a.m. on January 9, 1957, at Machakos in the Southern Province, being the owner of Ford V-8 pick-up Reg. No. KBU 666 being used in Hassanali St., Machakos Township, did fail to maintain all parts and equipment on the vehicle in such a condition that it was not likely to be a danger to other users of the road in that the following defects were found and were such that danger was likely to be caused to other users of the road:

Nearside front wheel bearing unserviceable.

Chassis broken in places.

Front cross member broken.

Nearside bottom wishbone on front suspension floating free

(Very dangerous as nearside front wheel runs out of control).

Nuts loose on tie rod ends.

Excessive play in steering box.

Nearside relay box worn out.

Rear spring hangers unserviceable.

Rear spring shackle pins and bushes unserviceable.

Gears will not engage.

Electrical wiring in dangerous condition.

Clutch required adjusting.

(3) Using a motor vehicle on a road with defective tyres contrary to s. 18 (2) as read with s. 52 (1) of the Traffic Ordinance, 1953.

Harban Singh Isher at about 10.30 a.m. on January 9,1957, at Machakos in the Southern Province, did use Ford V-8 pick-up KBU 666 in Hassanali St., Machakos when the front offside tyre was worn to the canvas and was in such a condition as likely to be a danger to other persons using the road.

(4) Using a motor vehicle on a road without an audible means of warning of the approach of the vehicle to r. 34 as read with s. 52 (1) of the Traffic Ordinance, 1953.

Harban Singh Isher at about 10.30 a.m. on January 9, 1957, at Machakos in the Machakos District in the Southern Province, did use Ford V-8 pick-up Reg. No. KBU 666 in Hassanali St., Machakos without an instrument capable of giving audible warning of approach or position of the vehicle.

(5) Using a motor vehicle on a road with inefficient brakes contrary to r. 21 (1) as read with s. 52 (1) of the Traffic Ordinance, 1953.

Harban Singh Isher at about 10.30 a.m. on January 9, 1957, at Machakos District in the Southern Province, did use Ford V-8 pick-up Reg. No. KBU 666 in Hassanali St., Machakos when the handbrake and footbrake of the vehicle was not working.

On the back of the summons (served upon him under the provisions of s. 99 of the Criminal Procedure Code), to which was attached a separate sheet of paper setting out the charges, the appellant wrote the words “Plead Guilty” and appended his signature. The magistrate, using the form appropriate for the trial

of a minor offence under the provisions of s. 197 of the Criminal Procedure Code, entered the plea and finding as: “Written plea of guilty accepted to all counts. Guilty on plea,” and sentenced the appellant as follows:

Count 1: Two hundred shillings;

Count 2: Fifteen hundred shillings;

Count 3: Twenty shillings;

Count 4: Twenty shillings;

Count 5: Eighty shillings.

The grounds of appeal set forth in the petition are:

1. The plea of the appellant accused was not an unequivocal plea of guilty to all the five counts of the charges against the accused.
2. The charge against the accused was bad for duplicity.
3. The sentence passed on the appellant was harsh and excessive.

On April 17, 1957, we allowed the appeal and quashed the convictions and sentences on the third and fourth counts but upheld the convictions on the other three counts, varying the sentence passed on the second count from a fine of Shs. 1,500/- to one of Shs. 1,000/- (for reasons hereinafter appearing), the sentence on the first and fifth counts to stand.

We now give our reasons for so doing.

As to the first ground of appeal, in our view, a person who writes in English on the back of a summons "Pleads Guilty" must be assumed to understand that he is pleading guilty to each and every charge the subject of the summons. The summons bears on its face the words

> "your personal attendance will not be necessary if you plead 'guilty' in writing (or appear by an advocate)."

If the person served wished to defend any one or more of the charges the subject of the summons, we find it impossible to believe that he would, having read the words above quoted on the face of the summons, adopt the course of pleading guilty in writing. In our judgment, the appellant in this case did enter an unequivocal plea of guilty to each and all of the charges preferred against him.

As to the second ground of appeal, it was conceded by Crown Counsel, and we agree, that the third and fourth counts are bad for uncertainty. There is no sub-s. (2) to s. 18 of the Traffic Ordinance, 1953; but assuming that it was intended to charge an offence against r. 18 (2) of the Traffic Rules, 1953, such a charge should not be joined in the same count with one alleging an offence against s. 52 (1) of the Ordinance. Section 52 (1) is complete in itself and if it is desired to charge an offence the ingredients of which are contained in that section as well as in r. 18 (2), the person framing the charges should elect under which he intends to proceed and should not, at any rate in the same count, charge an offence against both. Similarly, an offence against r. 34 should not be joined in the same count with an offence against s. 52 (1). In addition, however, we do not think that s. 52 (1) is the appropriate section under which to bring a charge alleging that the vehicle was not fitted with a warning instrument. We therefore quash the convictions on the third and fourth counts. Although we would point out that in the fifth count it was unnecessary (and undesirable) to mention both r. 21 (1) and s. 52 (1), we do not consider the conviction should be quashed in view of the plea of guilty. We would also point out that in the second count it was unnecessary to give detailed particulars of the defects alleged.

As to the third ground of appeal, in our judgment the sentences are not excessive and we would not have interfered with any of them on this score.

In addition to these grounds Mr. Nene has submitted that the proceedings were not properly instituted by a summons issued under s. 99 (1) of the Criminal Procedure Code in view of the penalty prescribed for contravention of s. 52 (1) of the Traffic Ordinance, 1953 (the breach of which was alleged in the

second count). There is no merit in this submission. The magistrate may, under s. 99 (1), dispense with the personal attendance of the accused unless the offence charged is a felony. Here the offence charged was not a felony. This provision gives power to the magistrate to adopt the procedure in question even in cases which come outside the terms of s. 113 of the Traffic Ordinance, 1953, relating to similar procedure.

Mr. Nene further submitted that the case should not have been “tried” summarily under s. 197 of the Criminal Procedure Code because the penalty prescribed (by s. 55

(1) of the Traffic Ordinance, 1953) for the offence the subject of the second count was in excess of the limitations imposed by sub-s. 2 (*a*) of s. 197. There is no substance in this submission. It is true that the magistrate in recording the proceedings used the form appropriate to a trial held under the provisions of s. 197; but where there is a plea of guilty we are satisfied that the use of that form in recording the plea and finding in no way affects the validity of the proceedings even though the offence was one which was not triable summarily because of the provisions of s. 197 (2).

Mr. Nene further submitted that the magistrate, being of the third class, had no jurisdiction to impose a fine of Shs. 1,500/- (the sentence imposed on the second count) because of the provisions of s. 9 of the Criminal Procedure Code. Crown Counsel, in error, conceded that the maximum fine which this magistrate had power to impose was Shs. 1,000/- and we inadvertently agreed that this was correct and therefore reduced the fine on the second count from Shs. 1,500/- to Shs. 1,000/-. It is, of course, a fact that by virtue of the amendment made by Ordinance No. 42 of 1952 this magistrate has jurisdiction to impose a fine of Shs. 1,500/-.

In the circumstances, the fines imposed on the third and fourth counts and the sum of Shs. 500/- in respect of the fine imposed on the second count, must, if those fines have been paid, be refunded.

Order accordingly.

For the appellant:
DN Nene
DN Nene, Nairobi

For the respondent:
KC Brookes (Crown Counsel, Kenya)
The Attorney-General, Kenya

Natoobhai Kashibhai v R
[1957] 1 EA 638 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	12 March 1957
Case Number:	13/1957
Before:	Sir Kenneth O'Connor CJ and Forbes J
Sourced by:	LawAfrica

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[1] Criminal law – Evidence – Credibility of witness – Evidence of witness accepted despite discrepancy compared with evidence of other witnesses – Misdirection.

Editor's Summary

The appellant who was a partner in a firm trading in automobile spare parts was convicted before the Resident Magistrate, Nairobi, of receiving stolen property contrary to s. 317 (1) of the Penal Code, the property being tins of brake fluid. At the trial only one of four prosecution witnesses gave direct evidence identifying the appellant and although that witness's evidence in one particular was not believed the magistrate considered the credibility of his remaining testimony to be unaffected by that discrepancy. The magistrate also accepted evidence given by a defence witness of the number of tins involved although it was inconsistent with the number alleged by the witnesses for the prosecution. The appeal was against conviction.

Held–

(i) the magistrate's finding that the discrepancy in the evidence of the prosecution witness did not affect the credibility of his remaining testimony was a fundamental misdirection, and the conviction could not stand;

(ii) in order to convict it was not necessary for the magistrate to find that all the tins mentioned in the charges were received by the appellant, but the magistrate in accepting the testimony of the defence witness on this particular appeared not to have appreciated the further doubt it cast on the credibility of the prosecution evidence.

Appeal allowed. Conviction and sentence set aside.

No cases referred to in judgment

Judgment

Sir Kenneth O'Connor CJ: read the following judgment of the court: The appellant in this case was convicted before the resident magistrate, Nairobi of receiving stolen property contrary to s. 317 (1) of the Penal Code, the property in question being eighty-one tins of Lockheed Brake Fluid.

The appellant is a partner in the firm of Central Auto Spares, carrying on business in Grogan Road, Nairobi, the other partner being the appellant's brother.

It was established that three cartons containing one hundred and forty-four tins of Lockheed Brake Fluid were stolen from a railway truck between Magugu and Kikuyu Stations on or about July 12, 1956. On August 15 sixty-five similar tins of brake fluid were found at the appellant's shop in Grogan Road by Inspector Sergeantson.

It was the case for the prosecution that eighty-one of the tins stolen from the railway truck were sold to the appellant by some Africans on or about August 5, and that the sixty-five tins found by Inspector Sergeantson were part of the lot of eighty-one tins so sold.

Evidence of the alleged sale of the tins to the appellant was given by four Africans, namely Murithi s/o Ndonyi (P.W. 5), Mbugwa s/o Njoroge (P.W. 7), Maina s/o Kabiru (P.W. 8) and Ndungu s/o Muthia (P.W. 9). Murithi was one of the original thieves who had stolen the tins from the railway truck and he had, prior to the trial of the appellant, been convicted and sentenced on his own plea for that offence.

The appellant's defence was that on August 15, ninety-six tins of brake fluid were purchased for his shop as a result of an enquiry made that morning by a prospective customer; that the customer later that day purchased thirty tins and that the appellant's brother leaving on safari the same day took one tin with him, thus accounting for the sixty-five tins found in the shop by Inspector Sergeantson. Evidence was called by the appellant to support this defence.

According to the evidence of Murithi, the stolen tins of brake fluid were brought in to Nairobi in a motor van belonging to Mbugwa and were taken to Grogan Road near the appellant's shop. Mbugwa drove the van and the other two Africans, Maina and Ndungu, joined it on the way to Nairobi. There was nothing in the evidence to suggest that Mbugwa or Ndungu had any knowledge that the tins, which were brought to Nairobi in sacks, were stolen property, or that they were accomplices in the disposal of the stolen property, and the learned magistrate held, in our opinion rightly, that they were not accomplices. Maina, however, it was clear played some part in the disposal of the stolen property and the learned magistrate correctly held that he must be treated as an accomplice.

A number of discrepancies of varying degrees of importance emerged from the evidence of the four Africans as to the events after the van reached Grogan Road. In particular, Murithi stated that Maina got out of the car and went to sell the tins; that presently he came back and the tins were removed from the car in a sack; that he (Murithi) remained in the car; and that presently Maina came back with Shs. 100/-. Maina, on the other hand, stated that he went into the appellant's garage to buy spare parts; that Murithi brought a tin to him and, in effect, asked the appellant through him whether the appellant wished to buy oil of this sort; and that some bargaining took place between Murithi and the appellant in which he took some part, and which resulted in the appellant buying the tins (of which he said there were eighty-one)

for Shs. 1/40 per tin.

Maina's evidence is the only direct evidence identifying the appellant as the person to whom the tins were sold. The other two Africans, Mbugwa and Ndungu, agree that both Maina and Murithi left the car in Grogan Road, and that presently an Asian came out and the sack of tins was taken out of the car. Ndungu, however, was unable to identify the Asian, and Mbugwa could only say that he "thought" the Asian was the appellant. There is other evidence tending to connect the appellant with the transaction, but that evidence taken alone is little stronger against the appellant

than it is against the appellant's brother and partner. Maina's account of the transaction and his identification of the appellant are therefore essential links in the chain of evidence against the appellant, and it is clear from the judgment that the learned magistrate did in fact rely upon them.

In considering the evidence as to the incidents in Grogan Road, however, the learned magistrate found as a fact that Murithi did not leave the car as stated by Maina and the other two African witnesses. He went on to find that this discrepancy did not of itself affect the credibility to be attached to the evidence of Maina, Mbugwa and Ndungu. We are unable to agree. It is clear that Maina's identification of the appellant is closely bound up with his account of the bargaining carried out by Murithi with the appellant. If it is held as a fact that Murithi was not present at this alleged incident, it must of necessity throw doubt on the whole account of the incident, including the identification of the appellant as the purchaser of the stolen tins. We do not agree with the reasoning which led the learned magistrate to accept Murithi's evidence as against that of the other three Africans, two of whom were not accomplices in the disposal of the stolen goods, but we consider we are bound by his finding of fact. The learned magistrate thereafter obviously misdirected himself as to the effect of that finding of fact when he held that it did not affect the credibility to be attached to the evidence given by Maina. In our opinion this misdirection is fundamental. We feel that it is impossible to say that the learned magistrate must still have convicted the appellant if he had properly appreciated the effect of his finding on the credibility of Maina. In the circumstances we are bound to hold that it is unsafe to let the conviction stand.

Our attention was drawn to two other misdirections in the learned magistrate's judgment. The more important of these concerned the number of tins of brake fluid involved in the alleged sale to the appellant. In the course of his judgment the learned magistrate found that the tins found by Inspector Sergeantson in the possession of the appellant were the same tins as were brought to Nairobi by the four Africans and sold to the appellant

> "less thirty sold to J. M. Patel and one taken by the Accused's (i.e. the appellant's) brother for his safari."

The only positive evidence as to the number of tins alleged to have been sold to the appellant is given by Maina who says there were eighty-one tins. Murithi himself only says that "half of the cartons" stolen were brought to Nairobi by him, which would make the number of tins sold somewhere in the region of seventy-two. In either case, if the learned magistrate accepted the evidence of J. M. Patel, as he evidently did, there could not have been sixty-five of the stolen tins left in the appellant's shop for Inspector Sergeantson to find-the number would be fifty or less.

It is true that, in order to convict, the learned magistrate did not have to find that the whole of the eighty-one tins mentioned in the charge were received by the appellant, but the misdirection here is that the learned magistrate does not appear to have appreciated that the evidence of J. M. Patel, which he accepted, must throw doubt upon the evidence of the witness Maina since it was obviously inconsistent with Maina's evidence that there were eighty-one tins.

In our opinion this misdirection also is a serious one though we do not think it would necessarily have been fatal to the conviction if it had stood alone.

The third misdirection concerned the retail price of the tins of brake fluid mentioned in the judgment. The learned magistrate states that the price of Shs. 1/40 or Shs. 1/50 per tin at which the stolen tins were alleged to have been sold to the appellant

> "was greatly below the wholesale price of Shs. 5/40 per pint tin and fantastically less than the retail price of about Shs. 10/40 per pint tin,"

and he draws the conclusion that the appellant must have known that the tins were stolen property.

It is perfectly clear that the learned magistrate mis-read his note of the evidence of the witness Jashbhai Patel who says that the wholesale price is Shs. 5/40 per tin, and the retail price “is an increase of about 5%. The learned magistrate has read

‘5/-’ for ‘5%.’ ” In our opinion, however, this error is not material as the difference between the price at which the tins were alleged to have been sold to the appellant and the wholesale price of Shs. 5/40 per tin is such that the learned magistrate must inevitably have come to the same conclusion quite apart from the retail price.

There were other points raised on the appeal but we do not think it necessary to go into those. In our opinion the first misdirection referred to above, particularly when considered with the second misdirection, must be fatal to the conviction. It is regrettable that a judgment which sets out the law with exemplary clarity and which may have reached a correct conclusion should have to be upset for misdirections on fact. But the first misdirection is so substantial that we see no alternative to allowing the appeal.

The conviction and sentence are accordingly set aside and the appellant is discharged.

Appeal allowed.

For the appellant:
AR Kapila
SR Kapila & Kapila, Nairobi

For the respondent:
GP Nazareth (Crown Counsel, Kenya)
The Attorney-General, Kenya

Highlands Commercial Union Limited v Abdulmalek Ahmed Jamal
[1957] 1 EA 641 (HCT)

Division:	HM High Court for Tanganyika at Dar-Es-Salaam
Date of judgment:	22 August 1957
Case Number:	34/1956
Before:	Crawshaw J
Sourced by:	LawAfrica

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[1] Company – Director – Prosecution for alleged fraud whilst acting as director – Claim against company for indemnity for costs of defence.

[2] Company – Liquidation – Payment by company after petition filed but before winding-up order – Whether payment constitutes a disposition of property made after commencement of winding-up – Companies Ordinance (*Cap.* 212), *s.* 172 (*T.*).

Editor’s Summary

The plaintiff company went into compulsory liquidation, and thereafter a director was prosecuted for an alleged fraud committed prior to the liquidation in the course of his official duties, namely, that he had obtained goods by falsely representing that certain cheques would be met when, in fact, he had reason to believe that they would not be. He was convicted in the magistrate's court and sentenced to imprisonment and his appeal to the High Court was dismissed, but on appeal to the Court of Appeal for Eastern Africa his conviction was quashed. He was subsequently sued by the company in liquidation for the balance of a running account with and due to the company prior to liquidation and for a further sum of Shs. 6,000/- paid to him by the company between the dates of the winding-up petition and the winding-up order, in respect of the initial cost of his defence in the criminal proceedings. He denied liability to repay the Shs. 6,000/- and counterclaimed the sum of Shs. 27,045/50, or alternatively Shs. 33,045/50, if the sum of Shs. 6,000/- was held to be repayable to the company. The sum of Shs. 33,045/50 was made up as to Shs. 11,045/50 for the expenses of his defence in the criminal proceedings, and Shs. 22,000/- loss of earnings whilst he was engaged in those proceedings and imprisoned. The counterclaim was based on the implied indemnity of a director at common law in respect of liabilities properly incurred by him in the management of the company's business.

Held–

(i) the defendant was not entitled to indemnity in respect of loss of earnings or expenses, for the charge was that he had done something which he did not in fact do and which it would have been against his duty to have done, and it could not be said that the expenses or losses were incurred in the discharge of his duties.

(ii) the payment of Shs. 6,000/-, being a disposition after the commencement of the winding-up, was void by virtue of the provisions of s. 172 of the Companies Ordinance.

Judgment for the plaintiff.

Cases referred to:

(1) *The James Seddon* (1866), L.R. 1 A & E. 62.

(2) *Re Famatina Development Corporation*, [1914] 2 Ch. 271.

(3) *Tomlinson v. Scottish Amalgamated Silks Ltd.* (*Liquidators*), [1935] S.C. (H.L.) 1.

Judgment

Crawshaw J: An order for the compulsory winding-up of the plaintiff company was made on April 10, 1954, and the company is still in the process of liquidation. A sum of Shs. 21,905/63 is shown in the plaint as being the balance owed to the company by the defendant, who was a director of the company, on a running account up to and including April 9, 1954, and a further sum of Shs. 6,000/- is claimed as having been paid to him on April 9, 1954, towards the cost of his defence in certain criminal proceedings. The defendant has made it clear in the course of this suit that he admits the debt of Shs. 21,905/63 less the last two items of account amounting to Shs. 182/-, and the plaintiff has agreed that the Shs. 182/- should be deducted; this leaves the sum at Shs. 21,723/63. The defendant admits having received the Shs. 6,000/- from the plaintiff "to pay to his advocates for his defence," but denies liability to repay "as the company spent this sum for him" and that in any event it is time-barred. The defendant counterclaims in alternative sums of Shs. 27,045/50 or Shs. 33,045/50. The former is made up of a sum of Shs. 5,045/50, which he says his defence cost him in addition to the Shs. 6,000/-, and the balance of Shs. 22,000/- as salary or damages for loss of earnings during the period covered by the prosecution proceedings (which he alleges arose out of his employment) and the time he spent in prison. The counterclaim is increased to Shs. 33,045/50 if the plaintiff's claim for Shs. 6,000/- is allowed by this court. The counter-claim is based on an implied indemnity (there is no evidence of any express indemnity) and in this connection I have been referred to Palmer's Company Law (17th Edn.), p. 202, where the following appears:–

> "Directors, as agents, are by law entitled to indemnity in respect of all liabilities properly incurred by them in the management of the company's business . . . This extends to costs incurred by an agent in defending a libel action in connection with a report made by him for the company (*Re Famatina Development Corporation*, [1914] 2 Ch. 271) and no express provision for that purpose is necessary; but the articles commonly contain express provision on the subject, and where this is the case a right of indemnity may be and often is given more extensive than that implied by law . . . The right does not, of course, extend to indemnity for wrongful or ultra vires acts of the agent."

I have also been referred to Halsbury's Laws (3rd Edn.), Vol. 1, Art. 463, which reads as follows:–

“The relation of principal and agent raises by implication a contract on the part of the principal to reimburse the agent in respect of all expenses, and to indemnify him against all liabilities incurred in the reasonable performance of the agency provided that such implication is not excluded by the express terms of the contract between them and provided that such expenses and liabilities are in fact occasioned by his employment.”

Mr. Murray has argued that the defendant is not entitled to indemnity because his action which gave rise to his prosecution was wrongful in that it was negligent or in breach of duty. Mr. Murray produced no evidence but relied on what the defendant himself said in the witness box, on the ground that it was for the defendant to satisfy the court that his liabilities had been "properly incurred . . . in the management of the company's business" and "were occasioned by his employment." The defendant's evidence was that the plaintiff company had purchased cashew nuts from H. Ghaui & Co., Ltd., and that payment was to be against delivery of the bills of lading. On February 9, 1954, he, personally, obtained these documents by handing to the vendors two cheques for Shs. 76,582/- and Shs. 1,800/- respectively, which cheques were presented to the bank of the plaintiff company the following day, the 10th, and were dishonoured. The defendant says that the bank originally gave the plaintiff company overdraft facilities to an extent of Shs. 60,000/-, and in a further sum of Shs. 140,000/- on the guarantee of a Mr. Dhanji Bhatia. On January 29, 1954, the bank wrote to the plaintiff company that as Dhanji Bhatia had withdrawn his guarantee their overdraft must be reduced to Shs. 60,000/- by the close of business next day, the 30th. The defendant says that on receipt of this letter he approached Bhatia, who renewed his guarantee thereby increasing the maximum permissible overdraft once again to Shs. 200,000/-. In fact, at the close of business each day from February 2 to February 8, 1954, inclusive, the actual overdraft varied between Shs. 142,000/- and Shs. 159,000/-, and at the close on February 9 was Shs. 65,178/-. Had, therefore, the two cheques been paid in that day the overdraft would have risen to Shs. 141,760/- only, a sum which at that time appears to have been quite normal. However, the next day, the 10th, the bank again wrote to the plaintiff company withdrawing its overdraft facilities and demanding repayment of the company's full indebtedness to the bank, being a sum of Shs. 252,463/78. This sum, the bank said,

> "includes the overdrafts formerly at our Mombasa and Lindi branches which have now been consolidated with the overdraft here."

There is nothing in the evidence to suggest that the Shs. 200,000/- facility granted by the Dar-es-Salaam branch was to include overdrafts at other branches, or that if the other had not been "consolidated" the Dar-es-Salaam account would on the 10th have exceeded the Shs. 200,000/-. I cannot, therefore, see that on the evidence which is before me the defendant did anything wrong or negligent or contrary to his duty in trading on the overdraft as he did on February 9. The plaintiff company's business may have been running at a loss at the time, but for all I know it may have stood to gain by the purchase of the cashew nuts and, if so, the use of the overdraft would surely have been justified. I do not think it can therefore be said that the defendant's act was wrongful.

The question is, were the defendant's expenses and losses which followed this transaction covered by the indemnity. In the following April he was charged under s. 302 of the Penal Code with obtaining possession of the documents by falsely pretending that the cheques would be met, when in fact he knew they would not be. He was convicted in the magistrate's court and sentenced to imprisonment. He appealed to the High Court and his appeal was dismissed. He then appealed to the East Africa Court of Appeal and his appeal was allowed, and the conviction quashed. The only case to which I have been referred where the subject matter was a claim in respect of expenses and losses resulting from criminal proceedings is the case of *The James Seddon* (1) (1866), L.R. 1 A. & E. 62. There, in the terms of the headnote:–

> "A master, while at a foreign port with a homeward bound vessel, incurred expenses in defending himself against a charge of murder maliciously brought by two of the crew, whom he had censured for misconduct. The master was tried and acquitted, and bound over in a sum of £10 to prosecute the men for perjury. He forfeited the £10 in order to return with the vessel to England."

It was held that the master was entitled to be refunded the expenses of his defence and also the £10. Dr. Lushington in giving judgment said:

> "The very cause which originated the charge against the master was the performance of his own duty in correcting these very men for their misconduct, and the false charge emanated instantly from it, and there were no intervening circumstances whatsoever which could cause it to be considered remote . . . What is that but defending himself against the consequences of the performance of his own duty, and which, if he had not performed, he would have been greatly to blame? For he would have been to blame if he had allowed, from fear of the consequences to himself, any false charge to be preferred against him . . . You must not fetter your masters too closely, and I say that the expenses now objected to were actually incurred for the benefit and advantage of the owners themselves. For what would have been the consequence? The master must have been incarcerated; he would not have been protected in any way against the false evidence brought against him; and even the temporary absence of the master in those distant countries would have been attended with great disadvantage, and serious inconvenience to the owners themselves. I entertain no doubt whatever of this. Far be it from me to say I would encourage a master in assuming to himself an authority the law does not confer upon him; but if I see the necessity of the case, the convenience of the case, and the discharge of duty, are all united in one transaction, it is also my duty to support a master, that he may not incur any expenses individually on account of having so acted."

Two main points seem to have been made, firstly that the charge arose directly out of and emanated instantly from the performance of a duty and, secondly, that the action the master took in paying for his defence and forfeiting the £10 was to the advantage of the owners of the ship. Had there been no advantage to the owners I must confess that I feel some doubt as to what conclusion Dr. Lushington would have come. As to the second point, in the instant case it cannot be said that the liabilities incurred by the defendant have benefited the company in any way. Even his services had not been lost to the company, for the company had gone into liquidation prior to the liabilities being incurred.

On the question whether the charge and expenses arose out of the performance of his duty, I have been referred to the case of *Famatina Development Corporation* (2), [1914] 2 Ch. 271) already cited. There as has been said, an agent claimed against his company for costs incurred by him in defending a libel suit arising out of certain reports, which he made for the company. He failed in the lower court but succeeded on appeal, Lord Cozens Hardy, M.R., saying that the claimant had acted in pursuance of his duties as an agent and therefore

> "he came within the well-settled rule that an agent had a right against his principal, founded upon an implied contract, to be indemnified against all losses and liabilities, and to be reimbursed all expenses incurred by him in the execution of his authority."

The judgment was of a few lines only and made no reference to *The James Seddon* (1), but it cannot be said that in the *Famatina* case (2) the expenses incurred by the agent as a result of the libel action were in any way for the benefit of his principal.

The James Seddon (1) and the *Famatina* (2) cases were considered by the House of Lords in *Tomlinson v. Scottish Amalgamated Silks Ltd.* (*Liquidators*) (3), [1935] S.C. (H.L.) 1. The circumstances in that case were remarkably akin to those in the instant case; the headnote reads as follows:–

> "An indemnity clause in the articles of a company provided for the indemnification of any director against all costs, losses, and expenses which he might incur by reason of any act done by him as director.
>
> "The company went into voluntary liquidation, and thereafter a director was indicted and tried for alleged fraud in relation to acts done by him as director prior to the date of liquidation, the charges being that he had issued a fraudulent prospectus, and had fraudulently misapplied funds of the company. He was

> acquitted; and thereupon he lodged a claim in the liquidation for the expenses incurred by him in his defence. The liquidators rejected his claim.
>
> "In an appeal against their deliverance, he maintained that he was entitled to be indemnified against these expenses (1) in virtue of the indemnity clause in the company's articles, and (2) in any event at common law, in respect that these expenses were incurred in consequence of acts done by him as agent of the company.
>
> "Held (aff. judgment of the First Division) that he was not entitled to his expenses either under the indemnity clause or at common law, in respect that expenses incurred in defending himself against an allegation that he did something, which he did not in fact do and which it was not his duty to do, were not expenses incurred by him as a director or as an agent of the company in the discharge of his duties; and appeal refused.
>
> "Opinions reserved upon the question whether the expenses, having been incurred after the liquidation, could competently form the subject of such indemnity."

In the *Tomlinson* case (3), therefore, the director was charged on count 1 with issuing or causing to be issued a prospectus knowing it to be false in material respects, and in the instant case the defendant director was charged with making payment by cheques which he knew, or believed would be dishonoured. In each case the alleged offences arose out of the exercise of normal duties by the respective directors prior to the respective companies going into liquidation, offences on which they were tried and acquitted subsequent to the commencement of the liquidations.

In comparing the charges in the *Tomlinson* case (3) with that in *The James Seddon* (1), Lord Tomlin said:

> "Here, of course, in this case the second ground, namely, benefit to the principal, has no application at all, and the first ground seems equally inapplicable when one considers that, so far from there being a false charge emanating instantly from the act which it was the duty of the master to perform, the charges were based upon alleged conduct which would have been contrary to his duty and were made only after considerable delay, and at the instance of the Lord Advocate in the interests of public justice."

Admittedly in the instant case there was no "considerable delay" in bringing the charge, but as in the *Tomlinson* case (3) the charge was "based upon alleged conduct which would have been contrary to his duty."

This last point was brought out more clearly by Lord Tomlin when he referred to the *Famatina* case (2). The instant case is sufficiently similar to the *Tomlinson* case (3) for it to be distinguished from the *Famatina* case (2) on the same basis as the *Tomlinson* case (3) was, and for that reason I quote Lord Tomlin's comments as follows, in extenso. He says:

> "That (the *Famatina* case (2)) was the case of a company which sent out an officer abroad to report upon the affairs of the company there and upon the conduct of the local manager, special attention being directed to the possibility of unlawful commission having been received by the local manager. The report which was made was unfavourable to the local manager, and in terms which were necessarily *prima facie* defamatory, with the result that an action for libel was brought by the local manager and was defended with success by the officer of the company. Afterwards that officer claimed reimbursement from his principals for the expenses which he had so incurred. It was held by Mr. Justice Sargant that he was not entitled to them. Mr. Justice Sargant took the view upon the facts that what he had done was not what it was his duty to do. 'As I have already said,' says Mr. Justice Sargant on p. 280, 'I come to the conclusion that the company never did order Mr. O'Driscoll to do anything of the sort.' The matter went to the Court of Appeal, and the Court of Appeal took another view of the facts, the Master of the Rolls saying that he was undoubtedly appointed

> to be the agent of the company for many purposes, and that all he had done was done in pursuance of his duty as agent. So far as that case is concerned, the matter cannot, I think, be put better, if I may say so with respect, than it is put in the opinion of Lord Sands when he said, referring to that case: "When a candid report is called for by a board from one of its officials, the communication of that report, if it be a bona fide one, to the board is the action of the board.' He explains the decision on those grounds, that it was something arising directly out of that which it was the duty of the agent to do and which he had in fact done.
>
> "When your lordships come to consider the facts of this case (the *Tomlinson* case (3)) you will find how far they are away from the facts of either of those cases to which I have referred. Here the allegation against the agent was that he had done something which he did not in fact do, and which it would have been against his duty to have done; and the question really is, upon the construction of the article, whether the expenses incurred by him by reason of an allegation that he did something which he did not do, and which it was not his duty to do, are expenses incurred by him by reason of an act done by him as a director in discharge of his duty. Upon the true construction of that article (the article of indemnity) I am unable to see how that can possibly be maintained. In my view the expenses incurred by reason of the allegations made against the deceased (the director had died shortly before this appeal), being allegations of matters which would have been a breach of his duty and which were held to be disproved or non-proven, are not expenses incurred by him by reason of an act done by him as a director in the discharge of his duties.
>
> "If the case does not fall, as I think it does not fall, within the language of art. 160 of the articles of association, it is difficult to see upon what principle it can possibly be brought within the common law rule."

In the instant case also I would say that the allegation against the defendant was that he had done something (obtaining goods by false representation as to the cheques) which he did not in fact do, and which it would have been against his duty to have done. The expenses incurred and loss of earnings suffered by him by reason of this allegation were not therefore incurred or suffered by reason of an act done by him "in the discharge of his duties" or, as Palmer says, "in the management of the company's business," and the counterclaim is disallowed on those grounds. It is not therefore necessary to consider what effect, if any, the law relating to claim in a liquidation might anyway have on any such set-off or counterclaim for expenses and damages incurred subsequent to the date of the winding-up petition or order.

The remaining question is whether the sum of Shs. 6,000/- can be recovered by the plaintiff from the defendant. This payment is said by the plaintiff to be void under s. 172 of the Companies Ordinance, (Cap. 212) which reads as follows:

> "172. In a winding-up by the court, any disposition of the property of the company, including actionable claims, and any transfer of shares, or alternation in the status of the members of the company, made after the commencement of the winding-up, shall, unless the court otherwise orders, be void."

The defendant baldly denies that the disposition is void, but his counsel has given no reasons why the section should not apply. Nor for that matter has counsel for the plaintiff said anything in support of his contention under this section. The payment of Shs. 6,000/- was made one day before the winding-up order, but after the petition had been filed and under s. 174 (2) of the Companies Ordinance

> "the winding-up of a company by the court shall be deemed to commence at the time of the presentation of the petition."

Our s. 172 is similar to s. 227 of the English Companies Act, 1948, in a note to which Buckley on the Companies Acts (12th Edn.), at p. 496 says:

> "But payment by the company after petition presented, and after the creditor must be taken to have notice of the petition, of even a perfectly bona fide debt

> of the company, is not a transaction to which the court will give validity. To do so would be against a cardinal principle of the Act, viz. pari passu distribution."

The creditor, as a director, must be taken to have known of the petition and there is certainly no suggestion that he did not. It is not in evidence exactly how payment was made, but Buckley points out that

> "if directors after petition presented make payments, they do so at their peril and are personally liable if the payments are improper."

The defendant, even though the payee, must as a director be held to have been a party to the payment even though he may not have signed the cheque. Payment of certain debts incurred in the ordinary course of business after a petition has been filed can be properly allowed, but the Shs. 6,000/- does not come within this category. In view of my finding on the counterclaim as a whole, the Shs. 6,000/- was not a debt for which the company was legally liable, and, unless it was a gift it would be void also for want of consideration, under s. 25 of the Indian Contract Act. It is not clear what the nature of the payment was intended to be but as I have found it to be void on other grounds it is not necessary for me to decide this. This does not seem to me to be a case in which I should make an order in favour of the defendant under s. 172 of the Companies Ordinance, and repayment of the Shs. 6,000/- must therefore be made by the defendant to the plaintiff company and not be set-off in any counterclaim. Not only is the defendant liable to repay as a director, but also under the provisions of s. 65 of the Indian Contract Act, which reads as follows:–

> "When an agreement is discovered to be void or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

I should mention that the plaint as originally filed on June 6, 1956, was for Shs. 21,905/63 only and did not include the sum of Shs. 6,000/-. In his written statement of defence filed on August 28, 1956, the defendant pleaded, *inter alia*, that this claim of Shs. 21,905/63 was time-barred. On December 15, 1956, Mr. Sayani, for the defendant, asked that this ground of defence should be struck out. On May 3, 1957, the plaint was amended by consent to include the additional sum of Shs. 6,000/- and in his amended written statement filed on May 21, 1957, the defendant re-introduced, in identical words, the ground of defence which had been struck out, and which related to the plaintiff's claim as a whole. I think this must have been reintroduced in error, for later in the written statement he admits having received the Shs. 6,000/- and then specifically pleads that it is time-barred. The Shs. 21,905/63 (or Shs. 21,723/- as it has now been reduced to) represents the balance of a running account up to April 9, 1954, and proceedings for its recovery were instituted well within the statutory period, and no reason has been given why it should be regarded as time-barred. As to the Shs. 6,000/- the plaint, as I have said, was amended to include this sum on May 3, 1957, which is over three years after the sum was paid to the defendant, but the application to amend was filed on April 5, 1957, which was within time. Even if the amendment is to be regarded as instituting a new cause of action it is still in time for in the words of Rustomji on the Law of Limitation (5th Edn.), Vol. 1, at p. 450,

> "the suit is deemed instituted (for the purposes of limitation) when the application for amendment is made and not when such application is granted."

The answer to the first two issues is in the negative, and to the third issue in the affirmative, and judgment is therefore entered for the plaintiff company in a sum of Shs. 27,723/63 with interest thereon at 6 per cent. from the date of filing the suit until to-day, and at the same rate on the decretal amount until

payment. I award no interest for the period prior to the filing of the suit as there is no apparent reason,

and none has been presented, why it should be awarded. Except in so far as costs to date have in any particular respect been awarded specifically to either party in any event, the defendant will pay the plaintiff's costs.

Judgment for the plaintiff.

For the plaintiff:
WD Fraser Murray
Fraser Murray, Thornton & Co, Dar-es-Salaam

For the defendant:
NR Sayani
Sayani & Co, Dar-es-Salaam

Yoana Matovu v The Katikiro
[1957] 1 EA 648 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	17 July 1957
Case Number:	417/1957
Before:	McKisack CJ
Sourced by:	LawAfrica

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[1] Elections – The Great Lukiko of Buganda – Suit questioning validity of election – No enactment prescribing procedure – Who are proper and necessary defendants – The Great Lukiko (*Election of Representatives*) *Law*, 1953 (*U.*).

Editor's Summary

The plaintiff filed a suit against the Katikiro of Buganda claiming a declaration that the election of one M, to the Great Lukiko was null and void on the grounds that the proper procedure under s. 35 of The Great Lukiko (Election of Representatives) Law, 1953, had not been followed, that the Saza electoral college had not been properly constituted and that all the proceedings of the election and of the college were null and void. The Katikiro was sued "as chief returning officer" but in the Law the Katikiro is not so designated or referred to. There was no statutory provision for election petitions arising out of elections to the Great Lukiko but the successful candidate, M, applied to the court to be joined as a defendant "as the person most concerned in these proceedings" and filed an affidavit averring that his joinder was necessary to enable the issue to be effectively determined. The Katikiro did not oppose this application but the plaintiff contended that M should not be made a party because he, M, was only indirectly interested in the result of the suit and in any event as a person against whom the plaintiff

sought no relief he should not be joined against the wish of the plaintiff.

Held–

(i) it is impossible to say that the successful candidate is only "indirectly" interested in a suit claiming that he was not lawfully elected.

(ii) since in the absence of statutory provision for election petitions the plaintiff had brought a suit which would (if successful) have the same effect as a petition, the proper and necessary defendants are the persons who would be respondents to an election petition.

(iii) on the principle that where a declaration is sought, all persons should be made parties who are interested in or may be prejudiced by the declaration, M would be joined as a defendant and should have been so from the outset.

London Passenger Transport Board v. Moscrop, [1942] 1 All E.R. 97, followed.

Application allowed.

Cases referred to:

(1) *Moser v. Marsden*, [1892] 1 Ch. 487.

(2) *Woodward v. Sarsons and Sadler* (1875), L.R. 10 C.P. 733.

(3) *London Passenger Transport Board v. Moscrop*, [1942] 1 All E.R. 97.

Judgment

McKisack CJ: This is an application by one Matayo Mugwanya to be joined as a defendant in a suit brought by Yoana Matovu against the Katikiro of Buganda and relating to the election of the applicant to the Great Lukiko of Buganda. The suit is for the following declarations:–

> "A. That the proper procedure was not followed as provided by s. 35 of the Law of Election of Representatives to the Great Lukiko and that all subsequent proceedings under the said Law were null and void.
>
> "B. That the Saza electoral college was not properly constituted and that all its proceedings were null and void.
>
> "C. That the said Matayo Mugwanya was not lawfully elected or returned and that his election and return were and are wholly null and void."

The Katikiro of Buganda is, according to para. 2 of the plaint, sued

> "in his capacity as the chief returning officer under the Law of Election of Representatives to the Great Lukiko."

The Law here referred to is, to give it its correct title, "The Great Lukiko (Election of Representatives) Law, 1953," and is to be found in Legal Notice No. 232 of 1953. Despite para. 2 of the plaint the Katikiro does not appear to be designated or referred to in that Law as the "chief returning officer."

The ground upon which the applicant seeks to be joined as a defendant is succinctly stated in the affidavit attached to the summons as follows: – "that I am the person most concerned in these proceedings," and the affidavit further states that his joinder as a defendant is necessary to enable the court to determine effectively the issue involved in this action. The applicant relies upon r. 10 (2) of O. 1 of the Civil Procedure Rules, the relevant part of which is as follows:

> "The court may at any stage of the proceedings either upon or without the application of either party, and on such terms as may appear to the court to be just, order that . . . the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."

Mr. Binaisa for the plaintiff, Yoana Matovu, opposes the application. Mr. Zake for the defendant, the Katikiro, does not oppose the application.

The suit which has been brought against the Katikiro is, it appears, a substitute for an election petition, since there is no provision in the Great Lukiko (Election of Representatives) Law, 1953, for such petitions.

Mr. Binaisa opposes the application that Matayo Mugwanya be joined as defendant on two grounds. The first is that the applicant is only indirectly interested in the result of the suit. The case of *Moser v. Marsden* (1), [1892] 1 Ch. 487, is authority for the proposition that a person indirectly interested will not be added; see Annual Practice, 1957, p. 259, where this case is referred to in the commentary on O. 16, r. 11, which contains a provision for adding parties similar to that contained in O. 1, r. 10 (2), of the Uganda Rules. But to contend that a successful candidate at an election is only "indirectly" interested in a suit claiming a declaration that (among other things) he was not lawfully elected and that his election was void seems to me to be a manifestly impossible position to maintain. It is difficult to imagine any

person more directly interested in the legality and validity of an election than the person who was elected.

Mr. Binaisa's second ground for opposing the application is also based upon the commentary in the Annual Practice, 1957, on O. 16, r. 11, where it is stated (at p. 259) that

> ". . . a defendant against whom no relief is sought by the plaintiff will not be added against the wish of the latter (*Hood-Barrs v. Frampton & Co*., [1924] W.N. 287); a third party notice is in such a case usually the proper course."

The report of the case here referred to is not available, but it is apparent that in the instant suit a third party notice would be quite inappropriate.

It may be that the plaint in this suit is not, in form, one which claims relief against Matayo Mugwanya, but, as I have already said, he is a person directly interested and, if the suit succeeds, his election will be declared void. If there were statutory provision for election petitions in respect of elections to the Great Lukiko, the plaintiff would not doubt have filed an election petition instead of a suit for a declaration. In such case, if the procedure for election petitions in respect of the Great Lukiko were similar to that for Parliamentary or Local Government election petitions in England, the successful candidate whose election is challenged would necessarily be a respondent to the petition; see s. 108 (2) of the Representation of the People Act, 1949. And that section further provides that, where in such petition the conduct of a returning officer is complained of, the returning officer shall be deemed to be a respondent. The legislature in England, therefore, has thought it necessary that, where (as in the instant suit) an election is questioned on the ground of incorrect conduct by a returning officer, both the successful candidate and the returning officer shall be respondents to the petition. Nor is this provision, though contained in an Act of 1949, one of merely recent origin; the requirement that successful candidate and returning officer both be respondents is to be found, for example, in the Corrupt Practices (Municipal Elections) Act, 1872, s. 13, and the case of *Woodward v. Sarsons and Sadler* (2) (1875), L.R. 10 C.P. 733, is an illustration of a petition in which it was alleged that the successful candidate (Sarsons) was elected by reason of irregularities for which the returning officer (Sadler) was responsible, and to which petition both those persons were made parties.

In my view, therefore, it is clear that, if a suit is brought for a declaration which is intended to have the same effect as an election petition (if successful) would have, the proper and necessary defendants to that suit are the persons who would be respondents to the election petition.

Moreover, I think the matter is put beyond all doubt by the following observations of Viscount Maugham in *London Passenger Transport Board v. Moscrop* (3), [1942] 1 All E.R. 97, at p. 104:–

> "I also think it desirable to mention the point as to parties in cases where a declaration is sought. The present appellants were not directly prejudiced by the declaration, and it might even have been thought to be an advantage to them to submit to the declaration; but, on the other hand, the persons really interested were not before the court, for not a single member of the Transport Union was, nor was that Union, itself, joined as a defendant in the action. It is true that in their absence they were not strictly bound by the declaration, but the courts have always recognised that persons interested are or may be indirectly prejudiced by a declaration made by the court in their absence, and that, except in very special circumstances, all persons interested should be made parties whether by representation, orders or otherwise before a declaration by its terms affecting their rights is made. In the Chancery Division, in which this case started, the rule would seem to be almost invariable, and the well-established practice in actions by shareholders and debenture holders may be mentioned as instances of the rule."

This application, therefore, succeeds and the applicant will be joined as a defendant in the suit. In my view he should have been made a defendant from the very beginning and this application ought not to have been necessary. The plaintiff will, therefore, pay the costs of the applicant and the defendant (the Katikiro) in respect of this application.

Application allowed.

For the applicant:
BKM Kiwanuka
BKM Kiwanuka, Kampala

For the plaintiff:
GL Binaisa
GL Binaisa, Kampala

For the defendant:
SJL Zake
SJL Zake, Kampala

R v Zakaria s/o Mfango
[1957] 1 EA 651 (HCT)

Division:	HM High Court for Tanganyika at Dar-Es-Salaam
Date of judgment:	10 December 1957
Case Number:	322/1957
Before:	Lowe J
Sourced by:	LawAfrica

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[1] Personal tax – Accused convicted of default in payment of tax – No evidence of age of accused – Age at which liability begins – Personal Tax Ordinance, 1955, *s.* 45 (1) *and s.* 46 (1) (*T.*).

Editor's Summary

The accused was charged before a magistrate with default in payment of personal tax. The Personal Tax Ordinance, 1955, s. 35 (1) permits a tax inspector to require any male person who appears to him to have attained the age of eighteen years to produce his receipt for personal tax and sub-s. (5) provides that evidence of non-production of the receipt is *prima facie* evidence of non-payment, which the alleged tax-payer is at liberty to rebut, if he can. By s. 43 the burden of proof as to age is on the person who claims the accused is not liable or is exempt. By s. 45 (1) any person who has not attained the age of eighteen years is exempted from payment of the tax, but s. 46 (1) provides that no person above the age of sixteen years shall be exempt on any ground unless he is on a temporary visit or is not in employment or business or owns land in the territory, or, not being an exempted visitor, is in possession of a certificate of exemption granted or deemed (by virtue of s. 33 of the Poll Tax (Non-Native) Ordinance or s. 9 of the Native Tax Ordinance) to have been granted. The charge against the accused was drawn in respect of tax for 1956 and 1957 in blanket form and was irregular. The magistrate noted in his record "Accused aged about twenty years" and having charged the accused who said he was under age, the magistrate entered pleas of not guilty whereupon the prosecution volunteered the opinion that the

accused was about twenty-three, but added "He has no proof of his age, neither can I prove it." The accused then said he was under age but he had been told he was eighteen, without admitting he was that age when the tax fell due. The magistrate recording a finding that accused was "aged about twenty years" and convicted the accused and fined him, without, however, having heard any evidence on the charges at all.

Held–

(i) in charging persons for default in payment of personal tax, a separate count should be preferred in respect of each year's alleged default.

(ii) every male person over sixteen years is liable to pay tax under the Personal Tax Ordinance but persons under eighteen can obtain exemptions.

(iii) unless the person charged is under sixteen years of age, the magistrate should make no finding as to age as the onus of proof is on the accused.

(iv) s. 45 and s. 46 should be read together to ascertain when liability to pay tax arises; liability arises at sixteen years with no right of exemption on the ground of age unless the accused shows he has not yet reached eighteen years.

[**Editorial Note:** See also *R. v. Omari Abdullah* reported at p. 687.]

Convictions quashed. Sentence set aside.

Cases referred to in judgment:

(1) *R. v. Juma s/o Mlundi*, Tanganyika High Court Criminal Revision No. 106 of 1957 (unreported).

Judgment

Lowe J: The trial magistrate has found himself in some difficulty in this case and it would appear that he has not had an opportunity of studying the order of this court in Criminal Revision 106 of 1957, *R. v. Juma s/o Mlundi* (1). Much said in that order, regarding the procedure to be followed in criminal proceedings for neglect or default in paying personal tax as required by the Personal Tax Ordinance, 1955, applies with equal strength to this case. The charge

is drawn in "blanket" form and beneath the charge is noted "Court 1 of 1956; Count 2 of 1957." Charges should always be drawn separately in respect of each year's alleged default.

The trial magistrate, before charging the accused on two counts, noted: "Accused aged about twenty years." The pleas were then taken and the accused said, *inter alia*, that he was under age. The magistrate rightly entered the pleas as being "not guilty," whereupon the prosecutor stated that the accused was about twenty-three years of age but added, wisely, "he has no proof of his age, neither can I prove it." The accused then repeated that he was under age but said that he had been told that he was eighteen years of age. He did not, however, admit that he was that age when the tax became due.

The magistrate recorded a finding that the accused was "aged about twenty years" but there is no evidence whatever which could enable him to have reached that conclusion except his personal estimate after looking at the accused. In any event his finding as to age is of no effect as will be seen later. Nothing could thus be certain. However, having satisfied himself (wrongly) as to age, the trial magistrate convicted the accused on each count and imposed penalties of a fine of Shs. 40/- or two months' imprisonment in default on the first count and a fine of Shs. 30/- or one month's imprisonment in default on the second count. An appropriate penalty would have been Shs. 30/- fine with one month's imprisonment in default on the first count; the same penalty as was imposed on the other count. That is, of course, had the accused been properly convicted. In spite of the plea of "not guilty" the trial magistrate heard no evidence at all and the prosecution therefore failed to prove the case against the accused. However, the manner in which the case was tried and the entering of convictions without any proof of guilt has resulted in the trial being a nullity. The convictions are quashed and the sentences set aside, but the accused may be prosecuted again in respect of the same alleged offences.

As the question of age is an important factor in this case I should perhaps take the opportunity of clarifying, so far as I can, the apparent conflict which exists in the Ordinance itself in that respect. Section 45 (1) says, *inter alia*:

> "There shall be exempted from the payment of the tax under this Ordinance any person who has not attained the age of eighteen years."

That is abundantly clear, but s. 46 (1) brings confusion by saying, in effect, that no person above the age of sixteen years shall be exempted from paying the tax on any ground whatsoever unless he is on a temporary visit and is not in employment or business or owns land in the territory; or, not being an exempted visitor, is in possession of a certificate of exemption granted or deemed to have been granted, which certificate is valid for the tax year in which exemption is claimed. The "deeming" is in respect of certificates of exemption already granted under s. 33 of the Poll Tax (Non-Native) Ordinance or under s. 9 of the Native Tax Ordinance.

The magistrate might well have wondered whether or not s. 46 (1) has altered from eighteen to sixteen years the age at which a potential tax-payer becomes liable for the payment of tax under the 1955 Ordinance. It is a separate enactment, subsequent to the one which gives the age at eighteen years, and its intention also seems abundantly clear when the sub-section is considered alone. Had s. 45 (1) commenced with the words "Subject to the provisions of s. 46 (1), there shall be exempted," etc., or had s. 46 (1) been enacted as a proviso to s. 45 (1), all doubts would have been resolved. It is necessary to ascertain the intention of what appears to be a repugnancy between the two sections.

Section 35 (1) permits a tax inspector (defined in sub-s. 7) to require any male person *who appears to him* to have attained the age of *eighteen* years to produce his receipt for current tax, and sub-s. 5 provides

that evidence of non-production of the receipt is *prima facie* evidence of non-payment of tax, which, of course, the alleged tax-payer is at liberty to rebut if he can.

Section 43 throws the burden of proof as to age on to the person who claims that the accused is not liable to pay or is exempted from payment of tax or penalty.

At that stage it is clear that a person who may be younger but who appears to the tax inspector to have attained the age of eighteen years might find himself asked to produce a receipt for current tax and if he cannot do so he would, no doubt, be summoned or charged with non-payment unless he could produce evidence of exemption. When he is before the court the onus of proof of age is on him and nothing but a birth certificate registered under the Births and Deaths Registration Ordinance or one from the country of registration of birth showing that he is, in fact, under sixteen years of age, or a certificate of exemption on the grounds of age, will satisfy the court that, on such grounds, he is not yet liable for tax. That seems to indicate the necessity for a provision such as s. 46 (1) and, for the reasons I have given, any person who has reached the age of sixteen years but could be taken by appearance to be eighteen years of age has the protective right to apply to the "collector" (defined in s. 2) for a certificate of exemption. If he is not granted such a certificate or makes no attempt to obtain one he, although in fact only about sixteen or seventeen years of age, would find himself in trouble for non-payment of a tax which is, in effect, deemed to be due and payable by him. The intention of s. 46 (1) thus becomes more apparent. It would be virtually impossible for those responsible for the collection of this tax to prove with any degree of certainty the exact age of the vast majority of male youths in the territory and, naturally enough, the onus of disproving an apparent age of eighteen years is passed by the Ordinance to the youths concerned. If a person to whom the Ordinance applies has not yet attained the age of eighteen years and, on application for exemption, satisfies the "collector" that such is the case, he is therefore entitled to an exemption certificate. It would be absurd to think that by s. 46 (1) the legislature intended to repeal a portion of or to amend s. 45 (1) in the same Ordinance, and the only reasonable construction which can be placed on those sub-sections is that the latter is intended to be an exception to the former. Maxwell on the Interpretation of Statutes (10th Edn.), p. 170, puts the position clearly where he says:

> "But repeal by implication is not favoured. A sufficient Act ought not to be held to be repealed by implication without some strong reason. It is a reasonable presumption that the legislature did not intend to keep really contradictory enactments on the statute book, or, on the other hand, to effect so important a measure as the repeal of a law without expressing an intention to do so. Such an interpretation, therefore, is not to be adopted unless it is inevitable. Any reasonable construction which offers an escape from it is more likely to be in consonance with the real intention."

All the more so with an apparent amendment enacted at the same time and in the same Ordinance as the provision which, at first glance, appears to have been amended. In the instant case the prosecutor said he thought the accused was about twenty-three years of age. If the tax inspector had given evidence, as he should in such cases, and had said that he considered the age of the accused to be as stated, the magistrate would be bound to accept that age until the accused rebutted the evidence of that witness, and only a birth certificate showing him to be under sixteen years of age or an exemption certificate is a sufficient rebuttal under the Ordinance. The trial magistrate can come to a finding that an accused is, on the evidence, under sixteen, but a finding that an accused is sixteen or more is of no lawful effect; the accused then without an exemption certificate must, if so charged, still be found to be liable to tax. Even although there was reasonable doubt as to whether or not the accused has actually attained the age of eighteen years the magistrate is bound by the provisions of s. 46 (1), and a sixteen-year-old accused who has not obtained exemption under any of the relevant provisions of the Ordinance is liable to pay tax. If a certificate of exemption is refused, the magistrate, subject to the accused not being shown to be under sixteen or having appealed successfully under s. 46 (2) to the Appeal Commissioner against the collector's refusal, must make the necessary order or enter a conviction and sentence the accused, as the case may be. In other words, the magistrate can be completely satisfied in such a case that an accused person is seventeen or even sixteen, but with no evidence of exemption he must still treat him as being

liable to tax as though he were in fact eighteen years old; the provisions of the Ordinance leave no option. In fact, I am satisfied that the relevant provisions of s. 45 and s. 46 should be construed together as though they said:

> "Every male person of sixteen years of age or more is liable for the payment of tax as provided in this Ordinance, but those who have not attained the age of eighteen years shall not be liable for the payment of such tax if they are in possession of a certificate of exemption,"

or words to like effect. The legislature clearly intended that the liability should attach to sixteen-year-old males as soon as they reach that age, and have placed the onus on them to obtain exemption. I should, perhaps, make it clear that even if a tax collector does *not* think a male person is of the apparent age of eighteen years (in which case he cannot demand a tax receipt) that person, being sixteen or seventeen years of age, and not having taken steps to obtain exemption, is still liable for tax and it follows, is also liable to be summoned or convicted for non-payment.

This Order should be read together with Criminal Revision Order No. 106 of 1957 to which it is supplementary.

Convictions quashed. Sentence set aside.

Teja Singh and others v Isher Singh and others
[1957] 1 EA 654 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	27 September 1957
Case Number:	68/1957
Before:	Sir Newnham Worley P, Briggs Ag V-P and Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Uganda – Keatinge, J

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[1] Sale of land – Caveat – Caveat lodged by members of a Sikh Temple, a charitable trust and body corporate – Notice to caveators of submission of transfer – Application to High Court filed but not heard within thirty days from date of notice – Whether caveat lodged by "a beneficiary claiming under any will or settlement" – Whether caveat lapsed – Registration of Titles Ordinance, s. 149 (*U.*) *– Trustees* (*Incorporation*) *Ordinance,* 1939 (*U.*).

Editor's Summary

The appellants were members of a charitable trust known as the Sikh Temple, Tororo, which was a body corporate registered pursuant to the Trustees (Incorporation) Ordinance, 1939. They had lodged a caveat with the Registrar of Titles in respect of certain land which the trustees of the Sikh Temple were the owners. The trustees proposed to dispose of this land and a transfer was submitted to the Registrar of

Titles in respect thereof. On October 10, 1956, the registrar notified the appellants of the submission of the transfer with a view to the automatic lapse of the caveat under the provisions of s. 149 of the Registration of Titles Ordinance. This notice was served a week later, but before the thirty days had expired the appellants applied to the High Court for an order under s. 149 continuing the caveat. There was unexplained delay of some months in proceeding with the application and the High Court held that after the expiration of thirty days from the registrar's notice an order continuing a caveat could not be made. On appeal the appellants contended that where an application for continuation is made of which the registrar is informed, the caveat does not lapse pending disposal of the application. During the argument of the

appeal the appellate court pointed out that s. 149 of the Registration of Titles Ordinance showed that caveats were of two classes (*a*) those lodged by or on behalf of a beneficiary claiming under any will or settlement or by the Registrar of Titles and (*b*) all other caveats, and that the former class could only be removed by the caveats or by an order of court obtained on application inter partes. The appellants then contended that their caveat was in class (*a*) and that the registrar's notice to them was a nullity.

Held–

(i) each member of the charitable trust has a beneficial interest created by the trust instruments in the trust property and the trust's instruments are in the circumstances a "settlement" within s. 149.

(ii) the caveat had never lapsed, the notice from the Registrar of Titles was a nullity and the High Court should have made an order for continuation of the caveat.

Appeal allowed. Order that the caveat be re-entered on the register and be continued until withdrawn or until further order of the High Court and that it be deemed to have been subsisting at all times since lodged.

No cases referred to in judgment

September 27. The following judgments were read.

Judgment

Briggs Ag V-P: This is an appeal by leave from an order of the High Court of Uganda dismissing with costs an application by the appellants for continuation of a caveat on registered land under the provisions of s. 149 of the Registration of Titles Ordinance (Cap. 123).

In 1940 the Governor of Uganda on the petition of Isher Singh, Kartar Singh and Achhar Singh, who were then the trustees of an existing charitable trust known as the Sikh Temple, Tororo, granted to them a certificate of registration as a corporate body under the provisions of the Trustees (Incorporation) Ordinance, 1939, with the title of "The Registered Trustees of Sikh Temple, Tororo (Uganda)." The corporation is a religious and educational charitable trust for the benefit of the Sikh community in and around Tororo and membership is open to any adult Sikh on signing an admission form agreeing to abide by the rules of the charity. The parties are all members and there are many others. The land now in question vested in the charity on incorporation. It was a condition of the incorporation that new trustees should be appointed in a specified manner and by a general meeting of the members. The respondents are Isher Singh and Achhar Singh, two of the original trustees, Gurdit Singh, who is alleged by some of the parties to have been lawfully appointed a trustee in place of Kartar Singh, whose tenure of office as trustee had been determined, while other parties say that this appointment was irregular and void; and Dial Singh Kalsi, the proposed transferee of the land. The Registrar of Titles was made a respondent on the original application to the High Court, but did not appear and is not made a party to the appeal. The first three respondents appear to be made parties both personally and in their corporate capacity as representing the charity itself, but the documents filed are neither clear nor consistent. The title originally used was inadequate. It would appear from that that only the corporation and Dial Singh Kalsi are respondents, but the summons was addressed to the trustees personally and to the Registrar of Titles. This laxity of procedure is regrettably common in Uganda. It causes much inconvenience and will not be checked until the courts apply sanctions by adjusting their orders for costs. I think, however, that all

necessary parties were and are before the court.

The transfer, to prevent registration of which the caveat was lodged, is by the corporation under its common seal affixed in the presence of Achhar Singh as trustee and vice-president, Gurdit Singh as trustee and one Saudagar Singh as honorary secretary. It is dated August 18, 1956. The caveat is dated September 1, 1956, and was lodged on September 3 before registration of the transfer. It states that the appellants “claim an interest as members of Sikh Temple, Tororo, a body corporate

. . .” in the land in question, and forbids transfer without notice to them. On October 10, 1956, the registrar gave notice to the caveators of the pending transfer with a view to effecting automatic lapse of the caveat after thirty days, as provided in the second part of s. 149. The notice was served about a week later and the thirty days expired on or about November 18, 1956. On November 5, 1956, the appellants applied to the High Court at Kampala for an order under s. 149 continuing the caveat. For some reason unexplained the summons was apparently not issued until some time in February, 1957, and the hearing only took place on May 26, 1957. Judgment was reserved and was signed on June 12 and delivered by another judge on June 14. That other judge then gave leave to appeal. The provision as to leave to appeal could not in the circumstances be embodied in the substantive formal order; but a separate order should have been extracted dealing only with the grant of leave to appeal and this order in addition to the one appealed from should have been included in the appeal record.

The substance of the High Court’s decision was that in a case of this kind an order for continuation of a caveat cannot be made after the expiration of the thirty days’ notice, and that, there being no jurisdiction to make the order prayed, it was unnecessary to consider whether there were grounds which would, if the application had been brought to hearing in time, have justified continuation. The caveators appeal on the short ground that, where applicant has been made to the High Court, and the Registrar of Titles has (as in this case) been informed of the pending application, the caveat does not lapse, but remains in a state of suspended animation pending disposal of the application, and the order for continuation can be made and be effective although the thirty days have long since expired. It is conceded that, if this view is correct, the matter would, subject to one consideration which will appear, have to be remitted to the High Court to decide whether continuation should be ordered on the merits. It should be noted that the registrar did not in fact remove, or purport to remove, the caveat from the title until after the decision of the High Court, but then did so at once. Other caveats have, however, since been lodged by other parties, and the status quo has been preserved.

The main question is in any event a difficult one, but during argument a further point was raised by the court itself, which apparently had not occurred to the parties and was not discussed in the High Court. The general power to lodge a caveat is given in s. 148 of the Ordinance and it is well established that it extends to protect any equitable interest in the land. Section 149 shows that caveats are of two classes, namely, (*a*) caveats

> “lodged by or on behalf of a beneficiary claiming under any will or settlement or by the Registrar of Titles,”

and (*b*) all other caveats, and the two classes are subject to quite different incidents. In particular, caveats of class (*a*) can only be removed by the caveator or by an order of court to be obtained on application inter partes by a party having an interest in such removal. They are not subject to the more summary procedure whereby the Registrar of Titles can give notice of an intended transaction and thereafter the caveat will lapse unless an order of court for continuation is obtained. The propriety of this distinction rests on the substantial and relatively permanent nature of the unregistered rights with which class (*a*) is concerned. The importance of the distinction is that where a caveat is within class (*a*) a notice of the kind issued here is incompetent and in law a nullity. Nevertheless, if in such a case a notice is issued mistakenly, the caveator would be wise to claim against the registrar an order for continuation, and in such proceedings the caveatee and any other person interested in an intended transaction would be properly joined as respondents, particularly if the notice was issued at their instance; for if the caveator remained inactive his caveat would, though wrongfully, be removed and other persons might obtain registered interests which would defeat his unregistered one. He might even be without remedy against

the registrar on grounds of latches or acquiescence. I am accordingly of opinion that on this application for continuance, in view of the facts established by the affidavits, the High Court should

have considered, among other issues, the question whether this caveat fell within class (*a*) or class (*b*). In fact everyone assumed that it was of class (*b*); but when we raised the point counsel for the appellant adopted it and asked us to hold that this caveat was of class (*a*) and that the registrar's notice had been a nullity. The question is purely one of law and I think we must decide it. It turns on the meaning of the word "settlement" in s. 149. "Settlement" is defined in s. 2 as meaning

> "any document under or by virtue of which any land is so limited as to create partial or limited estates or interests."

The singular, of course, includes the plural and the documents which appear to be relevant here, in addition to the Crown lease itself and any certificate of title, are the certificate of incorporation with any documents incorporated therein by reference and in particular the rules. The combined effect of those documents appears to have been to reconstitute the charitable trust on somewhat different terms from those on which previously existed, and to constitute the land in question an asset of the re-formed charitable trust. Every member of the charity has an equitable interest in the trust property and every part of it. *Prima facie* it seems that the documents create "partial . . . interest," whether or not the other words of the definition are apt. It is clear that the "documents" themselves need not be registered documents, and that the "interests" may be either legal or equitable. I would agree readily that the primary intention of the definition is to comprehend what is normally understood by a settlement, and it is natural that in Hogg on the Australian Torrens System (1905 Edn.) most of the references to settlements are in relation to the various Settled Land Acts. Hogg is largely concerned with the technical question whether in cases of settlements a change of registered interest is by transfer or transmission. He discusses (p. 925) the creation of successive estates on the register and the simpler and more satisfactory settlement which creates only equitable interests (pp. 792–3). He remarks (p. 976) that

> "the precise method in which the trust is declared or created seems to be immaterial, so long as it is a method which would have effectually created a trust under the general law."

I find no special reference to charitable trusts and consider that they must follow the ordinary rules. I am of opinion that each member of this charity has a beneficial interest in the trust property which was created by the trust instruments. His interest is "partial" and need not be also in the strict sense "limited," but I think that in truth it is "limited" also, for on his death it comes to an end and passes to the other members by survivorship. The words "estates or interests" show that an interest not having the special status of an equitable estate may be protected. The word "limited" where it first occurs in the definition is, I think, apt to describe the carving out from the "freehold" or legal estate of a number of equitable interests, whether concurrent or successive. I am of opinion therefore that the trust instruments as a whole were a "settlement" within the definition of the Ordinance and the appellants in lodging this caveat were beneficiaries claiming under a "settlement" within the meaning of s. 149. The words of the caveat, to which I have referred above, indicate that it was their intention to claim in this manner. They "claim an interest as members of Sikh Temple, Tororo, a body corporate . . ." Save perhaps in the case of an immediate unconditional trust in favour of a single individual, I am inclined to think that any trust of land created by writing may be the subject of a "settlement" within the meaning of s. 149. It follows that in my view this caveat never lapsed by reason of the registrar's notice, which should not have been served and was a nullity, and that, irrespective of any question of the date of the order, the High Court should have made an order for continuance of the caveat.

I return to the question which the High Court did consider. There are strong arguments of convenience against either view. On the one hand, although a caveator may file his application for continuance at

once, it may easily occur, if the proceedings are in a district registry, that no judge will be available to hear the matter within thirty days. Even if the caveator comes to Kampala, it may not always be possible

to obtain an order in time. It appears from Hogg (p. 1042) that there have been conflicting decisions in Australia on the question whether an order under sections similar to s. 149 may be made *ex parte*. The section does not at first glance appear to contemplate more orders than one being made on a single application, and if the merits cannot be decided summarily the proper course would then be to make an order for continuance of the caveat pending determination of the proceedings, probably an action, to be brought for that purpose. The provisions about security all make for delay. The judge may, as he did here, reserve judgment. If the proceedings are inter partes, it will be very difficult and perhaps impossible to obtain an order in time and even more so to serve a sealed order on the Registrar of Titles within the thirty days; but if this is not done he may on the thirty-first have treated the caveat as lapsed and may have registered the transaction to which objection was taken, so that the order may be ineffective, though made in due time. If the learned judge was right, there seems to be a strong case for amendment of the law. On the other hand, if the appellant is right, the provision that the caveat "shall be deemed to have lapsed" would produce the unfortunate situation that the register should be amended to show that it has lapsed, and so to show a clean title, and it should then be possible to register the transaction proposed. If the caveat has a conditional continued existence and can be resuscitated after its apparent lapse, this must be with retrospective effect, and the "mirror of title" is distinctly blurred. As between these two sets of unfortunate consequences I think the latter is much the less serious, in that all practical inconvenience could perhaps be avoided by administrative instruction. It would be essential both that the application should have been filed, and the Registrar of Titles should have been duly notified that it had been filed, within the thirty days. Subject to this, I see no objection to an instruction that the registrar should in all cases preserve the status quo pending receipt of the court's order. The caveat would still appear against the title and would not be removed or noted as lapsed until the order was received. If there was undue delay the registrar could always intervene on the application. It should be remembered that this was the actual course of events in the present case, and it may be that an instruction of the kind indicated is now in force. These considerations, however, though important in practice, must take second place. The primary question is what the words of the section mean.

The difficulty arises from three distinct sources. Where in Uganda the words are "appears before the High Court" the corresponding Australian Acts (Victoria and Western Australia) have instead the words "appears before a judge." It is submitted that whereas the latter words clearly point to physical appearance on the disposal of the application, the former are satisfied by filing the application. If they stood alone, I think this might be so, but the provisions following as to security militate against this construction. The second point arises from the words "shall be deemed to have lapsed." It is submitted that the use of these words instead of the more straightforward "shall lapse" is significant and shows that there is not an immediate and actual lapse for all purposes. This argument is substantial and is bound up with the third point, which concerns the words

> "before the expiration of such period of thirty days or such further period as is specified in any order made under this section."

If the power to make an order expires with the thirty days, the words concerning a further period are meaningless, unless on one of two bases. It is argued in support of the order that they may mean, first, that although the order for continuance and for the furnishing of security or payment into court must be made within thirty days, the security may be furnished or the payment made within such further period as may be provided by the order: alternatively, they may mean that an interim order for continuation for, say, sixty days may be made within the initial period and, if that is done, a further order may be made within the next sixty days for further continuation, whether on the same or another application.

In considering these arguments, it must not be forgotten that s. 152 provides that a memorandum of every caveat shall be entered in the register, and s. 153 (2) provides

that where a caveat has lapsed under s. 149 the caveat shall be removed from the register and a note shall be made of the date of removal. It is also relevant to note that on an application under s. 149 by a caveator, the court may direct the registrar to defer registration of any proposed transaction or "may make such other order . . . as is just." The usual order is merely to continue the caveat, but this is not the only possible order. I think it is not impossible that the words "any order made under this section" may relate back to the earlier provisions of the section and to a situation where a caveatee has applied for a removal of the caveat. In such a case the court might order removal unless the caveator furnished security within ninety days. If that occurred, an application might properly lie under the later part of the section to continue the same caveat indefinitely, and the conditions might perhaps be changed. I think the attempt to separate the times for making the order and for giving security or the like does violence to the words, which all together plainly define the period within which an order may be made. It is unfortunate that we are unable to refer to the Australian cases and do not know on what grounds they were decided. They may have turned on the general policy of the Acts and the view that a caveat once lapsed cannot be revived, or perhaps on some special construction of the words "or such further period," etc. The second suggestion, that the words refer to the making of successive orders for continuation, each within a period limited by the preceding one is, I think, the less distasteful. Under s. 26 of the Interpretation and General Clauses Ordinance powers exercisable may be exercised from time to time, and there is nothing in the wording which precludes the making of successive orders. This construction does not account for the use of the words "shall be deemed to have lapsed." I can only suppose that the words "shall lapse" were thought to be unduly definite where the very next sentence showed how a lapse might be prevented. On the whole, I am driven to the conclusion that the wording of the section, where it tends to cast doubt on the construction adopted in Australia and by the learned trial judge, can be explained, or explained away, and I consider that construction to be correct, in spite of the arguments from inconvenience, which are in no way impaired. If the matter fell to be determined on this ground alone, I should propose to dismiss the appeal.

I think, however, that the appeal should be allowed and the order of the High Court should be set aside on the ground that this caveat was not subject to lapse after notice; but since this point was never raised by the appellants I think it would be unjust to make the respondents liable for costs. I would order that the caveat be re-entered on the register and be continued until withdrawn or until further order of the High Court, and that it be deemed to have been subsisting at all times since it was lodged, and I would make no order as to costs either here or below.

Sir Newnham Worley P: I have had the advantage of reading the judgment which has just been delivered. I agree that the decision appealed from was correct if the caveat in question was not one

> "lodged by or on behalf of a beneficiary claiming under any will or settlement or by the Registrar of Titles."

The reasons for that view are fully set out in the judgment of the learned acting vice-president and nothing would be gained by my repeating them. This construction of the relevant provisions of s. 149 may, in practice, cause great inconvenience but that must be a secondary consideration. The difficulties experienced in this case and which may arise in other cases, as well as the conflicting decisions of other courts on similar sections, all emphasise the need of amendments which will clarify and simplify the provisions of s. 149.

It is with some hesitation that I accept the view that this was a caveat lodged by or on behalf of beneficiaries under a settlement. I regret that we do not have the advantage of the opinion of the court below on this point. But I have come to the conclusion that the words of the definition of "settlement" are

wide enough to include the constitution of a charitable trust such as this trust undoubtedly is. It is, I think, fully consistent with the intention of the section that the interests of the beneficiaries

of a charitable trust should receive the greater measure of protection which is afforded by a caveat that can only be removed by the caveator or by an order of court.

I agree that as this latter point was not taken by the respondents either here or in the court below, it would be unjust to require the appellants to pay their costs.

An order will be made in the terms proposed by the acting vice-president.

Forbes JA: I also agree.

Appeal allowed. Order that the caveat be re-entered on the register and be continued until further order of the High Court and that it be deemed to have been subsisting at all times since lodged.

For the appellants:
PJ Wilkinson
PJ Wilkinson, Kampala

For second and third respondents:
JM Shah
Patel & Shah, Mbale

The first respondent did not appear and was not represented.

R v Absolom s/o Mohanga and Wilson s/o Wasike
[1957] 1 EA 660 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	27 August 1957
Case Number:	119/1957
Before:	Rudd Ag CJ and Forbes J
Sourced by:	LawAfrica

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[1] Criminal law – Auterfois convict – Respondents members of Police Force – Convicted and sentenced by Orderly Room Tribunal on disciplinary charge – Subsequently charged with rape on same facts in magistrate's court – Whether respondents entitled to plead autrefois convict – Police Ordinance, 1948, *s.* 41 (44), *s.* 43 *and s.* 62 (*K.*) *– Criminal Procedure Code, s.* 138 *and s.* 367 (*K.*).

Editor's Summary

The respondents were members of the Kenya Police Force and it was alleged that on October 21, 1956, they took two women from the prison cells and had carnal knowledge of them without their consent. On

November 26, 1956, the two respondents were charged with conduct to the prejudice of good order and discipline in respect of the alleged acts under s. 41 (44) of the Police Ordinance, 1948. The charge was duly heard in accordance with the orderly room procedure and the respondents were convicted and sentenced. Subsequently they were charged with rape and the trial magistrate upheld their pleas of autrefois convict. Thereupon the Crown appealed by way of case stated. Counsel for the respondents took the preliminary point that an appeal by way of case stated did not lie under s. 367 of the Criminal Procedure Code since, it was submitted, a plea in bar was not a "hearing and determination of a summons, charge, information or complaint." The three substantial question stated by the trial magistrate for the opinion of the Supreme Court were:

> "(1) Was the learned magistrate correct in holding that the plea of autrefois acquit was available to both the accused under s. 138 of the Criminal Procedure Code. (2) Was the offence which was the subject of the charge before the learned resident magistrate on February 1, 1957, the same offence and based on the same facts as the offence which was the subject of the charge in the orderly room on November 26, 1956. (3) Did Supt. Constant of the Kenya Police hearing charges in an orderly room constitute a court of competent jurisdiction under the terms of s. 138 of the Criminal Procedure Code."

As regards question (2) it was argued for the respondents that although the element of consent was not a necessary ingredient of the charge before the orderly room tribunal as it is in the charge of rape, yet it was in fact a material issue which was specifically considered and decided by the presiding superintendent of police and that therefore in considering the charge before him, the presiding superintendent in fact adjudicated on the question of rape. As regards question (3) it was contended for the respondents that the orderly room tribunal established under s. 43 of the Police Ordinance was more than a mere domestic tribunal; that it was established by Ordinance and did not rely on an agreement between employer and servant; and that while the majority of the offences specified in s. 41 which are triable by a police authority relate to domestic matters within the Force, yet sub-s. (44) was very wide and was capable of embracing a number of offences against the public.

Held–

(i) the hearing and determination of a case upon a special plea in bar is a "hearing and determination" of the information or complaint within the meaning of s. 367 of the Criminal Procedure Code.

(ii) the trial magistrate should have rejected the plea of autrefois convict.

(iii) the offence which was the subject of the orderly room charge was certainly based on the *same facts*, but it was not the offence of rape; for the plea in bar to be effectual, the previous conviction must be for the same, or at least, practically the *same offence* as that subsequently charged.

Lewis v. Mogan, [1943] 2 All E.R. 272; [1943] K.B. 376, applied.

R. v. Jessop, Kenya Supreme Court Criminal Appeal No. 127 of 1956 (unreported), considered.

(iv) "the offences set out in s. 41 of the Police Ordinance are expressly stated to be offences against discipline, and it is only as offences against discipline that they are triable by orderly room procedure; there is no jurisdiction for any general offence against the public to be tried by orderly room procedure."

Per curiam – ". . . if we are wrong and the orderly room tribunal is a court and not a domestic tribunal, the matter falls under s. 141 of the Criminal Procedure Code . . . The orderly room tribunal, of course, has no jurisdiction to try the offence of rape. Whether or not, therefore, the orderly room tribunal is a domestic tribunal, the offence of rape charged is triable by a court of competent jurisdiction notwithstanding the conviction of the respondents under s. 41 (44) of the Police Ordinance of an offence against discipline constituted by the same acts."

Case remitted to magistrate for hearing and determination.

Cases referred to:

(1) *R. v. Jessop*, Kenya Supreme Court Criminal Appeal No. 127 of 1956 (unreported).

(2) *Lewis v. Mogan*, [1943] 2 All E.R. 272; [1943] K.B. 376.

(3) *R. v. Kendrick and Smith*, 23 Cr. App. R. 1.

(4) *R. v. Thomas*, [1949] 2 All E.R. 662; [1950] 1 K.B. 26.

Judgment

Rudd Ag CJ: read the following judgment of the court: This is an appeal by the Crown by way of case stated against the decision of the learned resident magistrate, Nyeri, upholding pleas of autrefois convict submitted on behalf of the respondents in respect of charges of rape which had been preferred against them. The case stated by the learned magistrate refers to pleas of autrefois acquit, but it is clear that this is an error and should have read "autrefois convict."

It appears from the case stated that the two respondents are members of the Police Force, and that it is alleged that on October 21, 1956, they took two women from the cells and had carnal knowledge of them without their consent.

On November 26, 1956, the two respondents were charged in respect of the acts alleged under s. 41 (44) of the Police Ordinance, 1948, with conduct to the prejudice of good order and discipline. The charge was duly heard by Supt. Constant in accordance with the orderly room procedure prescribed by s. 43 of the Police Ordinance, and the respondents were convicted and sentenced. Subsequently they were brought before the magistrates' court on charges of rape, when the plea in bar was raised.

A preliminary point was taken by counsel for the respondents, namely, that an appeal by way of case stated does not lie under s. 367 of the Criminal Procedure Code since, it was submitted, a plea in bar was not a "hearing and determination of a summons, charge, information or complaint." Reference was made to the judgment of this court in Criminal Appeal No. 127 of 1956, *R. v. Jessop* (1) (unreported) in which it was held that the decision of a magistrate that he had no jurisdiction to try a case because the accused was a European and claimed trial before the Supreme Court, under s. 218 and s. 221 of the Criminal Procedure Code, that is to say, that the magistrate declined jurisdiction, was not a "hearing and determination" within the meaning of s. 367 of the Criminal Procedure Code, and it was argued that by accepting a plea in bar a magistrate equally declines jurisdiction and does not hear and determine the case. We were, however, of the opinion that the decision in *R. v. Jessop* (1) was not applicable to a case where a plea in bar was made. In the *Jessop* case (1) the magistrate declined to dispose of the matter himself. He did not arraign the respondents and he heard no evidence. This court held that there had been no "hearing and determination" of the case. In this case the respondents entered a special plea in bar before pleading to the charges, and the learned magistrate heard and determined the case upon that special plea. That determination is a final disposal of the matter if it is not disturbed. It should be noted that in the *Jessop* case (1) the English authorities were carefully examined and followed, the gist of the English cases being that a case stated does not lie unless there has been a "hearing" by the magistrates' court. "Hearing," as there stated, *prima facie*, includes a determination, a final disposal. It is therefore of interest that in one of the cases cited to us in the course of argument on the merits of this appeal, namely *Lewis v. Mogan* (2), [1943] K.B. 376, the decision of the justices in accepting a plea of autrefois convict was challenged by way of a case stated, and it does not appear to have occurred either to counsel or the court that a case stated did not lie.

In our opinion the hearing and determination of a case upon a special plea in bar is a "hearing and determination" of the information or complaint within the meaning of s. 367 of the Criminal Procedure Code, and we accordingly overruled the preliminary objection and proceeded to hear argument on the case stated.

Three questions were posed by the learned magistrate in para. 1 of the case stated, namely–

> "(1) Was the learned magistrate correct in holding that the plea of autrefois acquit was available to both the accused under s. 138 of the Criminal Procedure Code.
>
> "(2) Was the offence which was the subject of the charge before the learned resident magistrate on February 1, 1957, the same offence and based on the same facts as the offence which was the subject of the charge in the orderly room on November 26, 1956.
>
> "(3) Did Supt. Constant of the Kenya Police hearing charges in an orderly room constitute a court of competent jurisdiction under the terms of s. 138 of the Criminal Procedure Code."

As regards question (2), it was argued for the respondents that although the element of consent was not a necessary ingredient of the charge before Supt. Constant, as it is in the charge of rape, yet it was in fact a material issue which was specifically considered and adjudicated upon by Supt. Constant, and that therefore in considering the charge before him Supt. Constant in fact adjudicated on the question of rape.

We are unable to accept this argument. It is clear from the statement of the law

in Archbold (33rd Edn.) at p. 156, that a plea of autrefois convict can only be pleaded effectually where–

(*a*) the conviction was for the exact offence subsequently charged; or

(*b*) the subsequent charge is based on the same acts or omissions as those in respect of which the previous conviction was made, and some statute directs that a person shall not be punished twice in respect of the same acts or omissions.

That proposition is supported by the case of *R. v. Kendrick and Smith* (3), 23 Cr. App. R. 1, and *R. v. Thomas* (4), [1950] 1 K.B. 26, which were cited to us.

Reference was made to s. 60 of the Interpretation and General Clauses Ordinance, 1956, and s. 62 of the Police Ordinance, 1948. Neither of those sections, however, in our opinion, assists the respondents. In *R. v. Thomas* (4) the section of the English Interpretation Act which corresponds with s. 60 of the Interpretation and General Clauses Ordinance, 1956, was considered by the Court of Criminal Appeal and in the course of the judgment it was said–

> "It is not the law that a person shall not be liable to be punished twice for the same act; it has never been so stated in any case, and the Interpretation Act itself does not say so. What s. 53 says is: 'No person shall be liable to be punished twice for the same offence'."

Section 60 of the Interpretation and General Clauses Ordinance and s. 62 of the Police Ordinance each similarly provide that a person shall not be punished twice for the same offence.

There is therefore no question of any statutory provision applicable to this case which prohibits punishment twice in respect of the same acts or omissions, and the proposition remains that for the plea in bar to be effectual the previous conviction must be for the same, or at least, practically the same offence as that subsequently charged. Clearly that was not the case here. The offence which was the subject of the orderly room charge in November, 1956, was certainly based on the same facts, but it was not the offence of rape. The answer to question (2) is accordingly in the negative.

As regards question (3), it was argued for the respondents that the orderly room tribunal established under s. 43 of the Police Ordinance is more than a mere domestic tribunal; that it is established by Ordinance, and does not rely on an agreement between employer and servant, as was the case in *Lewis v. Mogan* (2), [1943] K.B. 376; and that while the majority of the offences specified in s. 41 which are triable by a police authority relate to domestic matters within the Force, yet sub-s. (44) is very wide and is capable of embracing a number of offences against the public.

Once again, we are unable to accept the argument for the respondents. It seems clear to us that the orderly room tribunal is a domestic tribunal concerned solely with offences within the Force. The offences set out in s. 41 are expressly stated to be offences against discipline, and it is only as offences against discipline that they are triable by orderly room procedure. There is no jurisdiction for any general offence against the public to be tried by orderly room procedure. We are of the opinion therefore that the answer to question (3) is also in the negative.

However, it appears to us that the question whether or not the orderly room tribunal is a domestic tribunal is of very little moment, since the position appears to be fully covered by statutory provision. On the one hand a police officer convicted of an offence by the orderly room tribunal cannot by virtue of s. 62 of the Police Ordinance be punished a second time for that *same* offence. On the other hand, if we are wrong and the orderly room tribunal is a court and not a domestic tribunal, the matter falls under s. 141 of the Criminal Procedure Code, which provides that a person convicted or acquitted of any offence constituted by any acts may, notwithstanding such conviction or acquittal, be subsequently charged with

and tried for any other offence constituted by the same acts which he may have committed, if the court by which he was first tried was not competent to try the offence with which he is subsequently charged.

The orderly room tribunal, of course, has no jurisdiction to try the offence of rape. Whether or not, therefore, the orderly room tribunal is a domestic tribunal, the offence of rape charged is triable by a court of competent jurisdiction notwithstanding the conviction of the respondents under s. 41 (44) of the Police Ordinance of an offence against discipline constituted by the same acts.

In our opinion, therefore, the learned magistrate should have rejected the plea of autrefois convict, and the answer to question (1), which is the governing question in the case, is in the negative.

The matter will be remitted to the learned magistrate with a direction to hear and determine the case.

Case remitted to the magistrate for hearing and determination.

For the appellant:
JS Rumbold (Crown Counsel, Kenya)
The Attorney-General, Kenya

For the respondents:
DPR O'Beirne
DPR O'Beirne, Nairobi

R v John Gedeon and Simon Jeremiah
[1957] 1 EA 664 (HCT)

Division:	HM High Court for Tanganyika at Dar-Es-Salaam
Date of judgment:	28 November 1957
Case Number:	318/1957
Before:	Lowe J
Sourced by:	LawAfrica

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[1] Street traffic – Motor vehicle – Unlicensed vehicle – Third party insurance – Driving, or permitting to be driven, a vehicle unlicensed and without valid insurance – Motor Vehicles Insurance Ordinance, s. 4 (*T.*) – *The Traffic Ordinance, s.* 42 (2) (*T.*).

Editor's Summary

The first accused, a chief, was charged with permitting a driver who had no driving licence to drive a vehicle on the highway, with using on the highway an unlicensed vehicle and with permitting the use of the vehicle on the highway whilst no third party insurance was in force in respect thereof. The second accused was charged with three analogous offences as the driver of the vehicle. Both accused pleaded guilty in writing, were convicted, fined and disqualified for twelve months from obtaining or holding a driving licence. Both filed memoranda of appeal out of time but the High Court decided to deal with the

cases in revision.

Held–

(i) the court should not dispense with the attendance of a person charged with an offence in respect of which either s. 4 (2) of the Motor Vehicles Insurance Ordinance or s. 42 (2) of the Traffic Ordinance applies.

(ii) since disqualification from obtaining or holding a licence is automatic in the absence of "special reasons," and accused must be given an opportunity of stating the "special reasons" in his case.

(iii) "special reasons" are reasons special to the circumstances of the case and not to the accused, and if such reasons are given the trial court must either order that no disqualification is to follow conviction or that the disqualification should be less than twelve months, depending on the facts.

(iv) if no "special reasons" are given, and the court considers more than twelve months' disqualification is appropriate to the case, the court should order accordingly.

Conviction of second accused on second and third counts quashed.

Sentences and disqualifications modified.

Cases referred to:

(1) *Pyarali Abdul Padamsi v. R.*, Tanganyika *Gazette* Law Report Supplement No. 1 of 1955.

(2) *Campbell v. Sinclair*, [1938] S.C. (J.) 127.

(3) *R. v. Mtumva s/o Ahmed* (1951), 1 T.L.R. (R.) 99.

(4) *Blow v. Chapman*, [1947] 2 All E.R. 576.

(5) *Whittall v. Kirby*, [1946] 2 All E.R. 552; [1947] K.B. 194.

Judgment

Lowe J: The danger of notifying persons, accused of driving or permitting to be driven a motor vehicle in respect of which no valid third party insurance is in force, that they may plead guilty in writing, and in accepting such pleas, is exemplified in these two cases. In the first case a responsible chief was charged with three offences: firstly with permitting a driver who had no valid driving licence to drive a vehicle on a public highway; secondly with using on a public highway a vehicle which had not been licensed for the current period; and thirdly with permitting the use of a vehicle on a public highway without there being in force a valid third party insurance in respect of such vehicle. The chief wrote on the summons which had been served on him, "Plead guilty," and signed it. I do not think such a plea should have been accepted as three unequivocal pleas of guilty to the offences charged, but that is incidental to the main principles involved (which are of such importance that I will deal with them at some length) and in any event the chief, in a memorandum of appeal, has confirmed his previous intention to plead guilty in writing to all three counts.

The case against the second accused was dealt with immediately after that of the first accused. He had three similar offences against him except that he was charged as the driver of the vehicle. He wrote to the resident magistrate and pleaded guilty to all three counts "for the purpose of saving you valuable time and that of the prosecution witnesses"; a most commendable mental attitude. However, fines were imposed and each accused was disqualified from holding or obtaining a driving licence for twelve months by an "order" of the trial magistrate.

A magistrate's discretion is fettered by s. 4 (2) of the Motor Vehicles Insurance Ordinance when an accused is found guilty of driving, or permitting to be driven, a vehicle in respect of which there is no valid third party insurance, as, in addition to the imposition of any other penalty, the accused is automatically disqualified from holding or obtaining a driving licence for a period of not less than twelve months unless there are "special reasons" for ordering no disqualification or for ordering disqualification for a shorter or longer period than twelve months.

Ignorance of the law is, of course, no excuse but no person is expected to know all the laws and it is necessary to consider the conditions prevailing in this Territory in so far as they affect the degree of knowledge of the accused in each case.

In *Pyarali Abdul Padamsi v. R.* (1), Tanganyika *Gazette* Law Report Supplement No. 1 of 1955, Abernethy, J., said:

> "The accused should have been given an opportunity of putting forward any special reasons against cancellation of his driving licence. In fact, I think, in view of the appalling ignorance of the vast majority of

> motorists in this Territory as to motoring laws, including the Highway Code, that whenever a magistrate convicts an accused of an offence such as this, under s. 4 of the Motor Vehicles Insurance Ordinance, or of an offence under s. 42 of the Traffic Ordinance, he should explain to the accused that unless the accused can put forward special reasons as to why he should not be disqualified from holding a driving licence for a period of at least twelve months, the court is bound to cancel his driving licence and disqualify him from obtaining another driving licence for that period. If an accused then puts forward special reasons and the truth of these is challenged, the accused's statement will have to be proved in the usual way."

I also think the sections referred to bind the courts to take steps towards and if necessary to make inquiry before making an order of cancellation of the licence then

held, and to determine whether or not an order should be made that the accused be not disqualified or should be disqualified for a period greater or less than the automatic disqualifying period of twelve months which would follow as a natural consequence of the conviction. The relevant portions of s. 4 of the Motor Vehicles Insurance Ordinance (Cap. 169) are as follows:–

> "(1) Subject to the provisions of this Ordinance, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the use of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Ordinance.
>
> "(2) If a person acts in contravention of this section he shall be liable to a fine not exceeding one hundred pounds or to a term of imprisonment not exceeding six months, or to both such fine and imprisonment, and a person convicted of an offence under this section shall (unless the court for special reasons thinks fit to order otherwise and without prejudice to the power of the court to order a longer period of disqualification) be disqualified for holding or obtaining a certificate of competency for a period of twelve months from the date of conviction."

Section 42 (1) of the Traffic Ordinance makes provision for imprisonment or fine or both for an accused found guilty of driving or being in charge of a vehicle while his efficiency as a driver is impaired by drink or drugs, and sub-s. (2) is as follows:–

> "(2) A person convicted of an offence under this section shall, unless the court for special reasons think fit to order otherwise and without prejudice to the power of the court to order a longer period of disqualification, be disqualified for a period of twelve months from the date of conviction for holding or obtaining a driving licence."

It will be noted that in the case of each section the words used are the same: "unless the court for special reasons thinks fit."

As I have already indicated, each sub-section makes it clear that the disqualification follows automatically upon the conviction. Although it is essential in the circumstances of this Territory that the trial magistrate should note on the case record "Accused disqualified for twelve months" or words to that effect, he does *not* make an *order* of disqualification. The conviction, I would stress again, brings about the disqualification. The magistrate might for "special reasons" think that an adequate disqualification would be less or greater than twelve months. In such case he then *must* make an order. The words of the sub-sections make this abundantly clear if they are re-cast:

> "A person convicted . . . shall be disqualified for a period of twelve months from the date of conviction unless the court for special reasons thinks fit to order otherwise."

The disqualification for the twelve months is thus clearly shown to be by operation of law. If the court thinks that for special reasons shown there should be no disqualification he *must* make an order to that effect also.

The words "thinks fit to order otherwise" are not related only to disqualification; they refer also to the period of twelve months. In other words, they do not mean "disqualification or nothing" but "thinks fit to order otherwise than disqualification for twelve months" which entitles a shorter period. The specific power exists already in the sub-sections for a disqualification of more than twelve months by order of the trial court.

I am fortified in my view by Mahaffy and Dodson's Supplement, 1939, Road Traffic Acts and Orders, 3, where the learned authors say:

"If the court disqualifies for less than three months it should (they say in Scotland) set out its special reasons."

That was a finding in the Scottish case of *Campbell v. Sinclair* (2), [1938] S.C. (J.)

127, when the court was considering an offence under s. 15 (2) of the Road Traffic Act, 1930, which is the same as s. 42 (2) of the Traffic Ordinance. The decision is not, of course, binding on this court, and as to the setting out of special reasons I do not think it is necessary for a court in this Territory to do more than say that it accepts as such, the special reasons given by the accused, and consequently make an order for a lesser period than twelve months' disqualification informing the accused of the order. However, with respect, I agree with the decision in that it expresses an important intention of the words "or otherwise" in the sub-section. In Schless, The Road Traffic Act, 1956, p. 67, the learned author, in referring to the question of disqualification, says:–

> "Like the Road Traffic Act, 1930, itself, this Act distinguishes between disqualification by virtue of a conviction and disqualification by an order made in consequence of a conviction. A person is disqualified by virtue of a conviction where the disqualification is the automatic result of the conviction; and he is disqualified by an order made in consequence of such a conviction where the court makes an order disqualifying him because he has been convicted."

An example of the latter instance is to be found in s. 17 (1) (*b*) of the Traffic Ordinance:

> "if the person convicted holds a driving licence . . . the court may suspend the validity of his licence . . . or cancel the validity . . . and declare the person convicted disqualified for holding or obtaining a driving licence . . ."

These "special reasons" are, as will be seen later, reasons special to the circumstances of the offence and not special to the accused. The intention of each section is that the court shall hear the special reasons before making any order as to disqualification, and the reasons cannot come before the court from an accused who is invited to and does plead guilty in writing. Section 4 and s. 42 each have effect as if they said, using, in part, the words of s. 329 (2) of the Criminal Procedure Code:–

> "Such disqualification shall not take place and 'no order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence' by submitting to the court any reasons he might have, special to the circumstances of the offence, which might show good cause against any such disqualification or against disqualification for such period."

In my opinion it is not possible for a court to make such an order on a written plea of guilty unless it has first explained the relevant section and its mandatory provisions regarding disqualification to an accused. Even if that was done in writing the court would not, in the vast majority of cases, be satisfied that the accused understood what he was pleading to. The only safe principle to be followed in such cases is that as laid down in s. 329 (2) to which I have referred, and that principle should be applied without exception. It will be noted that all the court should do is to give an opportunity to the accused to state special reasons. If he does not avail himself of the opportunity the court is entitled to assume that he does not wish to put forward any special reasons and in such case, on conviction, the disqualification for twelve months is automatic.

It is safe always to assume that the vast majority of accused persons do not know of the possibly serious result which might flow from s. 4 (2) of the Motor Vehicles Insurance Ordinance, nor could they realise what they would be letting themselves in for by pleading guilty to an offence under that section without being present to explain all the circumstances to the court. In all "third party insurance" offences the owner of the vehicle concerned is the one who should be prosecuted, and the practice of charging an African driver also is, as a general rule, to be deplored. I cannot imagine any exception in this Territory in the case of a first offence when the court is satisfied as to the accused's ignorance. It requires little

imagination to envisage the likely result of an African driver telling his employer that he wished to see the third party insurance policy before he would drive a vehicle. If the employer was attempting to evade the law by neglecting to take out such an insurance, the driver would promptly

find himself without employment; whereas if the employer was a man of integrity and had taken out such an insurance he would probably be ready to produce it for perusal by the African driver who would, most likely, not be able to read it, or if he could do so he would in most cases find its terms so confusing as to leave in his mind a complete lack of understanding as to what it was all about. In such circumstances it is unjust that the police should charge any driver who could not be expected to and did not know of his liability in that respect, with an offence of driving the vehicle which was uninsured against third party risks. The owner can always be presumed to know the law as to third party insurance, and he is the person who should invariably be prosecuted and who should, if found guilty, be dealt with adequately, particularly in view of the fact that a member of the public would be unable to obtain any compensation if the uninsured vehicle of an impecunious owner injured him.

In *R. v. Mtumva s/o Ahmed* (3) (1951), 1 T.L.R. (R.) 99, a case in which a driver appealed against disqualification, Mahon, J., said at p. 100:–

> "I have been referred to *Blow v. Chapman*, [1947] 2 All E.R. 576. In that case a farm labourer who was employed, *inter alia*, to drive tractors was ordered by his master to convey manure over part of a highway in a vehicle drawn by a tractor which, unknown to him, was not insured in accordance with the Road Traffic Act, 1930. It was held that there were special reasons within s. 35 (2) of the Act for refraining from disqualifying the labourer from holding or obtaining a driving licence. Singleton, J., expressed the view that Chapman was entitled to assume that his employer had complied with the law on that day as he had the day before, and added: 'it is not, I think, the duty of a workman to ask his employer each day "Is this vehicle insured?"' With respect, I agree with this opinion and consider, particularly in the conditions prevailing in the Territory, that the fact that a person employed does not know that the vehicle which he is driving is not insured according to the law is a special reason for refraining from disqualifying him."

With respect, I agree with that but would make it clear that the learned judge was, quite apparently, dealing with the appeal of an unsophisticated African driver. An educated and experienced driver from an advanced society could be expected to know the law and to take all reasonable steps to see that he did not transgress. This is clear from the judgment of Singleton, J., referred to above (*Blow v. Chapman* (4), [1947] 2 All E.R. 576).

It must not be thought that any generalisation was intended in the judgment in *Mtumva's* case (3). It is not wise or indeed possible to generalise in such cases, but generalisation is justified with regard to a class such as unsophisticated African, employed drivers. If an employed African driver said in answer to a charge of the nature under present review, "I was ordered to drive it and was told I would lose my job if I did not," that *prima facie* discloses a special reason against disqualification, and more particularly if the driver was on low wages and had dependants. "Special reasons," however, must be "special to the facts constituting the offence" (*Whittall v. Kirby* (5), [1947] K.B. 194), that is to say:–

> "a mitigating or extenuating circumstance, not amounting in law to a defence, yet directly connected with its commission, which the court ought to consider when imposing punishment. It is difficult to envisage what could amount to a 'special reason' where the charge is driving when under the influence of drink other than the administration of a drug to a driver without his knowledge."

(Archbold (33rd Edn.), 1025.)

However, Archbold also says:–

> "A circumstance peculiar to the offender as distinguished from the offence – such as financial hardship, or the fact that the driver is a professional driver or is before the court for the first time – cannot be regarded as a special reason."

Neither can financial hardship, conviction for a first offence, forgetfulness or carelessness

in taking out a policy of insurance or that disqualification is too severe a penalty (24 Halsbury's Laws (2nd Edn.) 604).

Each of the accused has appealed out of time so I am dealing with the cases in revision. Each somewhat tied the hands of the magistrate by pleading guilty in writing but each has filed a memorandum of appeal, the facts of which I accept as each is consistent with the other in the story of events. In fact I do not think the facts could be disproved. They should, of course, have come before the trial magistrate.

The chief tells of his father taking ill and that it was necessary to drive him to hospital urgently. For this reason he ordered the driver to take the uninsured vehicle as the chief's driving licence had expired. So had that of the driver, but the chief did not know that. In the emergency the driver took the chief's father to hospital. The driver had no idea the vehicle was uninsured against third party risks, and obeyed the order of his chief.

In so far as the chief is concerned those facts disclose special reasons for not disqualifying him for the full twelve months, but regarding the driver they show special reasons against any disqualification whatever.

In Criminal Case 1385 of 1957 I can see no reason to interfere with the conviction or fine on the first count. On the second count, for driving an unlicensed vehicle, I cannot say the fine is so excessive that I should vary it in any way and I make no order in respect of that count. With regard to the third count which relates to the lack of third party insurance, the circumstances of the offences are such that I reduced the fine to Shs. 40/- and, for reasons which have been stated, I reduced also the period of disqualification to two months from the date of conviction.

As to the driver, who was convicted and sentenced in Criminal Case 1386 of 1957, I take no action as to the first count of driving the vehicle, he not having a valid driving licence.

The second count contains the charge regarding the lack of third party insurance, and in this case I quash the conviction because of the extenuating circumstances, and discharge the accused under the power in that behalf contained in s. 38 of the Penal Code. The fine and the "order" of disqualification are set aside and if the fine has been paid it is to be refunded to the accused. I substitute an order that this accused be not disqualified.

On the third count as to the vehicle being unlicensed, the owner having already been convicted and fined it is unjust that the driver should also suffer, and I quash the conviction on this count and set aside the fine which, if paid, is also to be refunded to the accused. In addition I discharge the accused under s. 38 of the Penal Code.

Conviction of second accused on second and third counts quashed. Sentences and disqualifications modified.

R v Nazerali Merali
[1957] 1 EA 670 (HCT)

Division: HM High Court for Tanganyika at Dar-Es-Salaam

Date of judgment: 3 September 1957

Case Number: 66/1957

Before: Crawshaw J

Sourced by: LawAfrica

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[1] Criminal law – Perjury – Irregularity in recording evidence in a civil case – Whether the evidence recorded is evidence in a subsequent trial for perjury – Indian Civil Procedure Code, O. 18, *r.* 5.

Editor's Summary

The accused was *inter alia* charged with perjury in that he gave false evidence in a civil case in which he was the plaintiff. On a submission of no case to answer in respect of the charge of perjury it was submitted on behalf of the accused that the evidence recorded in the civil case was inadmissible in support of the same because the magistrate hearing that case had failed to sign the recorded evidence and to read the evidence back to the accused as required by O. 18, r. 5 of the Indian Civil Procedure Code.

Held–

(i) the record of the evidence in the civil case was inadmissible in support of the charge of perjury, but nevertheless there was a *prima facie* case of perjury for the accused to answer.

(ii) if through irregularity in the record or otherwise the record cannot be proved, this would not affect the admissibility of evidence itself proving what the witness said as opposed to proving accuracy of the record.

Submission overruled.

Cases referred to:

(1) *Nurmohammed Remtulla Bapoo v. R.* (1931), 1 T.L.R. (R.) 663.

(2) *Ramadhani bin Mabati v. R.* (1953), 20 E.A.C.A. 212.

Judgment

Crawshaw J: Mr. Sayani submitted at the close of the prosecution case that there was no case to answer on count 4 charging perjury. I held there was, giving reasons which I now record. His argument was that as the trial judge in Civil Case No. 47 of 1956 had failed to sign the recorded evidence of the accused, who was the plaintiff therein, and further had failed to read the evidence back to the accused, the evidence could not be admitted in support of that charge. Mr. Sayani relied on O. 18, r. 5, of the Indian Civil Procedure Code which provides that in appealable cases the evidence of each witness shall be read over to him and signed by the judge. A note to that rule in Mulla on the Code of Civil Procedure (12th Edn.), Vol. II, p. 718, reads:–

> "*Shall be read over*. – There is a difference of opinion whether, if the deposition is not read over to the witness as required by this rule or interpreted to him as required by r. 6 below, it is admissible in evidence in trials for perjury and forgery, it being held in some cases that the deposition is not admissible in evidence while in others that it is. The former view proceeds on the ground that the deposition not being read over or interpreted to the witness, it does not prove itself under s. 80 of the Evidence Act, 1872, and that it cannot be

proved in any other way having regard to the provisions of s. 91 of that Act. The latter view proceeds on the ground that though the deposition does not in such a case prove itself under s. 80 of the Evidence Act, it may be proved in any other way, e.g., by the judge who took it down, and that s. 91 of the Act is no bar to such proof."

A further note reads:–

"*Signature of judge*. – A prosecution for perjury cannot be sustained if the

deposition is not signed by the judge. The signing of the deposition by the judge is made essential to the application of s. 80 of the Evidence Act, 1872, by the section itself."

2. In a judgment of the East African Court of Appeal in 1931, in *Nurmohammed Remtulla Bapoo v. R.* (1) (1931), 1 T.L.R. 663), it was held that failure to read over a witness's evidence in circumstances required by r. 5 rendered it inadmissible in a subsequent trial for perjury. In 1953, in *Ramadhani bin Mabati v. R.* (2) (1953), 20 E.A.C.A. 212, the court, however, said:–

"It is not essential, as the appellant suggests in his written arguments, that a witness's evidence should have been read over to him and he be given an opportunity to amend it before he can be convicted of perjury. Such a rule would preclude any conviction for perjury in every case where the falsity of the evidence only becomes known subsequently."

In that case the ground of appeal was that the witness's attention had not been called to the alleged false evidence and the court gave reasons why in the circumstances (e.g. questions on examination) the witness's attention had been sufficiently called to the matter in question. In other words the court was not then apparently considering, nor had been asked to consider the *Bapoo* case (1) or the effect of O. 18, r. 5, a rule which, of course, may not even apply to Zanzibar where the case originated.

3. As I view the authorities, even if one was to side with the opinion that a deposition which did not prove itself because of non-compliance with r. 5 cannot otherwise be proved (and I express no opinion as to this), this does not affect the admissibility of evidence itself proving what the witness said as opposed to proving accuracy of the record. The record if in order proves itself under s. 80 of the Indian Evidence Act, as it creates a statutory presumption that a record of evidence was duly taken. This evidence, though no doubt the more usual, convincing and convenient evidence, is not, however, the only evidence which can be adduced of a person's testimony. Lilani, who was the defendant in the civil case in question, has testified that the accused, when giving evidence in that suit, said that Lilani owed him money. In its context it is quite clear that the money Lilani was referring to was the money claimed in that suit by the accused on the invoices which both Lilani and N. H. Kassum testify were false. There is therefore evidence of a material part of the accused's testimony in the civil suit, and also the evidence of Lilani, corroborated by that of N. H. Kassum, that testimony was false and that accused knew it to be.

4. For the above reasons I have held that the deposition is inadmissible in support of count 4, but that in spite thereof there is a *prima facie* case of perjury for the accused to answer.

Submission overruled.

For the Crown:
WN Denison (Crown Counsel, Tanganyika)
The Attorney-General, Tanganyika

For the accused:
NRD Sayani and *BH Rahim*
Sayani & Co and *BH Rahim*, Dar-es-Salaam

Fatima Sheikh Khairuddin v Sheikh Ali Ahmed

[1957] 1 EA 672 (SCA)

Division:	HM Supreme Court of Aden at Aden
Date of judgment:	11 June 1957
Case Number:	255/1957
Before:	Knox-Mawer Ag CJ
Sourced by:	LawAfrica

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[1] Practice – Pleader's vakalatnamah – Right of person holding a general power of attorney to sign vakalatnamah – Meaning of "not resident within the Colony" in r. 23 (*b*) *– Rules of Court, r.* 23 (*b*) (*A.*).

Editor's Summary

The plaintiff's advocate objected to the vakalatnamah filed by the advocate for the defendant on the ground that it was signed not by the defendant himself, but by a person holding a general power of attorney from the defendant. It was common ground that the defendant was an Aden merchant who was staying temporarily in India for medical treatment.

Held – the defendant was, for the purpose of r. 23 (*b*) of the Rules of Court, Aden, "not resident" within the Colony, and accordingly his agent was empowered to sign an advocate's vakalatnamah upon his behalf.

Objection disallowed.

Cases referred to:

(1) *Ramchandra Sakharam v. Keshav Durgaji* (1882), 6 Bom. 100.

(2) *Damodar Das v. Inayat Husain* (1906), 28 All. 135.

Judgment

Knox-Mawer Ag CJ: A plaint having been filed in the usual way by Mr. Shah on behalf of the plaintiff in this suit, a summons was issued requiring the person named therein as defendant to appear before the court on May 6, 1957. On that date Mr. Gandhi informed the court that he had been instructed to represent the defendant and produced his vakalatnamah. Mr. Shah has objected that this vakalatnamah is invalid.

It is not disputed that the vakalatnamah is not signed by the defendant himself but by a person holding a general power of attorney from the defendant. Nor is it disputed that the defendant is an Aden merchant who is at the moment staying in India for medical treatment. Mr. Shah contends that the defendant's agent cannot sign the vakalatnamah, within r. 23 (*b*) of the Rules of Court, because the defendant is, in fact, an Aden resident.

The effect of r. 23 (*b*) is to provide that a recognised agent may perform on behalf of his principal an act such as signing a vakalatnamah, if he holds a general power of attorney from a principal "not resident

within the Colony." The Aden rule corresponds to the old s. 37 (O. 3, r. 2) of the Indian Code of Civil Procedure: the words "from parties not resident within," etc., have been omitted from the present s. 37 of the Indian Code. The words "non-resident" of the old s. 37 were construed very liberally by the courts in India. Thus, in the case of *Ramchandra Sakharam v. Keshav Durgaji* (1) (1882), 6 Bom. 100, the High Court held that

> "The term 'non-resident' in s. 37, cl. (*a*), of the Code of Civil Procedure (Act X of 1877) covers every absence which may reasonably be supposed to have been within the contemplation of the legislature in using that term: thus, where a Marwadi has resided for forty years at Pen, and had also a place of business there, but who had gone to his native country to get his sisters married, and had been absent upwards of four months, it was held that he was 'non-resident within the local limits of the jurisdiction of the Pen Court, and that a person holding general power of attorney from him was a recognised agent within the meaning of the section' "

Again, in *Damodar Das v. Inayat Husain* (2) (1906), 28 all. 135, Mr. Justice Knox of the Allahabad High Court held that the term 'resident' as used in s. 37 (*a*) of the Code of Civil Procedure must be construed liberally.

> "A party 'not resident within the local limits of the jurisdiction of the court' may include a person who, though originally residing within, is temporarily absent from the limits of the court's jurisdiction."

I can see no reason why the Aden Court should adopt a less liberal construction of these words. Accordingly, I hold that the defendant is, for the purpose of r. 23 (*b*) "not resident" within the Colony, and therefore that his agent is empowered to sign Mr. Gandhi's vakalatnamah upon his behalf. The objection is overruled and Mr. Gandhi may now proceed to file a written statement.

Objection disallowed.

For the plaintiff:
RK Shah
RK Shah, Aden

For the defendant:
KA Hussain Gandhi
KA Hussain Gandhi, Aden

Fatoom Bint Abdul Razak Mamda v Nabiha Bint Ahmed Mohamed Ibrahim
[1957] 1 EA 673 (SCA)

Division:	HM Supreme Court of Aden at Aden
Date of judgment:	2 November 1957
Case Number:	136/1957
Before:	Campbell CJ
Sourced by:	LawAfrica

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[1] Infant – Gurdian – Custody – Welfare of child – Guardianship and Words Ordinance (*Cap.* 72) *s.* 13 (*A.*).

Editor's Summary

The paternal grandmother of a four-year-old boy applied for his guardianship and custody. The mother of the boy had been divorced by the father and the boy had lived with his mother ever since. Under the Sharieh law the applicant was entitled to guardianship. The provisions of s. 13 of the Guardianship and Wards Ordinance provide that the court shall be guided primarily by what appears to be the welfare of the child but shall also endeavour to give effect to the law to which the child is subject.

Held – the welfare of the child cannot be and is not intended to be exclusively confined to the matter of material welfare as opposed to psychological welfare and accordingly it would be for the welfare of the child at present to remain with his mother.

Application dismissed.

No cases referred to in judgment

Judgment

Campbell CJ: This is an application by a paternal grandmother for the guardianship and custody of her four-year-old grandson. The evidence is that the father of the minor married the mother about five years ago. He divorced her when she was pregnant; and for no particular reason as far as I know. At any rate no evidence of bad conduct on her part has been given in this suit. The child has lived with its mother ever since.

The mother has now, however, re-married and her new husband is a man who is not within the prohibited degrees of consanguinity of the minor. Both parties are

Hanafis. It is well settled as Sharieh law among the Hanafis that when the mother has re-married outside her or her husband's family and she herself has no mother then the guardianship of the child goes to the father's mother. The purely material welfare of the child would in my view be the same whether or not this application succeeds.

Under the Guardians and Wards Ordinance this court is enjoined, by s. 13 thereof, to be guided primarily by what appears in the circumstances to be the welfare of the minor but also to endeavour to give effect to the law to which the minor is subject. As I have said by the law of which the minor is subject the guardianship belongs to the applicant. It would be a distasteful thing to give to her the child for whose mother the father's side of the family do not appear to have shown much consideration. But I realise that I must put this aspect of the matter out of my mind. The Guardians and Wards Ordinance directs the court to be guided by the "welfare" of the minor. This means that the happiness of the mother is not a consideration and undue weight must not be given to the temporary unhappiness which must result from a child being taken away from its mother with whom it has lived all its life and given to its paternal grandmother.

But after consideration I have come to the conclusion that welfare cannot be and is not intended to be exclusively confined to the matter of material welfare as opposed to psychological welfare. The relationship of a mother and her very young child is a totally different relationship to that of a grandmother and grandchild. There can be no question that far greater sacrifices on its behalf would be made by the mother. One cannot discount the probability also that the mother will have other children and the present child will have step-brothers and sisters with whom he may play.

Giving the fullest effect therefore to the words of what I believe to be the intention of the Ordinance I have come to the conclusion that it would be for the welfare of the minor at present to remain with its mother. Different considerations will, of course, arise after the child is older. The present application is dismissed but I make no order as to costs.

Application dismissed.

For the applicant:
HM Handa
HM Handa, Aden

The respondent in person.

Ali Omer Ockba v Aziza Bint Ali Omer Ockba
[1957] 1 EA 675 (SCA)

Division:	HM Supreme Court of Aden
Date of judgment:	15 October 1957
Case Number:	307/1956
Before:	Campbell CJ
Sourced by:	LawAfrica

[1] Mohamedan law – Marriage of adult virgin – Shafei sect – Father's right to restrain marriage – Whether father also entitled to custody and guardianship of adult unmarried daughter.

[2] Jurisdiction – Claim for injunction – Sharieh law – Whether Supreme Court can grant injunction to prevent marriage – Supreme Court Ordinance, s. 8 (*A.*) *– Interpretation and General Clauses Ordinance, s.* 41 (*A.*).

Editor's Summary

The plaintiff, father of the defendant who was twenty-three years of age and a virgin, sought a declaration that he is entitled to her guardianship and custody until she is married. He also claimed an injunction restraining her from marrying without his consent. The parties were Shafei Moslems.

Held–

(i) the plaintiff was entitled to an injunction restraining her from marrying without his consent.

(ii) the plaintiff was entitled to guardianship of the defendant's property, but her custody devolved upon her mother, or failing her, as in this case, upon her maternal grandmother. Failing the latter or other close relations on the maternal side it would devolve upon the plaintiff.

Order for injunction restraining defendant from marrying without plaintiff's consent granted. Order for custody of defendant refused.

Cases referred to:

(1) *Hassan Kutti Beary v. Jainabai* (1928), A.I.R. Mad. 1285.

(2) *Mohamed Ibrahim v. Ghulam Ahmed* (1864), I Bom. H.C. Rep. 236.

(3) *Mohamdee v. Bairam* (1866), I Agra 130.

Judgment

Campbell CJ: This is a suit by a father against his adult daughter, claiming a declaration that he is entitled to her custody until she is married and an order from the court that she shall return to his house. He also claims an injunction restraining her from marrying a Mr. Hagop Masropian or any other person without his consent. Mr. Masropian has not appeared in the suit and is said to be in Ethiopia. Being an Armenian, the presumption is that he is a Christian. Although evidence has been given that he has tried to become a Muslim it does not satisfy me that he has succeeded. Certain formalities are needed and a mere expression of intention is not by itself sufficient. It is not in dispute that the plaintiff and defendant are Shafei Moslems and that the defendant is twenty-three years of age and a virgin, not a thayyaba. She is a Government school teacher. The evidence satisfies me that the defendant wishes to marry Mr. Masropian and will probably do so unless restrained. It is admitted that she is at present living with friends.

The only case which has been cited to me is by Mr. Mansoor on behalf of the plaintiff and is *Hassan Kutti Beary v. Jainabai* (1) (1928), A.I.R. Mad. 1285. This was a case where an adult virgin of the Shafei sect had been married by her father to a man without her consent and she sought to have the marriage annulled. Odgers, J., says at p. 1285 of the report:

> "There are practically no cases on the points and therefore the opinions of the text-writers must be shortly examined."

After examination of the Minbaj et Talibin, the Hedaya, and the works of Wilson, Tyabji, Abdul Rahim and Amir Ali, he and Madharan Nair, J., came to the

conclusion that the marriage was invalid by reason of the lack of her consent. This, however, is not the point here. We have not to decide whether a father can marry his daughter against her wish but whether she can herself marry against his wish. The full report of the only case quoted in the judgment by the Madras Court which might have assisted us is unfortunately not available here. It is *Mohamed Ibrahim v. Ghulam Ahmed* (2) (1864), 1 Bom. H.C. Rep. 236, and it is quoted as holding that

> "according to the doctrine of Shafei, a virgin whether before or after puberty cannot give herself in marriage without the consent of her father."

Sir Abdul Rahim in his book Mohamedan Jurisprudence at p. 330 says as follows:–

> "According to the Hanafis, every person who is not a minor, whether male or female, maiden or thayyaba (that is, a girl who has had sexual intercourse), is competent to contract marriage and cannot be given in marriage without his or her consent whether by the father or any other relative. The Shafis and the Malikis agree with the Hanafis so far as boys and thayyabas who have attained majority are concerned: the former, however, hold that a minor thayyaba is competent to contract marriage and a maiden, even if she has attained majority, cannot marry without the consent of the guardian, while the Hanafis in each of these two cases hold the contrary view. Thus with the Hanafis, so far as the females are concerned, minority is the test whether the intervention of a guardian is necessary or not and with the Shafis the test is whether the intervention of a guardian is necessary or not and with the Shafis the test is whether the girl is a maiden or thayyaba. The difference between the two schools on this point though not perhaps of much practical significance, involves a question of principle. The Hanafis allege that the Shafis' refusal to acknowledge the right of a maiden of full age to contract marriage of her own will amounts to a breach of a cardinal principle of Muhammadan law, namely, that the legal status of grown-up females is as complete as that of a male."

Tyabji in his Muhammadan Law; the Personal Law of Muslims (3rd Edn.) at p. 97 states:

> "17 B 2 (*b*) under the Shafi and Maliki law, a thayyaba is competent so to contract (a marriage), but not a woman who is a virgin."

Sir Roland Wilson in his Muhammadan Law (5th Edn.) at p. 98 says:

> "A sane adult of either sex is legally free to contract a marriage *without the intervention* of any guardian, and to repudiate any marriage contracted for him without his or her consent; but *perhaps* a marriage otherwise lawfully contracted by an adult woman can be or must be set aside by a civil court at the instance of the so-called guardian (that is of the relatives who would be guardians if the woman had been a minor) if they can prove such social inferiority on the part of the bridegroom as would injuriously affect the family credit or interest."

He cites *Mohamdee v. Bairam* (3) (1866), 1 Agra 130, where it was held that the bride's father could set aside the marriage on the ground of inequality, if it had taken place without his consent, the consent of the bride's mother and brother notwithstanding. He quotes no authority, however, for his first proposition, viz. that an adult of either sex is legally free to contract a marriage without the intervention of any guardian, and I do not feel that his opinion on this point carries much weight.

The matter is fully considered by Amir Ali in his book Muhammadan Law. Of all the text-books on the subject this is the one which I have found generally earns the most respect. He first points out that there is considerable divergence among the several schools on the point. He says at p. 273 (3rd Edn.):

> "The right of *jabr* in its harsher form, terminates *practically* with puberty."

At p. 274 he says:

> "Among the Hanafis and Shiahs the children of both sexes on attaining majority are free to contract marriages without the consent of their guardian."

but at p. 275–

> "The followers of Maliki and Shafi, on the other hand, are of opinion that the exceptional right of *jabr*, in the case of females, continues in force until they are married, and consequently, emancipated from paternal control."

Amir Ali quotes extensively from the judgment of Causse, C.J., and Lamb, J., in *Mohamed Ibrahim v. Ghulam Ahmed* (2) (1864), 1 Bom. H.C. Rep. 236. In this case a girl, whose family were of the Shafis sect had, on arriving at puberty, made a declaration before the Kazi of Bombay that she had renounced the Shafis doctrines and had adopted the tenets of the Hanafis. She then married the plaintiff in accordance with the Hanafi rites, but without the consent of her father. The plaintiff then brought a suit against the father for the unlawful detention of his wife. The judgment appears to have dealt with certain points, such as the power of a person to change his or her sect, which are not relevant to this case. But the judgment expressly stated:

> "a Musselman female, after arriving at the age of puberty without having been married by her father or guardian can select a husband without reference to the wishes of the father or guardian, though, according to the doctrines of the Shafis, a virgin, whether before or after puberty, cannot give herself in marriage without the consent of her father."

Next there is the Minhaj et Talibin. In Book 33, chapter 1, s. 4, it is laid down as follows:

> "A father can dispose as he pleases of the hand of his daughter, without asking her consent, whatever her age may be, provided she is still a virgin. It is, however, always commendable to consult her as to her future husband; and her formal consent to the marriage is necessary if she has already lost her virginity."

Lastly I come to a work A Treatise on the Muhammadan Law which pertains to Aden and written by Sheikh Abdul Kadir bin Mohamed Al Mekkawwi. The book is written in the form of question and answer and at p. 242 (2nd Edn.) the question is asked:

> "Q. Is it lawful for a father, or, in his absence, a grandfather, to compel a woman, who has attained to puberty to marry?
>
> "A. By reason of the termination of guardianship on attaining to puberty, a woman who has become of age cannot be compelled to marry; but as Shafee says compulsory guardianship belongs to the father and grandfather in the case of a virgin daughter who has arrived at puberty, as being unacquainted with the affairs of marriage; and therefore she resembles a minor."

I find therefore there is abundant authority for saying that the proposed marriage of the defendant would be invalid for lack of the consent of her father. It may be added that it would also be invalid according to Sharieh law for another reason – the religion of the proposed bridegroom. Although it is permitted among almost all Moslem sects for a Moslem to marry a woman who believes in a heavenly or revealed religion and which possesses a religious book (when she is known as a Kitabia) all are agreed that no Moslem woman can validly marry a non-Moslem. This matter is beyond all doubt and does not need further discussion.

It remains to decide whether an injunction should issue restraining the defendant from marrying Mr. Masropian or any other person without the plaintiff's consent.

It is urged on behalf of the defendant that this court has no jurisdiction to grant such injunction. I do not know why not. Section 8 of the Supreme Court Ordinance, (Cap. 144), provides that

> "subject to the provision of any other enactment for the time in force in the Colony, the Supreme Court shall have original civil jurisdiction to hear and determine all cases of whatever nature."

Section 16 of the Schedule to the Civil Courts Ordinance, (Cap. 25), removes a case

such as this from the cognizance of the Court of Small Causes since it is a suit for an injunction. Section 16 of the Qadhi Ordinance, (Cap. 133), states:

> "16. Nothing herein contained and no appointment made hereunder shall be deemed–
>
> (*a*) to confer any judicial powers on the Qadhi; . . ."

The power to apply Sharieh law is conferred on the Supreme Court by s. 41 of the Interpretation and General Clauses Ordinance, (Cap. 83). The relevant part of the section reads as follows:

> "Provided that the said common law, doctrines of equity and Statutes of general application shall be in force in the Colony so far only as the circumstances of the Colony and its inhabitants permit and subject to such qualifications as local circumstances may render necessary, and in particular nothing in this section shall prevent the continued application of rules or customs of any community in matters of marriage, dower, divorce, woman's property, guardianship, maintenance, legitimacy, succession, inheritance, coparceners and coparcenary property, wills, gifts, religious and charitable endowments, wakfs, debts, preemption, partition and any other matters in any case in which prior to the commencement of this ordinance such rules or customs would have been applied, unless such rules or customs have been expressly superseded by legislation coming into operation subsequent to the commencement of this Ordinance."

Lastly, it is common knowledge that the Supreme Court in Aden is every day dealing with suits concerning Moslem marriages, divorces, guardianship and the like and applies the principles of Sharieh law and issues injunctions. I hold that I have jurisdiction.

The power to grant or refuse an injunction is a discretionary one. I think that the discretion to grant an injunction should be exercised in this matter. It seems probable that if an injunction is refused the defendant will marry the Armenian. It is not necessary to discuss the ensuing results if such a marriage took place: whether it would be invalid or void ab initio and whether or not the children would be legitimate. It is sufficient to say that such a marriage would be contrary to Sharieh law and that this court is concerned to see that Sharieh law is observed in the Colony by those to whom it undoubtedly applies. Moreover the plaintiff has a right, not to make his adult daughter marry whom she does not wish, but to prevent her marrying whom he does not wish. There seems no good reason here to deprive him of this right. An injunction will therefore issue restraining the defendant from contracting marriage without the consent of the plaintiff.

The plaintiff asks also for an injunction restraining the defendant from living elsewhere than in his house. He claims her hizanat, or custody of her person, as opposed to the custody of her property.

Sheikh Abdul Kadir bin Muhammad Al Mekkawwi of Aden, when answering the question: "What is meant by Hidhanah and who is entitled to it?" states:

> "As for the girl, if she is a virgin, her father can keep her in his charge after her becoming of age, because she is an object of anxiety; but if she were a woman (thayyaba), he has no right to keep her in his charge unless she were not trustworthy, and there is no reason to apprehend bad temptations."

Amir Ali at p. 289 remarks:

> "Among the Hanafis, the mother is entitled to the custody of her daughter until she arrives at puberty; (1) among the Malikis, Shafeis and Hanbalis the custody continues until she is married. (2) According to the judgments of the Court of Algiers it appears that, in several notable instances, the Hanafi Kazis have followed the Maliki doctrines, and decided that the mother is entitled to the custody of her daughters until their marriage.
>
> "An analysis of the dicta contained in the authorities recognised among the eastern Hanafis leads to the

conclusion that the difference between the doctrines

> of the Malikis and the Hanafis respecting the term during which the mother's custody lasts is not so great nor so marked as would at first appear. The Fatawai Alamgiri which gives the opinions of several jurists, points to the conclusion that the right of hizanat terminates when the girl is marriageable. The Malikis hold that it should continue until she is actually married. As, in eastern countries, girls are generally contracted in marriage as soon as they are marriageable, and occasionally before they have arrived at maturity, it is apparent that there is practically no difference between the two schools. It may be remarked, however, that the Maliki doctrines are more conformable to right reasoning and furnish a definite standard for the guidance of those who have to administer the law. Probably the Anglo-Indian courts, in deciding questions bearing on this point, would follow the precedents of the Algerian courts, which have adopted the Maliki rules as the guiding principle in all such cases."

I think that the opinion of Amir Ali is to be preferred, for he gives authorities, and I adopt it. It follows that the hizanat of the defendant would be that of her mother if she were alive. Among the Shafeis, if there is no mother, the right of hizanat in respect of females devolves upon the maternal grandmother. It is only failing the existence or willingness of certain classes of maternal relatives that the hizanat passes to the father's side of the family. The plaintiff's application for an injunction restraining the defendant from living elsewhere than with him is therefore rejected. He could, if he wished, have the guardianship of her property.

I will only add that the residence of the defendant with her friends appears to cause pain to the plaintiff as he says she is not keeping purdah. The evidence tendered was not sufficient to satisfy me that this is so. But as it is clear that her father has what he believes to be her interests very much at heart, I hope she will consider the advisability of moving elsewhere.

Order for injunction restraining defendant from marrying without plaintiff's consent granted.

Order for custody of defendant refused.

For the plaintiff:
MH Mansoor and *AE Kazi*
MH Mansoor and *AE Kazi*, Aden

For the defendant:
HM Handa
HM Handa, Aden

The Commissioner of Customs and Excise v Sidik Elias
[1957] 1 EA 680 (CAM)

Division:	Court of Appeal at Mombasa
Date of judgment:	23 May 1957
Case Number:	16/1957
Before:	Sir Newnham Worley P, Sir Ronald Sinclair V-P and Briggs JA
Sourced by:	LawAfrica

[1] Customs – Smuggling – Seizure of motor launch used in landing of uncustomed goods – Whether under s. 160 (1) *of the East African Customs management Act,* 1952, *condemnation is automatic of things involved in commission of offence.*

Editor's Summary

The respondent owned a motor launch "Simba" from which on October 19, 1955, one Abed bin Omar landed at Mbaraki Coal Jetty, Mombasa, carrying a suitcase of uncustomed goods. He was prosecuted in the resident magistrate's court for having uncustomed goods in his possession contrary to s. 147 (*d*) (iii) of the East African Customs Management Act, 1952, to which he pleaded guilty and was convicted. The magistrate ordered that the "Simba" having been used in the commission of the offence was "confiscated to Her Majesty and condemned." It was common ground that the order was made in excess of jurisdiction and inoperative. The "Simba" was however seized by the customs authorities pursuant to the above order. The respondent then sued the appellant in detinue for the return of the "Simba." The appellant in his defence pleaded that the "Simba" had been condemned in forfeiture by operation of law, or alternatively, that it was liable to forfeiture under the provisions of the East African Customs Management Act, 1952. The trial judge held that the "Simba" had not been condemned by operation of law under s. 160 (1) of the Act. As to the alternative defence, he held that a mere allegation that the "Simba" was liable to forfeiture was an insufficient defence, but that, in any event, there had been no forfeiture was an insufficient defence, but that, in any event, there had been no forfeiture under any of the provisions of the Act. On appeal it was argued on behalf of the appellant that on the evidence the trial judge should have held that the "Simba" was liable to forfeiture by reason of the commission of the offence of which Abed Bin Omar was convicted and accordingly that under s. 160 (1) of the Act the conviction of Abid bin Omar had effect as the condemnation of the "Simba". It was submitted on behalf of the respondent that (*a*) before s. 160 (1) could be brought into operation, the thing which it is alleged is liable to forfeiture by reason of the commission of the offence must necessarily be involved in the commission of the offence and that the record of the proceedings which result in the conviction must show that it is so involved (*b*) there was nothing in the record of the proceedings before the resident magistrate to show that the "Simba" was either directly or indirectly involved in the commission of the offence and that other evidence was not admissible to establish that it was so involved.

Held–

(i) under s. 160 (1) of the Act the conviction of any person of an offence has effect as condemnation of anything which is liable to forfeiture by reason of the commission of such offence but before there can be an automatic condemnation on conviction, the record of the proceedings which result in conviction must show facts which clearly establish that the thing has been condemned;

(ii) there can never be an automatic condemnation under s. 160 (1) as a result of conviction consequent on a plea of guilty, unless facts have been alleged in the charge from which it can necessarily be inferred that there has been condemnation;

(iii) evidence to supplement the facts found proved at the trial of the offence would not be admissible in subsequent proceedings to prove automatic condemnation under s. 160 (1);

(iv) there was nothing in the record of the proceedings before the resident magistrate to show that the "Simba" was the vessel involved in the commission of the offence of which Abed bin Omar was convicted and since evidence to supplement the facts

alleged in the charge was not admissible there was no automatic condemnation under s. 160 (1).

Appeal dismissed.

Cases referred to:

(1) *Ebrahim Ahmed Mohamed Modhaf v. R.* (1956), 23 E.A.C.A. 546.

(2) *Nakkuda Ali v. M.F. De S. Jayaratne*, [1951] A.C. 66.

May 23. The following judgments were read by direction of the court:

Judgment

Sir Ronald Sinclair V-P: This is an appeal from a judgment of the Supreme Court of Kenya. The respondent sued the Commissioner of Customs and Excise, the present appellant, in detinue for the return of the motor launch "Simba" which had been seized by the customs authorities on or about October 19 or 20, 1955. The appellant in his defence pleaded that the "Simba" had been condemned in forfeiture by operation of law, or, alternatively, that it was liable to forfeiture under the provisions of the East African Customs Management Act, 1952 (hereinafter referred to as "the Act"). The learned trial judge held that the "Simba" had not been condemned by operation of law under s. 160 (1) of the Act. As to the alternative defence, he held that a mere allegation that the "Simba" was liable to forfeiture was an insufficient defence, but that, in any event, there had been no forfeiture under any of the other provisions of the Act. He accordingly ordered that the launch should be released to the respondent under the provisions of s. 161 (2) of the Act. From that judgment the appellant has appealed.

It appears from the evidence that on October 19, 1955, the launch "Simba", which was owned by the respondent, left the vessel "Robin Doncaster" which was lying in Kilindini Harbour and went to the Mbaraki Coal Jetty, Mombasa. There one Abed bin Omar landed from the "Simba" carrying a suitcase containing a quantity of uncustomed goods. He was pursued and arrested after he had thrown the suitcase into the sea. On that day, or on the following day, the "Simba" was seized by the customs authorities. It is now conceded by the appellant that it was not seized in the presence of the respondent. On October 20, 1955, Abed bin Omar was prosecuted before the resident magistrate at Mombasa on a charge of having uncustomed goods in his possession contrary to s. 147 (*d*) (iii) of the Act. The particulars of the charge were as follows:

> "On October 19, 1955, at approximately 3.30 p.m. that he did land and have in his possession certain uncustomed goods to wit six thousand No. 1 cigarettes, one pair dungaree trousers, and six cartons of chewing gum, the said goods being landed packed in a suitcase at a jetty at Mbaraki, Mombasa."

Abed bin Omar pleaded guilty to the charge, was convicted on his plea and was fined Shs. 3,000/- or 3 months imprisonment with hard labour. After pronouncing sentence the learned magistrate ordered the "Simba", which he recorded had been used in the commission of the offence, "to be confiscated to Her Majesty and condemned." It is common ground that that order was made in excess of jurisdiction and inoperative.

It is necessary at this point to refer to the provisions of the Act which are relevant to this appeal. Section 147 provides that any goods in respect of which an offence under that section has been committed shall be liable to forfeiture. Section 156 (1) deals with conveyances, including vessels of less

than 250 tons register, used in the movement, including landing, of goods liable to forfeiture. Any such conveyance so used is itself made liable to forfeiture. Section 158 empowers any officer of Customs or Police or Her Majesty's Forces to seize anything, including a vessel, which is, or is reasonably believed to be, liable to forfeiture. Section 159 (1) provides that where

any thing has been seized then, unless such thing was seized in the presence of the owner thereof or, in the case of any aircraft or vessel, of the master thereof, the officer effecting the seizure shall, within one month of such seizure, give notice in writing of such seizure and of the reasons therefore to the owner thereof or, in the case of any aircraft or vessel, to the master thereof. But under proviso (*a*) no such notice is required where any person has within such period of one month, been prosecuted for the offence by reason of which such thing has been seized, or the offence has been compounded. If in either of such cases notice has in fact been given before condemnation, then on prosecution such thing shall be dealt with in accordance with s. 160 or, on compounding, shall be dealt with in accordance with the provisions of the Act relating to compounding as if no such notice had been given. Under proviso (*d*) no notice is necessary where the owner is not known. Sub-section (3) and sub-s. (4) of s. 159 and s. 160 are important and I quote them in full:

> "159 (3) Where any thing liable to forfeiture under this Act has been seized, then–
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> (*a*) if any person is being prosecuted for the offence by reason of which such thing was seized, such thing shall be detained until the determination of such prosecution and dealt with in accordance with the provisions of s. 160;
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> (*b*) in any other case, such thing shall be detained until one month after the date of seizure, or the date of any notice given under the provisions of sub-s. (1), as the case may be; and if no claim is made therefore as provided in sub-s. (4) within such period of one month, such thing shall thereupon be deemed to be condemned.
>
> "(4) Where any thing liable to forfeiture under this Act has been seized, then, subject to the provisions of proviso (*a*) to sub-s. (1) and of para. (*a*) of sub-s. (3), the owner thereof may, within one month of the date of the seizure or the date of any notice given under sub-s. (1), as the case may be, by notice in writing to the Commissioner claim such thing.
>
> "160 (1) Where any person is prosecuted for any offence against this Act and any thing is liable to forfeiture by reason of the commission of such offence, then the conviction of such person of such offence shall, without further order, have effect as the condemnation of such thing.
>
> "(2) Where any person is prosecuted for any offence against this Act and any thing is liable to forfeiture by reason of the commission of such offence, then, on the acquittal of such person, the court may order such thing either–
>
> (*a*) to be released to the person from whom it was seized or to the owner thereof or
>
> (*b*) to be condemned."

The procedure to be followed when notice to the Commissioner has been given under sub-s. (4) of s. 159 is set out in s. 161 which provides *inter alia* that the Commissioner may within a period of two months from the receipt of such notice of claim either by notice in writing to the claimant require him to institute proceedings for the recovery of the thing within two months of the date of such notice or himself institute proceedings for the condemnation of such thing. Where the Commissioner fails to take either of those courses, the thing must be released to the claimant.

In the instant case the "Simba" was not seized in the presence of the owner who was known to be the respondent, and no notice in writing of such seizure was given to him. Furthermore, although the respondent made a demand in writing for the return of the "Simba" within one month of its seizure, the appellant did not exercise any of the powers conferred upon him by s. 161. The present action was brought in detinue and not under the provisions of the Act. Unless, therefore, the "Simba" was condemned by the operation of s. 160 (1), the property in the launch has not passed to the appellant, he is

not entitled to retain it and it must be returned to the respondent. That is now conceded by counsel for the appellant.

The learned judge found on the evidence before him that the "Simba" was made use of in the landing and conveyance of the uncustomed goods in respect of the possession of which Abed bin Omar was convicted. He accordingly held that the "Simba," which it was not disputed was of less than 250 tons register, was liable to forfeiture under the combined provisions of s. 147 and s. 156. He then concluded that as the "Simba" would never have been seized but for Abed bin Omar's arrest, it was seized by reason of the offence with which Abed bin Omar was charged. But he held that

> "although the 'Simba' was seized by reason of the detection of the offence in respect of which Abed bin Omar was convicted, it did not become forfeitable by reason of that offence, but by reason of the conveyance of the uncustomed goods, such conveyance not being an essential ingredient in their possession by Abed bin Omar and possibly having been anterior to such possession."

He was, therefore, of opinion that s. 160 (1) had no application.

On behalf of the appellant it was contended that on the evidence before him the learned judge should have held that the "Simba" was liable to forfeiture by reason of the commission of the offence of which Abed bin Omar was convicted and accordingly, that under s. 160 (1) the conviction of Abed bin Omar had effect as the condemnation of the "Simba". Mr. O'Brien Kelly, for the respondent, submitted, as I understood him, that before s. 160 (1) can be brought into operation, the thing which it is alleged is liable to forfeiture by reason of the commission of the offence must necessarily be involved in the commission of the offence and that the record of the proceedings which result in the conviction must show that it is so involved. In the instant case, he submitted, there was nothing in the record of the proceedings before the resident magistrate to show that the "Simba" was either directly or indirectly involved in the commission of the offence and other evidence was not admissible to establish that it was so involved. In reply to that submission the appellant contended that, if the record of the criminal proceedings does not show that the thing is liable to forfeiture by reason of the commission of the offence, evidence to establish that fact is admissible in any subsequent proceedings.

In *Ebrahim Ahmed Mohamed Modhaf v. R.* (1) (1956), 23 E.A.C.A. 546, the appellant was convicted of importing contraband bullion contrary to s. 147 and s. 148 of the Act and the bullion was duly forfeited. The question which arose for decision was whether two suitcases in which the bullion was carried and their contents were subject to automatic forfeiture under s. 160. The appellant contended that the words "any thing" in sub-s. (1) and sub-s. (2) of s. 160 should have a restricted meaning, namely, that they should apply only to things which are the subject-matter of a charge, and not to things which are only involved collaterally such as containers of the subject-matter of the charge. That contention was rejected by this court which said:

> "We are satisfied that the true effect of s. 160 is that the words 'any thing is liable to forfeiture by reason of the commission of such offence' are perfectly general. They include both things the subject-matter of the offence and things only indirectly involved, such as conveyances within the terms of s. 159 or packages and 'other contents' within s. 157."

The particulars of the charges under s. 147 and s. 148 on which the appellant in that case was convicted referred only to the bullion which was the subject-matter of the charges, but the evidence showed that the bullion was carried in two suitcases belonging to the appellant and what the contents of the suitcases were. This court held that on the conviction of the appellant the suitcases and their contents were condemned automatically by the operation of s. 160 (1). It seems, therefore, that where at the trial of an offence facts are proved which show that any thing is liable to forfeiture by reasons of the commission of such offence, such thing is condemned automatically by the operation of s. 160 (1), though there may be

no reference to such thing in the particulars of the charge.

In the instant case, the facts established at the trial of Abed bin Omar do not show that the “Simba” was liable to forfeiture by reason of the offence of which he was

convicted. The statement of the trial magistrate, when purporting to order the condemnation of the "Simba", that the motor launch belonging to the respondent was used in the commission of the offence, was not supported by any evidence and must be disregarded. Since Abed bin Omar pleaded guilty, no evidence was adduced, but by pleading guilty he must be taken to have admitted the truth of the particulars of the charge. Those particulars show that the uncustomed goods were landed by Abed bin Omar at the Mbaraki Jetty. I think it can be inferred that they were landed from a vessel. Whether or not they were uncustomed goods while being conveyed in the vessel, they became uncustomed goods at the moment of landing. The vessel was therefore made use of in the landing of uncustomed goods by Abed bin Omar and was, if a vessel of less than 250 tons register, liable to forfeiture under s. 156 (1). But there is nothing in the record to show that the "Simba" was that vessel. If, therefore, the contention of the respondent that the appellant can rely only on the facts proved at the trial of Abed bin Omar is correct, this appeal must fail.

In my view the contention of the respondent should be accepted. It would be contrary to all normal principles of the administration of justice, that a penalty of forfeiture should be imposed without any record either of the fact of condemnation or of the reasons therefor appearing in any proceedings. Indeed it would be so far contrary to such principles as to force me to the conclusion that the legislature did not intend that that should happen. It may be noted that it could not happen under the provisions of the English Act from which these sections appear to be adapted. Under s. 160 (1) the conviction of any person of an offence has effect as a condemnation of any thing which is liable to forfeiture by reason of the commission of such offence, and it seems reasonable to infer that, before there can be an automatic condemnation on conviction, the record of the proceedings which result in the conviction must show facts which clearly establish that the thing has been condemned. If that were not so, in all cases in which facts relevant to the seizure of a thing, but not proved at the trial of the offence, were in dispute, there would be uncertainty as to whether such thing had been automatically condemned as a result of the conviction. The consequences of such uncertainty would be at least highly inconvenient to all concerned. The uncertainty could not be resolved unless the owner brought an action in detinue against the Commissioner since, as this court has held in *Modhaf's* case (1) *supra*, s. 161 can be brought into play only when s. 160 has no application. The Commissioner could never feel safe in selling any thing which he claimed had been condemned by the operation of s. 160 (1) until an action in detinue had been brought and determined or the period of limitation for bringing such an action had expired. I do not think that those consequences could ever have been intended by the legislature. As stated by Maxwell on The Interpretation of Statutes (9th Edn.) p. 198:

> "In determining either the general object of the legislature, or the meaning of its language in any particular passage, it is obvious that the intention which appears to be most in accord with convenience, reason, justice and legal principles should, in all cases of doubtful significance, be presumed to be the true one."

The view I have taken is, I think, more in accord with those principles than is the contention of the appellant. It at least reduces the number of cases in which there would otherwise be uncertainty as to whether there has been an automatic condemnation, though it does not resolve all the difficulties.

It follows from what I have said that there can never be an automatic condemnation under s. 160 (1) as a result of a conviction consequent on a plea of guilty, unless facts have been alleged in the charge from which it can necessarily be inferred that there has been a condemnation. Evidence to supplement the facts alleged in the charge is not admissible in subsequent proceedings. Where, however, sufficient facts which, if proved or admitted, would establish an automatic condemnation, have not been alleged in the charge, on the authority of *Modhaf's* case (1) the deficiency can be supplemented by the evidence if a

plea of not guilty has been entered, provided, of course, that such evidence can properly be led in proof of the charge. It seems to me that in order to prove that any thing is liable to forfeiture by reason of the commission

of an offence, the evidence would have to show such a close nexus between the offence and the thing seized that it would be admissible evidence in relation to the charge even if no question of condemnation arose. But in that case also, evidence to supplement the facts found proved at the trial of the offence would not be admissible in subsequent proceedings to prove automatic condemnation under s. 160 (1). Where the person charged is the owner of the thing which it is claimed has been condemned as a result of his conviction, in any subsequent proceedings he would, I think, be bound by the findings of fact of the court which tried the charge, though probably he could contend that the facts proved were insufficient to establish a condemnation. But where the owner of such a thing is not the person charged, as in the instant case, I do not think he would be bound by the findings of fact of the trial court or by the admissions of the party charged. Not being a party to those proceedings, he could not be bound unless the Act so provided in the clearest terms. The Act does not so provide. Section 162 (2) (*c*) reads:

> "(2) Where any thing is condemned under the provisions of this act then–
>
> (*c*) such condemnation shall, subject to any appeal in any proceedings which resulted in such condemnation, be final and, save as provided in s. 163, no application or proceedings for restoration shall lie."

But that sub-section has effect only if there has been a lawful condemnation and I can see no reason why an owner, if he was not a party to the criminal proceedings, should not be entitled in subsequent proceedings to contest the findings of fact of the court which tried the criminal charge and to show that there was no lawful condemnation. In that event the Commissioner would clearly be entitled to adduce evidence in support of the facts on which he relies, though not of any facts which were not treated as established in the proceedings which allegedly resulted in condemnation. He would, no doubt, also be entitled in special cases to call evidence to rebut his opponent's case. In the present case, however, there was no real dispute as to the facts and the findings of fact of the learned trial judge confirmed the allegations of fact in the charge against Abed bin Omar.

Where the Commissioner or the prosecutor is seeking to obtain automatic condemnation under s. 160 (1), it is therefore of vital importance that, where it can properly be done, the charge should be framed so as to achieve that result in the event of a plea of guilty. In the instant case I think the words "from the motor launch 'Simba,' a vessel of less than 250 tons register" could properly have been included in the particulars of the charge after the word "land." Had those words been inserted in the charge I think there would, at least *prima facie*, have been an automatic condemnation of the "Simba" on the conviction of Abed bin Omar. But they were not included in the charge and therefore there was no automatic condemnation under s. 160 (1).

Save as regards costs that disposes of the present appeal. To my mind, the difficulties to which I have referred show that amendments to the Act are essential to clarify the position and avoid the uncertainty which exists at present. I may add that sub-s. (2) of s. 160 appears to me to create even greater difficulties and obscurity. Under that sub-section, if the court is satisfied that a thing is liable to forfeiture by reason of the commission of the offence, though not satisfied that it was the person charged who committed the offence, it appears that the court is empowered to order such thing to be condemned without giving the owner an opportunity of being heard. I know of no provision giving the owner a right of appeal against such an order of condemnation and it may be that s. 162 (2) (*c*) would be a bar to any proceedings by the owner to recover the thing. His only remedy might be to seek the indulgence of the High Commission under s. 163. Again, if no evidence, or only part of the evidence, relevant to the seizure of the thing in question has been given before acquittal, as may often be the case, the court would have no material, or

insufficient material, on which to exercise its discretion. Should the court then hear evidence in order to decide what order should be made and, if so, should the owner be given an

opportunity of being heard? That question does not arise in this appeal but is one which might well be considered by the authorities concerned.

I turn now to the question of costs. Judgment was given for the respondent with costs. Sub-section (3) of s. 171 reads:

> "Where any proceedings are brought against any officer on account of any act done, whether by way of seizure or otherwise, in the execution or intended execution of his duty under this Act and judgment is given against such officer, then, notwithstanding that in any proceedings referred to in sub-s. (1) a court has not found that there were reasonable grounds for such act, if the court before which such proceedings are heard is satisfied that there were reasonable grounds for such act, the plaintiff shall be entitled to recover any thing seized, or the value thereof, but shall not otherwise be entitled to any damages and no costs shall be awarded to either party."

That provision was not brought to the notice of the learned trial judge and I think it must be assumed that he did not take it into consideration when making his order for costs. It was common ground before us that the "Simba" was lawfully seized as being liable to forfeiture but that if it was not automatically condemned on the conviction of Abed bin Omar, it was unlawfully detained thereafter or, at the least, after the time allowed to the Commissioner to take action under s. 161 had expired. For the respondent it was contended that if the "Simba" was not condemned on the conviction of Abed bin Omar, there were no reasonable grounds for its further detention by the Commissioner. For the appellant it was submitted that although the magistrate's order of condemnation was made in excess of jurisdiction and inoperative, it was an order of a court on which the Commissioner was entitled to rely until set aside and, accordingly, that he had reasonable grounds for continuing to detain the vessel. It was also argued that even if it were accepted that the magistrate's order was a nullity, the Commissioner still had reasonable grounds to detain the vessel in relaince on a supposed automatic condemnation. If the Commissioner acts on a wrong view of the law, it may be that this cannot amount to reasonable grounds for his action: see *Nakkuda Ali v. M.F. de S. Jayaratne* (2), [1951] A.C. 66. I do not propose to decide this point because the question of reasonableness is not one for our decision. If the Crown sought to be absolved from a normal order of costs, it should have asked the learned judge for a finding, and if that had been done the Commissioner might have had to appear and explain on what grounds he really did act. It cannot be said with certainty that the learned judge would have made a finding that there were reasonable grounds for detention and we have not been asked to remit the matter. In the circumstances I think the order for costs must stand. It follows that the costs of the appeal must also be paid by the Crown, though this must not be taken as a decision that the costs of an appeal are within the scope of sub-s. (3) of s. 171.

I would therefore dismiss the appeal with costs.

Sir Newnham Worley P: I have had the advantage of reading the judgment prepared by the learned Vice-President. I agree with it and do not wish to add anything.

This appeal is dismissed with costs and the judgment of the Supreme Court affirmed.

Briggs JA: I agree that this appeal should be dismissed with costs for the reasons given by the learned Vice-President.

Appeal dismissed.

For the appellant:
HB Livingstone (Senior Assistant, Legal Secretary, East Africa High Commission)

The Legal Secretary, East Africa High Commission

For the respondent:
J O'Brien Kelly
J O'Brien Kelly, Nairobi

R v Omari Abdullah
[1957] 1 EA 687 (HCT)

Division:	HM High Court for Tanganyika at Dar-Es-Salaam
Date of judgment:	21 October 1957
Case Number:	270/1957
Before:	Crawshaw J
Sourced by:	LawAfrica

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[1] Personal tax – Neglect or failure to pay personal tax – Personal Tax Ordinance, 1955 *s.* 36 (1) (*T.*).

Editor's Summary

The accused was charged under s. 36 (1) of the Personal Tax Ordinance, 1955, for neglecting or failing to pay the tax within three months after due date and to this he pleaded "It is true, I have not paid, nor have I been exempted." On this admission he was convicted and sentenced.

Held – an admission of non-payment of tax is not an offence in itself if the accused proves "that his failure to do so was due to poverty or other circumstances beyond his control," which he must be given a chance to do.

[**Editorial Note**: See also *R. v. Zakariah s/o Mfango* reported at p. 651]

Conviction and sentence quashed.

No cases referred to in judgment

Judgement

Crawshaw J: The plea in this case cannot be said to be one of guilty. The accused was charged under s. 36 (1) of the Personal Tax Ordinance, No. 3 of 1955, which reads as follows:

> "Any taxable person who neglects or fails to pay the tax for which he is liable within three months after the due date shall be guilty of an offence and shall be liable upon conviction to a fine not exceeding Shs. 500/- or to imprisonment for a term not exceeding three months or to both such fine and imprisonment, unless he proves to the satisfaction of the court that his failure so to do was due to poverty or other circumstances beyond his control."

The accused's plea to this was, "It is true, I have not paid, nor have I been exempted." This goes no

further than admitting that he has not paid, but this in itself is not an offence if the accused,

> "proves to the satisfaction of the court that his failure so to do was due to poverty or other circumstances beyond his control."

The onus of so proving is of course on the accused, but he must be given a chance of doing so. Having admitted non-payment, the accused should then be asked if he has any legal excuse for defaulting and, if so, whether he wishes to prove it.

The conviction and sentence are quashed. As it would seem that the accused has already served his sentence, no order for retrial is made.

Conviction and sentence quashed.

Abdulla Bin Said Bin Hassan v Halima Binti Said Bin Hassan and another
[1957] 1 EA 688 (SCK)

Division:	HM Supreme Court of Kenya at Mombasa
Date of judgment:	29 July 1957
Case Number:	13/1957
Before:	Mayers J
Sourced by:	LawAfrica

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[1] Mohamedan Law – Net income to be divided between children and descendants of settlor – No specific gift over to the poor or any charitable object – Validity of Wakf – Wakf Commissioners Ordinance, s. 4 (*K.*).

Editor's Summary

The father of the plaintiff and of the defendants was a Bajun of the Shafi sect of Mohamedans. By an instrument in writing made in 1945 he purported to create a Wakf in certain lands and directed that the net income should be divided equally among his three children then living and any further children born to him and to their descendants per stripes. The wakf contained no specific gift over to the poor or to any other purpose upon the extinction of the settlor's descendants. The plaintiff sought a declaration that the wakf purported to be created by his father was invalid for want of a residuary gift to some purpose regarded by Muslim law as of a religious, pious or charitable nature or to the poor and an order that the Registrar of Titles should give effect to such declaration by amendment of the Register of Titles in respect of the lands concerned. The defendants asserted the validity of the wakf and relied upon the classical Muslim law derived from the writings of the prophet, Mohamed, and authoritative traditions and commentaries, and more particularly that in the Shafi school of law the use of the word "wakf" in itself gives rise to an implied dedication to the poor.

Held–

(i) the court was not entitled in the face of authority to the contrary to hold that the use of the word "wakf" in itself gave rise to an implied gift in favour of the poor;

Fatima binti bin Salim Bakhshuwen and Another v. Mohamed bin Salim Bakhshuwen (1949), 16 E.A.C.A. 11 followed.

(ii) the plaintiff was entitled to the declaration prayed.

Judgment for the plaintiff. Costs to be paid out of the property the subject of the wakf.

Cases referred to:

(1) *Nizamudin Gulam and Others v. Abdul Gafur and Others* (1889), 13 *Bom*. 264.

(2) *Abul Fata Mohamed Ishak and Others v. Russomoy Dhur Chowdhry and Others* (1894), 22 I.A. 76.

(3) *Talibu bin Mwyaka v. Executors of Siwa Haji* (1907), 2 E.A.L.R. 33.

(4) *Said bin Mohamed bin Kassim El-Riami and Others v. Wakf Commissioners*, Zanzibar (1946), 13 E.A.C.A. 32.

(5) *Fatima binti bin Salim Bakhshuwen and Another v. Mohamed bin Salim Bakhshuwen* (1949), 16 E.A.C.A. 11.

(6) *Fatuma binti Mohamed bin Salim Bakhshuwen and Another v. Mohamed bin Salim Bakhshuwen*, [1952] A.C. 1.

(7) *Nawab Syed Mahammad Hashim Ali Khan v. Iffat Ara Hamidi Begum* (1942), A.I.R. Cal. 180.

(8) *Syed Ahmed v. Julaiha Bivi* (1947), A.I.R. Mad. 176.

(9) *Ghulam Mohammad v. Ghulam Husain* (1931), 59 I.A. 74.

(10) *Sheik Mohamed Ahsanulla Chowdhry v. Amarchand Kundu* (1889), 17 I.A. 28.

Judgment

Mayers J: In this suit which entails the decision of a question of law of the utmost importance to a considerable section of the Muslim community, no evidence was tendered as the parties were able to agree the material facts.

On July 12, 1945, the father of the plaintiff and of the defendants (hereinafter referred to as the settlor) who was, as are his children, a Bajun of the Shafi sect of Mohamedans, purported by an instrument in writing to create a wakf in and over certain lands of which he was then the registered proprietor and directed that the income from those lands should, after payment of taxes and other outgoings, be divided equally amongst his three children then living and any children who might thereafter be born to him and their descendants per stripes. The wakf contained no specific gift over to the poor or to any other purpose upon the extinction of the descendants of the settlor.

The plaintiff now seeks a declaration that the wakf is invalid and that the Registrar of Titles be directed to give effect to such declaration by appropriately amending the Registrar of Titles in relation to the property the subject of the purported wakf.

The defendants, contra, assert the validity of the wakf.

Properly to understand the nature of the question for decision it is necessary briefly to summarise the history of certain aspects of the law relating to wakf as administered in the courts of what was formerly British India and in the courts of Her Majesty's possessions in East Africa. Whatever may have been the case in jurisdictions which applied the principles of what may for convenience be described as classical Muslim law – an expression which is used to connote Muslim law derived from its ultimate sources, the writings of the prophet Mohamed, authoritative traditions and the commentaries regarded in the different schools of Muslim law as authoritative, unalloyed by any tincture of juristic concepts derived from other sources – the court of India, as is apparent from the cases reviewed in the judgment of Parsons, J., in *Nizamudin Gulam and Others v. Abdul Gafur and Others* (1) (1889), 13 Bom. 264 at pp. 272–274, rejected the proposition that a wakf could in the absence of a specific residuary gift to some purpose regarded by Muslim law as of a religious, pious or charitable nature or to the poor, be valid. So too in *Abul Fata Mohamed Ishak and Others v. Russomoy Dhur Chowdhry and Others* (2) (1894), 22 I.A. 76 the Privy Council held on appeal from a decision of the High Court of Calcutta that a wakf in which the only gift to the poor was to take effect upon the extinction of the descendants of the settlor was invalid as that gift was illusory.

Despite these decisions, however, in *Talibu bin Mwijaka v. Executors of Siwa Haji* (3) (1907), 2 E.A.L.R. 33, Hamilton, J., as he then was, declined to consider himself bound in this court by Privy Council decisions given on appeal from the Indian Courts, and after saying at p. 36:

> "The Mahomedan law in East Africa has, however, not been subjected to the same modifying influence as in India, and remains the same as when the Min Haj was written in the 6th century of the Hejira."

went on specifically to hold that the wakf which on the face of it professed to give "in charity to his children, their children and descendants" certain property belonging to the testator

> "for ever, it cannot be sold, and is not to be given to anybody, to the resurrection day"

was a valid wakf according to Mohammedan law in force in East Africa.

Thenceforward the validity of wakfs of the nature upheld by Hamilton, J., does not appear again to have been challenged in the courts of East Africa until the case of *Said bin Muhammad bin Kassim El-Riami and Others v. Wakf Commissioners*, Zanzibar (4) (1946), 13 E.A.C.A. 32 and on appeal there from before the Court of Appeal for Eastern Africa. In that case the material facts were that a testamentary disposition purported to create a wakf of a certain property wasted in the testatrix in favour of her

> "children and grand-children and their posterity and when they become extinct the wakf should revert to her near relatives among the Muslims and then to the

> poor Muslims of the Ibathi sect, to enjoy the said wakf by living and using the produce thereof until God inherits the earth and its occupants."

When the matter came before the Court of Appeal for Eastern Africa, in delivering his judgment, ((1946), 13 E.A.C.A. at p. 33) Sheridan, C.J., after dealing with certain other aspects of the case said:

> "The question is whether this gift over to the poor is so remote or uncertain as to be illusory and so invalid. It seems to me that the answer to this question is to be found in the judgment of the Privy Council in the case of *Abul Fata Mohomed Ishak and Others v. Rasamaya Dhur Chowdhri and Others* (2), 22 Cal. 619 at p. 634 where Lord Hobhouse in delivering the judgment of the Board held that a wakf of the nature under debate was invalid as illusory. This decision was followed by the Court of Appeal for Eastern Africa in *Fatima binti bin Salim Bakhshuwen and Another v. Mohamed bin Salim Bakhshuwen* (5), which was an appeal from this court and is reported in (1949) 16 E.A.C.A. 11. The decision of the Court of Appeal for Eastern Africa was upheld by the Privy Council in *Fatima binti Mohamed bin Salim Bakhshuwen and Another v. Mohamed bin Salim Bakhshuwen* (6), [1952] A.C. 1."

Did the matter end there the contention of the defendants in the instant case would, as was frankly admitted by Mr. Hassan who appears for them, have been unarguable. In 1913, however, the Legislature of India, presumably with a view to overcoming the consequences of the Privy Council decision in *Abul Fata Mohomed Ishak v. Russomoy Dhur Chowdhry* (2) (1894), 22 I.A. 76 already referred to, enacted legislation rendering wakfs of the nature under consideration valid there. Similarly as a result of the decision of the Court of Appeal for Eastern Africa in *Said bin Muhammad bin Kassim El-Riami v. Wakf Commissioners*, Zanzibar (4) (1946), 13 E.A.C.A. 32, there was promulgated in Zanzibar a Wakf Validating Decree legalising wakfs of the instant nature, an example which was followed in Kenya by the Wakf Commissioners Ordinance, 1951.

Put quite shortly Mr. Hassan's contention is that the effect of s. 4 of the Wakf Commissioners Ordinance is to abrogate the application to Kenya of the principles upon which the *Chowdhry* case (2) and the *Bakhshuwen* case (5) were decided and to constitute as the criterion by which the validity of a wakf constituted in Kenya is to be determined its validity or otherwise under what I have already referred to as classical Muslim law. The provisions of s. 4 of the Wakf Commissioners Ordinance are as follows:

> "4.(1) Every wakf heretofore or hereafter made by any Muslim which is made, either wholly or partly, for any of the following purposes, that is to say–
>
> (*a*) for the maintenance and support, either wholly or partly, of any person including the family, children, descendants or kindred of the maker; or
>
> (*b*) if the maker of the wakf is an Ibathi or Hanafi Mohammedan, for his own maintenance and support during his lifetime,
>
> is declared to be a valid wakf if:
>
> (i) it is in every other respect made in accordance with Muslim law; and
>
> (ii) the ultimate benefit in the property the subject of such wakf is expressly, or, in any case in which the personal law of the person making the wakf so permits, impliedly, reserved for the poor or for any other purpose recognised by Muslim law as a religious, pious or charitable purpose of a permanent character:
>
> Provided that the absence of any reservation of the ultimate benefit in property the subject of a wakf for the poor or any other purpose recognised by Muslim law as a religious, pious or charitable purpose of a permanent character shall not invalidate the wakf if the personal law of the maker of the wakf does not require any such reservation.

> "(2) No wakf to which sub-s. (1) of this section applies shall be invalid merely because the benefit in the property reserved by such wakf for the poor or any religious, pious or charitable purpose is not to take effect until after the extinction of the family, children, descendants or kindred of the maker of the wakf."

Paragraph (*b*) of sub-s. (1) of the section is for present purposes immaterial. The effect of the remainder of sub-s. (1) may be paraphrased as being to render valid wakfs which comply with three requirements, first that it should be for the maintenance and support of any person including the descendants of the maker; secondly, that it should in every other respect be in accordance with Muslim law, and thirdly, that the ultimate benefit in the property the subject of the wakf should be reserved for the poor or for some other purpose recognised by Muslim law as of a religious, pious or charitable nature. It is to the third of these requirements that attention should now be directed. The provision, on the face of it, permits the reservation to be an implied reservation in any case in which the personal law of the maker of a wakf permits of the reservation for the poor or other religious, pious or charitable purpose being by implication and not by express words. Mr. Hassan contends that in the Shafi school of law to which the settlor was admittedly subject, the use of the word "wakf" in itself gives rise, in the absence of an express dedication to some religious, pious or charitable purpose, to an implied dedication to the poor. This view is based upon the opinion of Abu Yusuf which it is said is to be preferred to the contrary opinion of other classical Muslim jurists. In the course of his scholarly and elaborate argument Mr. Hassan referred to a number of cases. I do not think, however, that it is necessary to deal with all of those cases inasmuch as their high water mark may be regarded as having been attained in *Nawab Syed Mahammad Hashin Ali Khan v. Iffat Ara Hamidi Begum* (7) (1942), A.I.R. Cal. 180, where at p. 199 Mitter, J., said:

> "The other principle is that a wakf will not fail for mere vagueness or uncertainty of the object. For when the object is not specified by the wakf, the usufruct is to be applied to the benefit of the poor (Ameer Ali Vol. I, 323 (3rd Edn.), for according to the Mussalman jurists 'an unrestricted wakf is for the poor by custom and practice . . . those purposes need not be expressed in clear terms of the wakfnama. If any of those purposes can be implied from the terms of the wakfnama, with the aid of principles formulated by Muslim jurists, the proviso would be complied with' the proviso referred to being a proviso to s. 3 of the Indian Validating Act which recognises the implied reservation for the poor or any purpose of a religious, pious or charitable nature."

On the face of it Mitter, J., is referring to cases where something which might, to adopt a term of English law, be referred to as a general charitable intent, can be inferred. No such general charitable intent can be inferred from the express provisions of this instrument, but Mr. Hassan falls back upon the argument that this court must adopt the opinion of Abu Yusuf and hold that the mere use of the term "wakf" itself implies a reservation in favour of the poor. This view is supported by the observations of Ameer Ali referred to in Mitter, J.'s judgment. So too, in *Syed Ahmed v. Julaiha Bivi* (8) (1947), A.I.R. Mad. 176 Patanjali Sastri, J., at p. 182 says:

> "On the other hand, the circumstances that led to the passing of the Act '(The Wakf Validating Act, India)' to which reference has been made already would seem to indicate that the Legislature has deliberately adopted the view of Abu Yusuf who propounded the doctrine of implied reservation of ultimate benefit to a perpetual object of bounty such as the poor."

There are however dicta in textbooks which may partially be supported by authority which controvert the view of Mitter, J. Thus in the fourth edition of Syed Ameer Ali's work upon Mahomedan Law there appears in the chapter entitled "The Law of Wakf according to the Shafi School" at p. 545 the following passage:

“The usufruct of the wakf reverts to the nearest relative of the founder when the purpose fails and the holders nominated by him have become extinct.”

While, as this passage was not referred to by counsel, I have not had the advantage of hearing argument upon it, it seems to me wholly inconsistent with the view that the use of the term wakf must necessarily, itself, imply an ultimate gift to the poor.

So too there appears in Mulla Principles of Mahomedan Law (14th Edn.) at p. 184 the following note:

> "The ultimate gift to charity may be an 'implied' gift; it need not be express (Wakf Act s. 3 Proviso). What does 'implied' mean? In a case where there was no express disposition of the ultimate benefit, the Allahabad High Court implied an ultimate benefit for charity, from intention of the founder as disclosed by the terms of the deed, from the fact that there was a provision for charity and from the fact that the wakf was to be perpetual, although the founder contemplated the possible extinction of his descendants. According to Abu Hanifa and Muhammad, it is necessary for a wakf to be complete that the ultimate benefit for the poor should be *expressly* reserved. Accordingly, however, to Abu Yusuf, such benefit may be reserved *impliedly*, and this can be done by the mere use of the word 'wakf.' . . . In the first case cited . . . the High Court of Bombay held that the opinion of Abu Hanifa and Muhammad was to be preferred to that of Abu Yusuf, and it accordingly held that in the absence of an ultimate gift to charity, the deed was not valid as a wakf. This decision was upheld by the Privy Council on appeal. Is it intended by the word 'impliedly,' which appears in s. 3 of the Wakf Act, to give effect to the opinion of Abu Yusuf so that an ultimate gift to charity may be implied, even where none is named from the mere use of the word 'wakf'? It has been held in Allahabad, Calcutta and Oudh, that it is not to be so implied. A similar view has been taken by the Privy Council."

The Privy Council authority cited in support of this proposition is *Ghulam Mohammed v. Ghulam Husain* (9) (1931), 59 I.A. 74. The facts in that case were particularly complicated and the argument covered a wide field. Counsel for the respondent contended *inter alia* at p. 77:

> "The effect of the three wills was to create a wakf . . . Although perpetuity is an essential element, Abu Yusuf was of opinion that an ultimate destination in favour of the poor may be implied where none is named; Muhammad thought otherwise, but in British India the opinion of Yusuf is preferred . . ."

Sir George Lowndes in delivering the judgment of the board said at p. 86:

> "No case of wakf was made by the first respondent in his defence to the suit . . . No one of the three wills purports to create a wakf, nor is there in any of them anything that could be regarded as a gift of the ultimate residue to charitable purposes, and no suggestion of wakf was made in any of the previous suits. It is admitted that a trust for slaves and dependants is not within the terms of the Wakf Validating Act (VI of 1913), and it is therefore unnecessary to consider the effect of Act XXXII of 1931, which purports to give retrospective effect to the Act of 1913. The argument which has been addressed to their lordships on this point is in reality only an attempt to re-open the controversy which was finally settled by decisions of this Board nearly forty years ago: see *Sheik Mohamed Ahsanulla v. Amarchand Kundu; Abdul Gafur v. Nizamudin; Abul Fata Mahomed Ishak v. Russomoy Dhur Chowdry*. Under these circumstances their lordships think it sufficient to say that the contentions of the first respondent on this part of the case must necessarily fail."

In the *Bakhshuwen* case (5), by which I am of course bound, Nihill, C.J., says at p. 12:

> "The Privy Council case of 1894 related to the Hanafi school of the Sunni sect but again the Indian decisions are to the effect that there is no difference in the law of wakf between the Shafi and Hanafi Schools."

So too Edwards, C.J., said at p. 13:

> "The *Abdul Fata* case (2) was decided in 1894 and in 1913 wakfs of the kind in question became valid in India by reason of the passing of a validating Act. Although the Zanzibar case was governed by Ibathi law while the present case is governed by Shafi law it is common ground, according to the learned trial judge, that, so far as this litigation is concerned, these two schools of law are identical"

and in *Sheikh Mohamed Ahsanulla Chowdhry v. Amarchand Kundu* (10) (1889), 17 I.A. 28, Lord Hobhouse said that their lordships

> ". . . have not been referred to, nor can they find, any authority showing that, according to Mahomedan law, a gift is good as a wakf unless there is a substantial dedication of the property to charitable uses at some period of time or other."

Again, in the *Bakhshuwen* case (6), ([1952] A.C. at p. 11) Lord Simonds says:

> "It is plain from the judgments of the courts below and from the notes of the arguments which appear on the record that the case proceeded on the footing that no relevant distinction on this point could be made between Shafi and Hanafi law. This might not have been fatal, if it had been shown to the lordships' satisfaction that there was such a distinction which had for some reason been overlooked. But this was not done and, as their lordships think, could not have been done."

Subsequently in dealing with the question as to whether the Privy Council should re-examine the principles of Muslim law with a view to the adoption of the opinion of Abu Yusuf, Lord Simonds says at p. 12:

> "This course they cannot adopt. It may well be that, since the decision in *Abdul Fata's* case was given Ameer Ali, j., and other writers have elaborated the views so fully propounded in *Bikani Mia's* case, but it is impossible to suppose that what has been written since that date or, having been written before it, has now for the first time been brought to the notice of the board, could have achieved what Ameer Ali, j.'s vigorous dissent failed to do. Nor does it avail the appellants that in parts of the world outside India where Mohamedan law obtains, whether in Africa or in Asia, such wakfs as these are considered to be valid. Their lordships are not satisfied of the general truth of this proposition; but, even if it were so, that would not be such fresh light as would justify the board in reversing its previous decision."

It appears to me that it would be contrary to established principle for this court which is bound by the decisions of the Court of Appeal for Eastern Africa and of the Privy Council, to seek to hold despite the observations above set out, that the opinions of Abu Yusuf are to be preferred to those of the other jurists which have heretofore been accepted by the Court of Appeal for Eastern Africa and the Privy Council. To put the matter succinctly in my view unless and until a court of superior jurisdiction in this colony of ours has held that the opinion of Abu Yusuf is to be adopted, this court is not entitled to hold that the use of the word "wakf" in itself gives rise to an implied ultimate gift in favour of the poor.

Mr. Inamdar for the plaintiff also contended that reliance could not be placed by the defendants upon s. 4 of the Wakf Commissioners Ordinance inasmuch as on the face of it the provisions of that section apply only to wakfs expressed to be for the maintenance and support of the specified beneficiaries, while in the instant case there is no restriction upon the purposes for which the beneficiaries might utilise any income derived by them from the wakf. It seems to me that there is a very real difference between a gift which is restricted to a particular purpose and one in unrestricted terms. Had the settlor purported to limit the use to which income from the property the subject of the wakf might be put to the maintenance of, shall we say, a racing stable by each of the beneficiaries, and had the wakf provided, if such be possible in Muslim law – a matter as to which I express no opinion – for a gift over to some other beneficiary if the income were applied to any other purpose, it could hardly have been

contended that the purported wakf complied with the requirements of s. 4 that it should be for the maintenance and support of the beneficiaries. In the absence of any specific allocation to the maintenance and support of the beneficiaries, it would seem to me open to the beneficiaries to utilise the whole or any part of the income for any purpose which they thought fit even though such purpose were as distant from their maintenance and support as that suggested in the above example.

For the foregoing reasons there will be judgment for the plaintiff in the terms prayed. In view, however of the importance to the Muslim community as a whole of this suit I think that the proper order in relation to costs is that the costs be paid out of the property the subject of the wakf.

Judgment for the plaintiff.

For the plaintiff:
IT Inamdar and *ST Inamdar*
Inamdar & Inamdar, Mombasa

For the defendants:
SF Hassan
O'Brien Kelly & Hassan, Mombasa

Udham Kaur Administratrix of Hurbaksh Singh s/o Bishen Singh (Deceased) Trading as EA Joinery Works Company v Khimji Premji Patel

[1957] 1 EA 694 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of ruling:	12 December 1957
Case Number:	454/1954
Before:	Rudd J
Sourced by:	LawAfrica

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[1] Arbitration – Setting aside award – When period of limitation commences to run – Arbitration Ordinance (*Cap.* 22) (*K.*) *– Article* 158 *of Schedule to the Indian Limitation Act,* 1877.

Editor's Summary

This case is reported only on the question of the period of limitation within which an arbitrator's award can be set aside. The award was made on August 28, 1957, and it was received by the court on August 29, 1957, in a closed envelope together with a letter in which the arbitrators asked for the registrar's cheque for Shs. 1,300/- in respect of the costs of the arbitration and award and further stating that the award should only be published on payment of the arbitrators' fees by the party concerned. On

notification by the registrar that the award had been filed and that it would be delivered up to the parties on payment of the requisite fees to be paid by the parties in equal shares the plaintiff paid his share of the fees on September 13, 1957, and obtained a copy of the award. The plaintiff then sought to move the court to set aside the award on grounds of misconduct whilst the defendant moved for judgment in accordance with the award. He opposed the plaintiff's application on the grounds that the period of limitation in such a case was ten days from the date of submission of the award to the court and that as the award was filed on August 29, 1957, the plaintiff's application was out of time.

Held–

(i) a sealed award cannot be considered as having been submitted to a court until its contents have been disclosed to the court, and consequently, it must be taken up before the submission is complete; therefore,

(ii) the application to set aside the award was within time in this case.

Ruling accordingly.

Cases referred to in ruling:

(1) *Mawji Jadavji v. Chanda Singh*, Kenya Supreme Court Civil Case No. 1419 of 1951 (unreported).

Ruling

Rudd J: There are two motions before the court for decision. One is a motion to set aside an award made by arbitrators on a reference in the suit under O. 45. The other is a motion for judgment in accordance with the said award.

As regards the first motion, objection has been taken that it is time barred under art. 158 of the schedule of the Indian Limitation Act, 1877, which provides a period of limitation for applications to set aside an award by an arbitrator of ten days from the submission of the award to the court.

The award was made on August 28, 1957, and was received by the court on August 29, 1957, in a closed envelope together with a letter in which the arbitrators asked for the registrar's cheque for Shs. 1,300/- in respect of the costs of the arbitration and award and further stating that the award should only be published on payment of the arbitrator's fees by the party concerned.

The registrar issued notices which were served on the parties on August 30, 1957, giving notice to them that the arbitrators had filed their award on August 29, 1957, and that it would be delivered up to the parties on payment of the arbitrator's fees amounting to Shs. 1,300/- to be paid by the parties in equal shares.

The plaintiff questioned the amount of the said fees, but deposited his share of the money namely Shs. 650/- on September 13, 1957, and obtained a copy of the award.

The defendants paid their share of the fees on September 17, 1957, and got a copy of the award.

The plaintiff brought his motion to set aside the award on September 23, 1957, while the defendant brought his motion for judgment according to the award on the same date.

In *Mawji Jadavji v. Chanda Singh* (1), Kenya Supreme Court Civil Case No. 1419 of 1951 (unreported) I said:

> "I think the sending of the award to court in a closed envelope on condition that it be not disclosed or published to the parties until later is not a complete submission of the award to the court within the meaning of art. 158 of the schedule of the Indian Limitation Act until the award is allowed to be disclosed to the parties"

and I held that the submission was not completed until the contents of the award had been disclosed. In that case the award was sent to court in a sealed envelope with a request that it be not "published" until the arbitrator's fees were paid, and its contents were not disclosed to the parties in the suit or to the court until a letter was received from the arbitrator, who had by that time been paid, instructing that the award could be "published."

In strictness the publishing of the award is the making of it. The publication to the parties is a different thing and entails that the award has been made, that is to say that it has been completed so that the arbitrator retains no power of altering it and notification to the parties that that has been done. It is immaterial as regards publication to the parties whether or not the parties are then made acquainted with the contents of the award or receive copies of it. Russell on Arbitration (16th Edn.) p. 325. In fact it is perfectly legitimate and often the case that the award is not delivered up to the party seeking to take it up until the charges have been paid. Russell (16th Edn.) p. 212. In Kenya under the Arbitration Ordinance (Cap. 22), s. 9 (2), the arbitrator is not required to file his award in court at the instance of a party or any

person claiming under him until his fees have been paid and, while it might be argued that this Ordinance does not apply to a reference to arbitration by order of the court under O. 45, De Lestang, j., in *Mawji Jadavji v. Chanda Singh* (1), upheld the arbitrator's right to ask the court not to publish the award until his fees had been paid, and that was a case of a reference under O. 45. It may be added that while it may, perhaps, be argued that the Ordinance does not apply to a reference under O. 45 the order is specifically made applicable to an arbitration pursuant to a submission under the Ordinance.

When an award is received in the court offices from an arbitrator with a request that it be not "published" until the costs have been paid or deposited it is merely filed in the case file in its closed envelope and is not opened by the court until the fees have been paid or the arbitrator authorises "publication." The use of the words published and publication in this sense is somewhat a misnomer. They mean taken up rather than published. I consider that ten days would be a very short period of limitation indeed if it ran from the date on which the envelope containing the award was received by the court in a case in which the terms of the award are not disclosed either to the parties or to the court.

It is possible to imagine cases in this country in which notification of the receipt of the award and payment of the fees would not be complete until most of that period had expired.

In England the rule of limitation is quite different from the rule in Kenya. The period is six weeks and is capable of extension and time runs from the date of publication to the parties. The English rule does not apply in Kenya.

It seems probable that the practice of an arbitrator sending his award to court with a direction that its contents be not disclosed until his fees be paid does not obtain in India for there appears to be no reference to it in the books in our library.

I see no reason to doubt the correctness of my ruling in *Mawji Jadavji v. Chanda Singh* (1), that an award cannot really be considered as having been submitted to a court until its contents have been disclosed to the court and consequently that it must be taken up before the submission is complete. Of course, if either party took it up by paying all the fees that would be sufficient. I, therefore, hold that the application to set aside the award is within time in this case.

Ruling accordingly.

For the plaintiff:
DV Kapila
DV Kapila, Nairobi

For the defendant:
KD Travadi
Trivedi & Travadi, Nairobi

In the Estate of Sheikh Fazal Ilahi

[1957] 1 EA 697 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	27 March 1957
Case Number:	65/1956
Before:	Connell J
Sourced by:	LawAfrica

[1] Probate and administration – Practice – Application for grant of Probate – Application not verified – Whether citation a nullity – Indian Probate and Administration Act, 1881, *s.* 67.

[2] Probate and administration – Practice – Application for grant of probate – Caveat lodged – Whether applicant can proceed by way of motion instead of suit – Probate and Administration (*Contested Suits*) *Rules,* 1940 *r.* 6 (*K.*).

Editor's Summary

An application for probate was filed on March 22, 1956, but the verification on the reverse side was not filled in although a declaration was completed and signed on the same day. An appropriate general citation was inserted in the Official *Gazette* on March 28, 1956, stating that the court would issue grant unless cause be shown to the contrary on or before April 17, 1956. A caveat was filed on May 2, 1956, and the caveator also filed an affidavit which was duly served on the applicants. On February 27, 1957, a notice of motion was filed by the applicants moving the court to remove the caveat forthwith and this was supported by an affidavit dated February 21, 1957. On March 18, the respondent caveator filed an affidavit stating that it was not competent for the court to grant the application in the notice of motion; that the application was not in accordance with the Probate and Administration (contested suits) Rules, 1940, in that it was not by way of a suit as required under r. 6; that a grant could not be made as the application for probate did not comply with s. 67 of the Probate and Administration Act, 1881, which required the application for probate to be verified; and that the absence of verification made the citation a nullity. For the applicants it was contended that matters could be set right other than in the manner required by r. 6.

Held–

(i) failure to verify may well be a reason for the court to refuse grant of probate, but the absence of such verification cannot in any manner affect the validity of the citation;

(ii) the present proceedings did not lie by way of motion, nor could they be cured except in the manner laid down in r. 6.

Motion dismissed with costs.

No cases referred to in judgment

Judgment

Connell J: What purported to be a probate application numbered 65/56 was filed by Messrs. Hamilton, Harrison & Matthews on March 22, 1956, but the verification on the reverse side was not filled in although a declaration of the same date was filled in and signed. I note in this respect that on March 20, since hearing this application Mr. S.A. Shakoor filed an affidavit swearing that he was one of the subscribing witnesses to the codicil.

The appropriate general citation was inserted in the *Gazette* on March 28, 1956, stating that the court will issue grant unless cause be shown to the contrary on or before April 17. In point of fact no caveat was filed until May 2; on the same date notice of the caveat was also filed and it was served on Hamilton, Harrison & Matthews on May 8, 1956. On May 10, 1956, the caveator filed an affidavit and this was served on Hamilton, Harrison & Matthews on May 11.

On February 27, 1957, a notice of motion was filed by Hamilton, Harrison & Matthews moving the court to remove the caveat forthwith; to this notice of motion was attached an affidavit dated February 21, 1957.

On March 18 respondents filed an affidavit stating that it was not competent for

the court to grant the application in the notice of motion. In sub-para. (1) and sub-para. (2) of para. 3 objection is taken that: (1) The application in the motion is not in accordance with the Probate and Administration (Contested Suits) Rules, 1940 (G.N. 264). (2) The procedure for trial of a contested probate suit as laid down in those rules has not been followed.

In sub-paragraph (3) the respondent lays down what procedure he would follow if the procedure prescribed had been followed by the petitioner.

In para. (4) objection is taken that a grant cannot be made as the application for probate does not comply with s. 67 of the Probate and Administration Act, 1881, which requires the application for probate to be verified.

Mr. Kelly for the respondent argues that as this verification was absent the whole citation was a nullity and this requirement must be complied with before the citation can be said to have any validity. I say at the outset I do not accept that argument; the definition and object of citation is defined in Hendersonon Testamentary Succession (4th Edn.)

> "Citation. This is what may be termed an instrument issued by the court, citing persons . . . to come in and show cause why a grant should not issue to a particular person."

Of course failure to verify may well be a reason for the court to refuse of grant of probate but I do not consider the absence of such verification in any manner affects the validity of the citation; normally, however, it would not be the practice to cause to insert a citation notice in the absence of verification.

I now come to the main objection of Mr. Kelly which is as to the form in which the present matter including the petition is before the court. Here I think Mr. Kelly is on good ground. I have tried to read r. 6 of G.N. 264 as liberally as I can; I cannot get away from the fact that

> "the proceedings shall be numbered as a suit in which the petitioner for a grant of probate . . . shall be the plaintiff, and the caveator shall be the defendant, the petition for and grant of probate or letters of administration being *registered* "(my underlining)" as and deemed to be a plaint filed against the caveator, and the affidavit or affidavits filed by the caveator being deemed to be his written statement."

Then follows the procedure requisite for the party opposing.

To my mind these are plain words; the petition has not been registered as a plaint and I cannot accept Mr. Harrigin's arguments that matters can be set right other than in the manner required by r. 6.

In the instant matter the validity of the will is contested in the affidavit of May 10. This is not a matter in my view which can be dealt with by originating summons under O. 36 or by notice of motion. Part of the distinctions arising under probate are brought out in Tristram & Coote's Probate Practice (19th Edn.) p. 460:

> "A will is proved in 'common form' where its validity is not contested or questioned. The executor, . . . obtains the grant . . . upon his own oath."
>
> "A will is proved in 'solemn form' by the executor, or a person interested under the will, propounding it in an *action* '(my underlining)' to which the persons prejudiced by it have been made parties, and by the court, upon hearing evidence, pronouncing for the validity of the will."

No doubt the 'action' procedure in Kenya is substantially cut down by r. 6, but still in my view the proceedings must be by way of 'action,' i.e. suit under r. 6.

Mr. Kelly asks that the motion be dismissed with costs. Mr. Harragin objects that the caveat was filed

later than the fourteen days allowed in the citation, so that, as he submits, the respondents have in that respect not for their part followed the procedure. The practise of the Probate Registry is to allow fourteen days, but in actual fact no time for entering appearance after citation is laid down by statute so far as I can find.

In the reasons I have stated I am of opinion that the present proceedings by way of motion do not lie, nor can they be cured except in the manner as laid down in r. 6.

The motion must be dismissed with costs.

Motion dismissed with costs.

For the applicants:
WL Harrigan
Hamilton Harrison and *Mathews*, Nairobi

For the respondents:
J O'Brien Kelly
J O'Brien Kelly, Nairobi

Kulsumbai Gulamhussein Jaffer Ramji and another v Abdulhussein Jaffer Mohamed Rahim, Executor of Gulamhussein Jaffer Ramji, Secretary, Wakf Commissioners, Zanzibar and others

[1957] 1 EA 699 (HCZ)

Division:	HM High Court for Zanzibar at Zanzibar
Date of judgment:	23 August 1957
Case Number:	27/1957 (O.S.)
Before:	Windham CJ
Sourced by:	LawAfrica

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[1] Practice – Originating summons – When applicable – Determination of validity of wakf – Issues affecting more than immediate parties – Rules of Court, 1922 *to* 1934, *O.* 33 (*Z.*).

Editor's Summary

The plaintiffs took out an originating summons to determine whether a wakf of certain property in Zanzibar, created by the will of one Mohamed Ramji in 1879 was void, or, alternatively, inoperative owing to the failure of the principal object of the wakf. Counsel for the defendant raised the preliminary issue that it was wrong procedure to take out an originating summons to determine the question of the validity of the wakf since the relief sought did not fall within O. 33 of the rules of court, 1922 to 1934, which prescribes what matters may be so determined. Counsel for the plaintiffs, whose contention it was that the wakf was void, argued that the plaintiffs claimed as "heirs" and thus their case fell within para. (*g*) of O. 33 which provided for

"the determination of any question arising in the administration of the estate or trust."

Held–

(i) the questions raised were neither simple nor clearcut, nor could they be determined, even if the summons were adjourned into court, with that expedition which the procedure by originating summons was designed to achieve; In *re William Davies* (1888), 38 Ch. D. 210; In *re Giles* (1890), 43 Ch. D. 391 and *Salehmohamed Mohamed v. P.H. Saldanha*, Kenya Supreme Court (Mombasa) Civil Case No. 243 of 1953 (unreported), applied;

(ii) the plaintiffs' action was not one which properly fell within the scope of O. 33 of the Rules of Court, 1922 to 1934.

Preliminary objection upheld. Summons dismissed with costs.

Cases referred to:

(1) *In re Davies* (*William*) (1888), 38 Ch. D. 210.

(2) *In re Giles* (1890), 43 Ch. D. 391.

(3) *Salehmohamed Mohamed v. P.H. Saldanha*, Kenya Supreme Court (Mombasa) Civil Case No. 243 of 1953 (unreported).

Judgment

Windham CJ: The plaintiffs have taken out an originating summons to determine the question whether a wakf of certain property in Zanzibar, created by the will of one Mohamed Ramji in 1879, is void, or alternatively whether it has become inoperative owing to the failure of the principal object towards which, under the will of the dedicator's nephew and administrator of his estate, one Gulamhusein Jaffer Ramji who died in 1941, the income of the wakf properties was directed to be applied. That object was the providing of an annual feat to the Ismaili Jamat in Zanzibar, and the feast has recently been stopped upon the directions of the late Aga Khan. The first defendant is the executor of Gulamhusein's estate. Since the rights of the Ismaili community appeared to be involved, the president and secretary of that community were added as third and fourth defendants upon the direction of this court. Their counsel now raises, as a preliminary issue, the contention that an originating summons is the wrong procedure for determining the question of the validity of the wakf, since the relief sought does not fall within O. 33 of the Rules of Court, 1922 to 1934, which prescribes what matters may be so determined. To this, counsel for the plaintiffs replies that the plaintiffs, whose contention it is that the wakf is void, claim as "heirs" both of Mohamed and of Gulamhusein, and thus fall within one of the categories of persons who under r. 33 may take out an originating summons, and that the question which they seek to have determined falls within para. (*g*) of the rule, which provides for

> "the determination of any question arising in the administration of the estate or trust."

These, however, are not the only points to be considered in deciding whether any relief falls within r. 33 and may be obtained upon an originating summons or whether it should be claimed by way of a regular action. There are other very pertinent factors. To begin with, it seems to me that the true dispute in this action is not between the first defendant (the executor of Gulamhusein) and the plaintiffs, but is between the plaintiffs on the one hand, who stand to gain by a declaration that the wakf is void, and the third and fourth defendants on the other hand, who as representing the Ismaili community who are the beneficiaries under the wakf stand to gain by a declaration that it is valid. That being so, an originating summons is not the appropriate procedure for determining the dispute. As was pointed out in *In re William Davies* (1) (1888), 38 Ch. D. 210, a case where the applicability of the corresponding and similarly worded Rules of the Supreme Court providing for procedure by originating summons was being considered,

> "No doubt the court has jurisdiction to order other persons to be served, but still, in my opinion, the rules apply only to questions arising between the executors, administrators, or trustees on the one hand, and the person, be he creditor or devise or next of kin, who sets up the claim, on the other hand."

On that ground the originating summons was dismissed.

Secondly, the question of the validity of the wakf in the present case, a wakf which was created nearly 80 years ago and which has been treated and administered as a good wakf until at least only a year or two ago, is a serious question whose determination may affect a whole community, and is in the nature of a test case upon the result of which the fate of other wakfs of a like nature may depend. Moreover it will be urged for the third and fourth defendants that the wakf is still good and that even if the annual feast towards which the income from the wakf properties has since 1941 been applied has now been abolished, the court should formulate a scheme for the future application of that income cy pres. Another question which may have to be determined is whether the direction in the will of Gulamhusein, who died in 1941, that the wakf income should be applied to the upkeep of the said annual feast was

a valid direction or whether, as the plaintiffs seek to show, it was void ab initio. And lastly, learned counsel for the third and fourth defendants has made it clear, and I accept his assurance, that a number of the facts upon which the plaintiffs rely in support of their claim will be contested. Thus the questions raised are neither simple or clear-cut ones, nor can they be determined, even if the summons is adjourned into court, with that expedition which the procedure by originating summons was designed to achieve. It was pointed out in *In re Giles*(2) (1890), 43 Ch. D. 391, that such procedure

> "was intended, so far as we can judge, to enable simple matters to be settled by the court without the expense of bringing an action in the usual way, not to enable the court to determine matters which involve a serious question."

And I would also refer to the following passage from a judgment of my own in *Salehmohamed Mohamed v. P. H. Saldanha* (3), Kenya Supreme Court (Mombasa) Civil Case No. 243 of 1953, (unreported), where the scope and general purpose of procedure by way of originating summons were being considered:

> "Such procedure is primarily designed for the summary and 'ad hoc' determination of points of law or construction or of certain questions of fact, or for the obtaining of specific directions, usually for the safeguarding or guidance of persons acting in a fiduciary capacity or acting under the general directions of the court, such as trustees, administrators, or (as here) the court's own execution officers. That despatch is an object of the proceedings is shown by O. XXXVI, which provides that they shall be listed as soon as possible and be heard in chambers unless adjourned by a judge into a court."

Those general observations were concerned with the Kenya Civil Procedure Rules relating to originating summonses, which correspond in all essential particulars with those of Zanzibar, and they apply with equal force to the latter.

For these reasons I hold that, in view of the issues involved, the plaintiffs' action is not one which properly falls within the scope of O. 33 of the Rules of Court, 1922 to 1934, and the summons is on that account dismissed with costs. It is open to the plaintiffs to institute an action in the ordinary way to obtain the relief which they seek.

Preliminary objection upheld. Summons dismissed with costs.

For the plaintiffs:
KA Master and *KL Jhaveri*
KL Jhaveri, Zanzibar

First defendant appeared in person.

For the second defendant:
S Walshe
Wakf Commissioners, Zanzibar

For the third and fourth defendants:
KS Talati
Wiggins & Stephens, Zanzibar

Karsan Velji v R
[1957] 1 EA 702 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	5 April 1957
Case Number:	19/1957
Before:	Sir Kenneth O'Connor CJ and Forbes J
Sourced by:	LawAfrica

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[1] Criminal law – Appeal – Forging and uttering immigration documents – Corroboration of retracted confession – Penal Code s. 38 (*K.*).

Editor's Summary

The appellant was convicted before the resident magistrate, Nairobi, of thirteen offences comprising personation with intent to defraud an immigration officer and the forging and uttering of immigration documents. He was sentenced to pay a fine of Shs. 6,000/- on each count the fines to be non-cumulative, or in default six months imprisonment with hard labour on each count the imprisonment to be concurrent. The principal grounds of appeal were that a written statement made by the appellant to the immigration authorities was induced by threat and was therefore inadmissible, that the statement was a retracted confession and the magistrate should have warned himself of the danger of convicting on such uncorroborated evidence, and that the weight of evidence did not justify conviction of any of the charges.

Held–

(i) there was ample evidence to justify the magistrate's conclusion that the appellant's statement was made voluntarily and free of any inducement or threat;

(ii) if, as the appellant argued, the rules pertaining to corroboration of accomplice evidence applied with equal force to corroboration of a retracted confession, the non-direction of the magistrate on this point would not be fatal unless a failure of justice had been occasioned; there was ample evidence to corroborate the retracted confession and to show that there had been no failure of justice;

(iii) the submission that certain of the offences were not proved to have occurred on the dates alleged was not material because a precise date was not the essence of the offence nor was it necessary to call oral evidence to prove the contents of documents produced from official custody and admittedly signed by the appellant; it was also unnecessary to give direct evidence of the uttering of the immigration documents when evidence had been given of a passenger's obligation to produce such forms before landing, and the exhibits in question had been produced from immigration records;

(iv) as it was illegal by the Penal Code s. 38 to impose non-cumulative fines and in default concurrent sentences of imprisonment, a total of three years imprisonment with hard labour and fines totalling

Shs. 1,000/- would be substituted.

Appeal against conviction dismissed. Appeal against sentence varied.

Cases referred to:

(1) *R. v. Mundia,* Kenya Supreme Court Criminal Revision case No. 49 of 1956 (unreported).

(2) *Robert Sinoya and David Sinoya v. R.* (1939), 6 E.A.C.A. 155.

(3) *Miligwa s/o Mwinje and Another v. R.* (1953), 20 E.A.C.A. 255.

(4) *Davies v. Director of Public Prosecutions,* [1954] 1 All E.R. 507; 38 Cr. App. R. 11.

(5) *R. v. Dossi,* 13 Cr. App. R. 158.

(6) *Kamau s/o Gikera and Others v. R.* (1955), 22 E.A.C.A. 539.

Judgment

Sir Kenneth O'Connor CJ: read the following judgment of the court: The appellant, a mason by trade, was convicted by a senior resident magistrate in Nairobi on January 14, 1957, of thirteen offences, that is to say, personation with intent to defraud an immigration officer, several counts of forgery and uttering false

immigration documents, forging an application for a certificate of permanent residence, forging a declaration on an application for a British passport and making a false statement for a passport. The appellant was sentenced to pay a fine of Shs. 6,000/- or, in default, to serve six months' imprisonment with hard labour on each count, the fines to be non-cumulative and the sentences of imprisonment concurrent. He was also ordered to pay Shs. 500/- towards the cost of the prosecution, and, in default, one month's imprisonment with hard labour. It was illegal to impose non-cumulative fines and concurrent sentences of imprisonment in default (see the proviso to s. 38 of the Penal Code and *R. v. Mundia* (1) Kenya Supreme Court Criminal Revision Case No. 49 of 1956 (unreported).

In brief, the case for the Crown was:

The appellant's real name was Karsan *Velji* Naran (that is to say that his name was Karsan, his father's name Velji and his grandfather's name Naran). His grandfather Naran was also known as Pancha. The appellant came from the village of Rampur Vekra in Cutch in India. In or about the year 1947, the appellant met in India one Karsan *Kanji* Naran and, either by theft or by purchase, acquired Karsan Kanji Naran's passport No. 23328. Someone, either the appellant or Karsan Kanji, substituted a photograph of the appellant for the photograph of Karsan Kanji in Karsan Kanji's passport. Karsan Kanji Naran has a brother named Vasta who resides in Kenya. Vasta was aware that the appellant had gained possession of Karsan Kanji's passport.

In June, 1947, the appellant arrived at Mombasa from India carrying Karsan Kanji's passport and falsely represented himself to be karsan Kanji. This personation is the subject of count 1.

On June 25, 1947, the appellant signed a form of immigration particulars purporting to be a form of Karsan Kanji Kanbi (Kanbi means mason) and signed it. This forms the subject of count 2. The appellant was accused of forgery of this form. On the same date he was alleged to have presented this to the Immigration Authorities in Mombasa. This uttering forms the subject of count 3.

In March, 1950, the appellant went back to India. An emigration particulars form signed by him is produced in which the name is stated to be Karsan Kanji. He is charged in count 4 with forgery of this form. He returned from India to Kenya in August, 1951, and signed a form of declaration by an entrant to the colony purporting to be a form of Karsan Kanji Naran. In respect of this he is charged, in count 5, with forgery and, in count 6, with uttering the same document.

On April 4, 1955, the appellant filled up and signed an application for a Kenya re-entry pass in the name of Karsan Kanji Naran Patel. Under count 7 he is charged with forgery of this document.

On May 3, 1955, he signed a declaration on a form of particulars of persons departing, purporting to be a declaration of Karsan Kanji. He is charged with forgery of this document under count 8.

On June 18, 1955, he returned to Mombasa again and signed a declaration by an entrant to the colony purporting to be a declaration of Karsan Kanji. This forms the subject of a charge of forgery under count 9 and of uttering under count 10.

On December 19, 1955, the appellant applied for a certificate of permanent residence in the name of Karsan Kanji and signed the application. This forms the subject of a charge of forgery under count 11.

On March 18, 1955, the appellant applied for a British passport and signed a declaration on the application form in the name of Karsan Kanji. This forms the subject of a charge of forgery under count 12. In this application for a passport the appellant stated that his father's name was Kanji Naran Mavji,

whereas, in fact, his father's name was Velji Naran. This forms the subject of count 13, which is a charge of making a false statement for a passport contrary to s. 316 of the Penal Code.

These matters came to light because Vasta Kanji gave information to the Immigration Authorities. Mr. Chawdary, an Immigration Officer in Nairobi, having received a report from Vasta Kanji, went with Vasta to a factory in the industrial area where the appellant was working. Mr. Chawdary asked the appellant whether his name

was Karsan and he said it was. The appellant was taken in Mr. Chawdary's car to the Immigration Department. Vasta was also in the car and, on the way, the appellant looked at Vasta, became very excited and said:

> "I know why you want me and why you are taking me to the office. It is you who are getting me into trouble . . ."

The appellant then said his name was Karsan *Velji*. Mr. Chowdary then said that he had reliable information that the appellant's name was Karsan Velji and not Karsan Kanji. The appellant said that he knew that it was Vasta who had told Chawdary and that what he (Chawdary) said was correct.

Chawdary took a statement from the appellant. The statement was given in Hindustani which Chawdary says that the appellant and he both speak. The statement was taken in the presence of Mr. Pearce, the principal immigration officer.

The defence objected to the inclusion of this statement in evidence on the grounds that it was not voluntarily made and that the appellant did not speak Hindustani properly. The question of the admissibility of this statement was separately tried. The appellant gave evidence on this issue and stated that Vasta had made the statement and not he; but that, eventually, under threats, he had signed it. The learned magistrate ruled that what the appellant had said amounted not to a retraction, but to a repudiation of the statement. He (the magistrate) was, however, satisfied that the appellant did make the statement and that he made it voluntarily and that it was properly taken. He, therefore, admitted the statement.

In his statement the appellant said, among other things, that his true name was Karsan Velji Naran, that in 1947 he had met Karsan Kanji Naran in his village in India who had offered to sell his passport to him (the appellant) for Rs. 1500: he purchased the passport: Karsan Kanji removed his own photograph and affixed that of the appellant, and Vasta was present when that transaction took place and knew all about it. The appellant further stated that he arrived in July, 1947: he went back to India in March, 1950, returning again to Kenya in August, 1951. He signed the immigration particulars form in 1951. He then went back to India on May 3, 1955, and signed the particulars of the persons departing form. He returned to Kenya on July 18, 1955, and signed an IM. 19 form. He further stated that he had obtained a certificate of permanent residence recently and admitted having signed the application therefore. He stated that he had always signed his name as Karsan Kanji in the immigration forms and applications because he was in possession of a passport under the name of Karsan Kanji although his true name was Karsan Velji. He signed in that way so that it might agree with his passport. In 1948 he lost the previous passport and signed an application form in the name of Karsan Kanji because that was the name in the original passport.

The prosecution called two witnesses hailing from Rampur Vekra. The first said that the appellant's name was Karsan Velji Pancha and that his father was Velji Pancha. The second said that he knew Karsan Kanji Naran who had a brother Vasta: he also knew the accused Karsan Velji.

Karsan Kanji was also called and said that he came from Rampur Vekra: he identified some immigration documents made in 1943 and 1945 as having been signed by him: he knew the accused, Karsan Velji Pancha. He saw him in Rampur Vekra in 1945 and took a case against him in India about his (Karsan's) passport which had been stolen. However he lost the case. He said that the subsequent immigration documents signed in the name of Karsan Kanji had not been signed by him.

At the close of the prosecution case, the appellant elected not to give evidence and stated from the

dock “I wish to withdraw the statement I made at the immigration offices.” He called no evidence.

Manifestly, the defence took this course in order to give the statement made at the immigration offices the status of a retracted confession and to make it necessary for the magistrate to look for corroboration of it and to give himself an appropriate direction. The learned magistrate, however, (possibly because he had ruled that the appellant had previously repudiated the statement and had not retracted it) omitted

to say anything about corroboration in his judgment or to give himself any direction as to the danger of acting on a retracted confession without corroboration. We think that the statement had previously been repudiated, but the learned magistrate having ruled that the appellant had, in fact made it, the appellant then, by his statement at the close of the prosecution case, retracted it, and it should then have been dealt with on the basis that it was a retracted confession.

On the appeal, three grounds of appeal were argued:

(1) that the statement made by the appellant was not admissible as having been made under inducement and threat;

(2) that the statement was a retracted confession and there should have been corroboration of it and a warning of the danger;

(3) that the weight of the evidence was not such as to justify a conviction on the charges.

As to the first ground, we think that the learned magistrate had ample evidence upon which he could reasonably conclude that the statement made by the appellant was voluntarily made and was not made under inducement or threat, and we agree with his finding.

As to the second ground, we have already indicated that we think that the statement was retracted by the appellant after the close of the prosecution case and should have been treated, in the judgment of the learned magistrate, as a retracted confession. In *Robert Sinoya and David Sinoya v. R.* (2) (1939), 6 E.A.C.A. 155, it was suggested by the Court of Appeal for Eastern Africa that the danger of acting upon a retracted confession in the absence of corroboration must depend to some extent upon the manner in which the retraction is made. It seems to us that if ever there was a case to which that dictum would apply it is this one. The retraction is made not on oath and without reasons after a repudiation on oath. As we have said, it was clearly a device by the defence to make the rule relating to retracted confessions applicable. In the circumstances of the case, we think it was understandable that the learned magistrate should give no weight to the purported retraction, though we do not think he should have ignored it to the extent of failing to give himself a direction as to the danger of acting upon a retracted confession unless it is corroborated in material particulars or unless the court after full consideration of the circumstances is satisfied of its truth (*Miligwa s/o Mwinje v. R.* (3) (1953), 20 E.A.C.A. 255); and he should have looked for independent corroborative evidence implicating the appellant in a material particular. There was, in fact, ample independent corroboration. If as argued by learned counsel for the appellant, the rule *Davies v. Director of Public Prosecutions* (4), 38 Cr. Ap. Rep. 11, as to corroboration of accomplice evidence, applies also to corroboration of a retracted confession, then the absence of a direction by the magistrate would be fatal to the conviction, notwithstanding that there may be corroboration, unless the appellate court can say that no failure of justice has in fact been occasioned. As already stated, there was ample evidence in this case corroborating the appellant's retracted written confession in material particulars implicating him and we are convinced that no failure of justice has, in fact, been occasioned by the absence of a proper direction. Accordingly, s. 381 of the Criminal Procedure Code applies and the second ground of appeal fails.

On ground 3, the first submission of learned counsel for the defence was that there was no evidence of the offences charged in counts 1, 2 and 3 (i.e. personation and forgery and uttering of a false Immigration Particulars Form) having occurred on the date mentioned in the charge i.e. June 25, 1947. It is not, of course necessary to lay the date of an offence with precision, unless it is of the essence of the offence. *R. v. Dossi*, (5), 13 Cr. App. R. 158; Archbold (33rd Edn.) 49; *Kamau s/o Gikera and Others v. R.* (6) (1955), 22 E.A.C.A. 539. But the Immigration Particulars Form (which was produced from proper

custody) is dated June 25, 1947, and there was evidence that these forms are filled in and produced to immigration officers who board a ship at or about the time of its arrival at Mombasa. On his own statement the appellant was personating Karsan Kanji and travelling on a bogus passport when

he arrived in 1947 and he said that he signed all the forms and applications of immigration as Karsan Kanji, (this is supported by the evidence of the handwriting expert) although his true name was Karsan Velji. We think that there was evidence on which the learned magistrate could reasonably convict the appellant on these three offences and that, whether the date of their commission was the date mentioned in the form i.e. June 25, 1947, or the date given by the appellant, i.e. July 6 or 7, 1947, is not material.

It was next argued that the evidence before the magistrate proved certain signatures on the documents exhibited and that, therefore, the only portions of these documents properly admissible were the signatures; and that there was no evidence of the contents of the documents other than the signatures. If this means that oral evidence should have been called to prove the contents of documents produced from official custody and admitted or proved to have been signed by the appellant, we do not agree.

Then it was said that counts 3, 6 and 10 related to the offence of uttering documents and that there should have been specific evidence that the appellant uttered the Immigration Particulars Form, and the Declaration by Entrant to the Colony, and that routine evidence was not enough. We do not agree. There was evidence that passengers arriving in the colony must produce these forms to the immigration officer who boards the ship and these forms were produced to the courts from the immigration records. We think that there was evidence upon which the learned magistrate could reasonably infer that they had been uttered to the immigration officer.

As regards count 13, learned counsel for the appellant argued that there was no evidence or presumption that the contents of exhibit 13 – the Passport Application Form – were completed by the appellant. There is, however, a declaration in it signed by the appellant that the information given in the application is correct to the best of his knowledge and belief. There is also his statement, which is evidence that his father's name was Velji and not Kanji as stated in the application and that he knew this, but completed the application to accord with the bogus passport which he had previously procured.

As regards the forgery charges, it was argued that the magistrate should have examined each separately and should not have dealt with all the charges together in one omnibus paragraph in his judgment and, further, that he should have stated which paragraph or paragraphs of s. 343 of the Penal Code applied. We agree that it is always desirable that a judgment should indicate that each charge against an accused person has been separately and carefully considered, and it is always desirable that the judgment should indicate that all the ingredients of each offence have been considered. But we do not think that, provided the learned magistrate was satisfied (as he clearly was) beyond reasonable doubt that the appellant had, with intent to deceive the immigration officials, signed the various documents mentioned in the forgery charges in such circumstances as to constitute forgery, the mere fact that the magistrate did not specify which one or more of the paragraph in s. 343 (*d*) applied would vitiate the convictions. We think that whether the offences charged in the forgery counts did or did not fall within other sub-paragraphs of s. 343 (*d*), they clearly fell within sub-para. (iv).

We see no reason for interfering with the conviction; and the appeal against the convictions is dismissed.

We have already pointed out that the sentences are illegal. In our view they are also manifestly inadequate for the gravity of the offences committed. Forgery and uttering are serious offences and personation and false statements for the purpose of evading the immigration laws are, unfortunately, prevalent. The sentences are set aside, (including the direction as to costs of the prosecution) and, in lieu thereof, we impose the following sentences:

The offences of which the appellant was convicted on counts 1, 2 and 3 arose out of the same transaction and we think should be dealt with by concurrent sentences. On each of these three counts we impose a sentence of six months' imprisonment with hard labour to be served concurrently. It could be said that the subsequent offences all arose from the original offence of personation and presentation of bogus

documents to the immigration authorities in 1947 and that the proper punishment would be to impose a sentence of several years' imprisonment with hard labour on the first 3 counts and nominal sentences on the subsequent counts. On the other hand, there was a locus poenitentiae between each set of offences, of which the appellant did not avail himself. He pursued a deliberate course of conduct and we think, in the circumstances, that we should deal with each subsequent set of offences by imposing a separate punishment.

On count 4, we impose a fine of Shs. 500/-; in default three months' imprisonment without hard labour to be served consecutively to the sentences on counts 1, 2 and 3.

On counts 5 and 6, we impose a sentence of six months' imprisonment with hard labour to be served concurrently with each other, but consecutively to the sentences on counts 1, 2 and 3 and on count 4, if served.

On count 7, we impose a sentence of six months' imprisonment with hard labour to be served consecutively to the sentences on counts 5 and 6.

On count 8, we impose a fine of Shs. 500/-; in default three months' imprisonment without hard labour to be served consecutively to the sentence imposed on count 7.

On counts 9 and 10, we impose a sentence of six months' imprisonment with hard labour on each count to be served concurrently with each other, but consecutively to the sentence of imprisonment on counts 7, and on count 8, if served.

On count 11, we impose a sentence of six months' imprisonment with hard labour to be served consecutively to the sentences on counts 9 and 10.

On counts 12 and 13, we impose a sentence of six months' imprisonment with hard labour on each count, the sentences to be served concurrently with each other, but consecutively to the sentence on count 11.

This makes a total of three years' imprisonment with hard labour and fines totalling Shs. 1,000/-; in default a further three months' imprisonment without hard labour in respect of each fine. If the fines and costs have been paid, Shs. 5,500/- should be refunded.

Appeal against conviction dismissed. Appeal against sentence varied.

For the appellant:
DPR O'Beirne
DPR O'Beirne, Nairobi

For the respondent:
DD Charters (Crown Counsel, Kenya)
The Attorney-General, Kenya

Shadi Ram Mohindra v BC Mohindra

[1957] 1 EA 708 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	31 January 1957
Case Number:	1619/1953
Before:	Rudd J
Sourced by:	LawAfrica

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[1] Costs – Interest – Whether costs carry interest in absence of specific order – Civil Procedure Ordinance, s. 26 (2) *and s.* 27 (2) (*K.*).

Editor's Summary

The successful defendant in this case was awarded costs but the judge made no order as to interest thereon. The defendant argued that when no such order is made, the aggregate amount of the decree is deemed to carry interest at 6 per cent. per annum and relied on s. 26 (2) of the Civil Procedure Ordinance. The plaintiff on the other hand contended that to add interest on costs automatically would take away all the discretion which had been specifically conferred upon the court.

Held – s. 27 (2) specifically deals with interest on costs and so overruled any possible application of s. 26 to interest on costs in the absence of a specific order.

No cases referred to in judgment

Judgment

Rudd J: In my opinion s. 26 of the Civil Procedure Ordinance does not apply to interest on costs. The wording of the section is perhaps capable of applying to decrees for costs if there were no other specific provision. But in my opinion s. 27 (2) specifically deals with interest on costs and so overruled any possible application of s. 26 to interest on costs. In my opinion when the costs are awarded to plaintiff or defendant they do not carry interest unless there is an order for interest on costs. Plaintiff to have costs of to-day without interest.

For the plaintiff:
Mrs L Kean
Sirley & *Kean*, Nairobi

For the defendant:
I Lean

Shapley, Barrett, Allin & Co, Nairobi

Elijah Ndegwa v President and Members of Nairobi Liquor Licensing Court

[1957] 1 EA 709 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	10 July 1957
Case Number:	42/1957
Before:	Rudd Ag CJ and Connell J
Sourced by:	LawAfrica

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[1] Licensing – Bias of court – Members of Licensing Court as witnesses against applicant and also members of court in same cause – Whether court properly constituted.

[2] Licensing – Cancellation of Licence – Whether liquor licensing court can cancel licence – Whether court can act of its motion in certain cases – The Liquor Licensing Ordinance, 1956, *s.* 3, *s.* 4, *s.* 12 *and s.* 16 (1) (*now replaced by Ordinance No.* 20 *of* 1957) (*K.*).

Editor's Summary

This was an application for an order of certiorari to quash the decision of the Nairobi Liquor Licensing Court cancelling the applicant's Non-Spirituous (Off) Liquor Licence. It was alleged that on May 3, 1957, the president and two members of the Liquor Licensing Court visited the applicant's premises and collected, in his absence, his "Non-Spirituous Liquor Licence" which was on the premises. On May 6, 1957, the applicant called on the president and was handed back this licence and he also received a fresh licence headed "Non-spirituous (Off) Liquor Licence." This licence was back-dated to February 5, 1957, the date of the original licence. On May 20, 1957, the Licensing Court cancelled this licence holding that it did so as an executed tribunal. Thereupon the applicant filed this motion and the affidavit in support alleged (*a*) that the Licensing Court as constituted under s. 4 of the Liquor Licensing Ordinance could not entertain applications for cancelling a licence; and (*b*) that

> "the officer-in-charge, Extra Provincial District who is also chairman of the Licensing Court could not hold a meeting for the purpose of cancelling a licence."

The other point for which the applicant contended was that as the president and the two members of the Liquor Licensing Court had visited the applicant's premises and told him that his licence would be cancelled and that these two members had given evidence before the court which included the same two members and the president, the court was violating one of the first principles of natural justice in that it comprised members who were witnesses and "pursuers" as well as judges.

Held–

(i) the Liquor Licensing Court was duly appointed under s. 4 of the Ordinance and it was perfectly clear that s. 16 (1) read with the definition in s. 3 gave it jurisdiction to cancel an existing licence;

(ii) "We have no doubt at all that by the wording and intention of the Ordinance the Liquor Licensing Court is a quasi-judicial tribunal and that the decision of the court cancelling the licence was a judicial act. It is by definition a court";

(iii) the two members of the court who gave evidence became at once prosecutors, witnesses and judges in the same cause; both these members must be held to have been biased and should not have sat as members of the court which cancelled the applicant's licence;

(iv) sub-s. 12 (1) enabled the court of its own motion to take notice of any matter or thing which in its opinion constituted an objection on an application for a licence; sub-s. (2) enabled the court to act of its own motion under sub-s. (1) in respect of renewals, transfer and removals of licence; and removals did not cover cancellations.

Per curiam – ". . . a court order investigations into the conduct of a licensee though that conduct might lead to eventual cancellation; it would seem that s. 11 (5) would require evidence on oath if the court desired to resuscitate the result or report of the investigations so that the result could be considered judicially."

Order of Certiorari to issue. Proceedings of the Liquor Licensing Court set aside.

Cases referred to:

(1) *Frome United Breweries v. Bath Justices*, [1926] A.C. 586.

(2) *R. v. Camborne Justices*. *Ex parte* Pearce, [1954] 2 All E.R. 850.

Judgment

Rudd Ag CJ: read the following judgment of the court: The facts leading up to the present proceedings by way of certiorari to quash the decision of the Nairobi Liquor Licensing Court cancelling the applicant's liquor licence are as follows:

On February 5, 1957, the cashier in the department of the officer-in-charge, Nairobi Extra Provincial District issued what purported to be a non-spiritous off-licence to the applicant in these proceedings. That licence, if it were validly issued, would normally expire on December 31, 1957. On the assumption that the old Liquor Ordinance (Cap. 266) were still in force, that licence would have been validly issued under s. 11 of that Ordinance or under s. 11 as amended by Ordinance No. 2 of 1955.

It so happens, however, that some months before February 5, 1957, on October 1, 1956, by Legal Notice No. 459 of 1956 the present Liquor Licensing Ordinance No. 37 of 1956 came into force. Section 52 of Ordinance No. 37 of 1956 repeals Cap. 266 in so far as Ordinance No. 37 of 1956 relates to the sale of liquor and licensing for sale of liquor, though under the proviso to s. 52 licences granted under Cap. 266 continue to have the same force and effect as if they had been granted under the present Ordinance.

On February 15, 1957, criminal proceedings were commenced against the appellant on a charge sheet containing five counts alleging various offences under Ordinance No. 37 of 1956, but on March 22, 1957, the charges were withdrawn on the grounds, *inter alia*, that the licence forms granted to the applicant on February 5, 1957, were of doubtful validity under Ordinance No. 37 of 1956.

On May 3, 1957, Mr. Goodbody, the president of the Liquor Licensing Court and Messrs. Blencowe and Tandon, members of the court, visited the applicant's premises and collected, in his absence, his "Non-Spiritous Liquor Licence" which was on the premises.

On May 6, 1957, the applicant called at the officer of the officer-in-charge, Extra Provincial District. A conversation took place and Mr. Goodbody handed back the former licence to Mr. Ndegwa and handed him another licence the form of which was exhibited as Ex. C; this licence was headed "Non-Spiritous (Off) Liquor Licence" and purported to be granted under the Liquor Licensing Ordinance, 1956, and the Liquor Licensing Rules, 1956; the form purported to follow with certain changes Form No. 3 which is the form prescribed by r. 3 (3) (*a*) of the rules. It is agreed by Mr. Kennedy that the condition at the foot of the licence was endorsed

> "that liquor shall not be sold for consumption on the premises or within 100 yards of the premises."

This licence was backdated February 5, 1957.

It was this licence and this licence only which formed the subject matter of the proceedings for cancellation held by the Liquor Licensing Court on May 5, 1957.

We must pause now to consider the affidavit of May 23 filed by the applicant in support of the motion for certiorari to quash the proceedings of the Liquor Licensing Court. It is to be observed that para. 9 of

the affidavit alleges as a basis for relief two grounds:

(*a*) that the Licensing Court as constituted under s. 4 of the Liquor Licensing Ordinance could not entertain applications for cancelling a licence;

(*b*) that the officer-in-charge, Extra Provincial District who is also chairman of the Licensing Court could not hold a meeting for the purpose of cancelling a licence.

The court indicated that in their view there was no substance in either of these grounds for relief. The Licensing Court was duly appointed under s. 4 of the Ordinance and

it is perfectly clear that s. 16 (1) read with the definition in s. 3 gives it jurisdiction to cancel an existing licence. Mr. Bhandari then urged the court to consider the statements in para. 3 and para. 4 of the supporting affidavit that the president and two other members of the court which sat on May 20 had visited Mr. Ndegwa's premises and collected his first licence on May 3. He also urged that Mr. Goodbody had stated to Mr. Ndegwa that he will cancel the licence. In Mr. Bhandari's submission both these allegations were sufficient to show that the president was biased in the legal sense, and that in visiting the premises on May 3 and subsequently sitting on the cancellation court all three members had acted in a manner contrary to the dictates of natural justice.

Mr. Kennedy objected to these allegations being argued as neither of them formed a specific ground for relief under para. 9. The court was of opinion that these allegations should have been stated as specific grounds for relief but, nevertheless, allowed Mr. Bhandari to argue on them.

Mr. Kennedy requested the court to allow him to put in an affidavit in answer to the allegations against Mr. Goodbody in para. 4 of Mr. Ndegwa's affidavit. The court gave permission to him to do so and gave permission to Mr. Bhandari to put in an affidavit in reply.

On the final adjournment the court heard Mr. Kennedy and then heard Mr. Bhandari in reply; it was only during his last speech that Mr. Bhandari shifted his ground yet again and took up the position that in allowing Mr. Blencowe and Mr. Tandon to give evidence before the court on May 20 and in allowing those same members to sit on the court which then decided the matter, the Licensing Court was violating one of the first principles of natural justice in that it consisted of members who were witnesses and "pursuers" as well as judges.

The court was strongly of opinion that this final position taken up at so late a stage by Mr. Bhandari should have expressly stated in the application as a ground for relief and averred on affidavit; he may have been supplied somewhat late with a copy of the proceedings before the Licensing Court but there was nothing whatsoever to stop him from requesting a short adjournment to include this ultimate position or submission as an additional ground for relief. Nevertheless, in view of the importance of this matter and the fact that the fact was admitted, we allowed Mr. Bhandari to argue this final ground and we allowed Mr. Kennedy to reply.

In our view there is substance in the final ground allowed to be argued by Mr. Bhandari. The relevant law on the subject and the authorities appear to be so fully and clearly discussed by the learned Law Lords in *Frome United Breweries v. Bath Justices* (1), [1926] A.C. 586, that we can see little necessity for referring to other authorities. The facts in the *Frome* case (1) were that on an application for renewal of a licence the licensing justices who were the borough licensing committee unanimously decided to refer consideration of the renewal to the compensation authority; at a later meeting of the licensing justices a resolution was passed to request a solicitor to act for the licensing justices in opposing the renewals referred to the compensation authority. The question of renewal then came up before the compensation authority of which four members were members of the renewal authority who had retained the solicitor to oppose renewals. The applicant's solicitor protested vehemently against any of the four members of the renewal authority sitting in the compensation court in view of the fact that they had retained a solicitor to oppose the renewal. The objection was overruled by the compensation court.

Though the provisions of the Licensing Consolidation Act naturally differ from those of the Liquor Licensing Ordinance we have no doubt that in considering the facts stressed by Mr. Bhandari in his final submissions we have to ask much the same succinct questions and be guided by much the same

principles which were asked, answered and applied by their lordships in the *Frome Breweries* case (1). At p. 600 of Lord Atkinson's judgment this passage occurs:

> "The first question for decision in the case is: Was the act of the compensation authority in refusing a renewal of the licence applied for by the appellants a judicial

> or merely an administrative act? And second, if it was a judicial act, were the members of that authority who took part in it, or any of them, actuated by bias, or were they not?"

Lord Atkinson continues:

> "I use the words 'any of them' in this connection advisedly because it was decided in *Reg. v. Hertfordshire Justices* that if one of the magistrates who heard a case at sessions be interested in the issue the court is improperly constituted, and an order made in the case would be quashed on certiorari. In such a case it was held to be no answer that there was a majority of the justices presiding in favour of the decision arrived at without reckoning the vote of the interested party, . . ."

Transposing the first question posed by Lord Atkinson and asking ourselves whether the act or decision of the Liquor Licensing Court in cancelling the applicant's licence was judicial or merely an administrative act we have no hesitation in stating that it was a judicial act. We do not propose to analyse the various section of the Ordinance; s. 13, s. 14 and s. 15 prescribe conditions under which the Licensing Court may refuse the grant, transfer or renewal of a licence. Subject to the provisions of s. 13, s. 14 and s. 15 s. 16 (1) allows the court to grant, renew or transfer a licence subject to such conditions as it may deem fit, or it may refuse such grant, renewal or transfer, or may, at any time, cancel an existing licence. Under s. 17 (1) appeals are allowed against refusals to renew or transfer. It is true no conditions are expressly laid down under which the court may or may not cancel a licence; but one has to bear in mind what is the real nature of the decision of the Licensing Court and the limitations contained in s. 15 on the court's power to refuse the renewal of a licence. To transpose another passage in the *Frome* case (1) slightly we think it was in effect a decision confiscating a substantial interest of the appellants in their own property; if, therefore, the Licensing Court makes a decision, the consequence and direct effect of which is to deprive the owner of the shop of the privilege of carrying on a business of a certain kind, then the decision involves a diminution in value of the subject's property. That should be done, if at all, properly in due form of law.

In the course of the decision of the Licensing Court before us the passage occurs

> "we are unable to accept the submission that the Licensing Court is a quasi-judicial tribunal, or that its proceedings or decision are quasi-judicial. We consider that a Licensing Court is an executive tribunal."

No doubt that was the genuine expressed opinion of the members of the court: Mr. Kennedy did not support that opinion and we find it unnecessary to comment at length on the opinion. We have no doubt at all that by wording and intention of the Ordinance the Liquor Licensing Court is a quasi-judicial tribunal and that the decision of the court cancelling the licence was a judicial act. It is by definition a court.

Having answered the first question posed by us we now turn to the second question. By way of an answer we can hardly do better than quote some passage from Lord Atkinson's speech in the *Frome Breweries* Case (1); at p. 605 he says:

> "Then why is an adjudication in which gentlemen have acted both as judges and accusers at the same time to be upheld? There is a sequence of authority holding that it cannot be, and it suffices to quote a passage from the judgment of Cotton, L.J. . . . in which he says 'Of course the rule is very plain, that no man can be plaintiff or prosecutor in any action, and at the same time sit in judgment to decide in that particular case, either in his own case, or in any case where he brings forward the accusation or complaint in which the order is made.'"

An earlier passage at p. 600 of Lord Atkinson's judgment so nearly fits what happened in the proceedings on May 20 in the Liquor Licensing Court, that we repeat this passage in extenso

> "It could not possibly have been intended by this statute to authorise a practise

> which would, I think, be inconsistent with the proper administration of justice – namely, that a licensing justice, one of the members of the compensation authority, should, on a given occasion, descend from the bench, give his evidence on oath, and then return to his place upon the bench to give a decision possibly based on his own evidence . . .”

The respondent relied on the judgment of Slade, J., in *R. v. Camborne Justices. Ex parte Pearce* (2), [1954] 2 All E.R. 850 at p. 855, but the facts of that case were quite different from the facts of the *Frome* case (1) and from the facts of the present case. That decision is not necessarily inconsistent with the decision in the *Frome* case (1), which was a decision of the House of Lords and is therefore of the highest authority. In the *Camborne* case (2) none of the justices were impugned. Their clerk was impugned but he did not take part in the deliberations of the justices although he advised them on points of law.

We do not in any way impugn the honesty and good motives of Commander Blencowe and Mr. Tandon in acting as they did, but they thus became at once prosecutors, witnesses and judges in the same cause; we have no doubt, therefore, that according to a line of authorities both these members of the court must be held to have been biased and should not have sat as members of the court which cancelled the applicant’s licence.

In our view, therefore, Mr. Bhandari must succeed on the final ground urged by him. The order of certiorari must issue and the proceedings of the Liquor Licensing Court held on May 20 cancelling the applicant’s licence are set asie.

As to the question of costs we have stated sufficient of the manner in which Mr. Bhandari went about this motion before us to leave us in no doubt as to the correct order; we make no order as to costs.

Before rising we state that we were invited to express as opinion on the interpretation of various sections of the Ordinance; we see no necessity to do so except with regard to s. 12 (1); this sub-section enables the Licensing Court of its own motion to take notice of any matter or thing which in the opinion of such court constitutes an objection on an application for a licence; sub-s. (2) enables the court to act of its own motion under sub-s. (1) in respect of renewals, transfer and removals of licences; we consider removals do not cover cancellations.

We are of opinion that a court can order investigations into the conduct of a licence though that conduct might lead to eventual cancellation; it would seem that s. 11 (5) would require evidence on oath if the court desired to resuscitate the result or report of the investigations so that the result could be considered judicially.

Finally, as we have in fact ruled, if a member of the Licensing Court wishes to give evidence in support of cancellation, under no circumstances should he sit as a member of the court to adjudicate on the cancellation.

Order of Certiorari to issue. Proceedings of the Liquor Licensing Court set aside.

For the applicant:
MK Bhandari
Bhandari & Bhandari, Nairobi

For the Liquor Licensing Court:
DC Kennedy (Crown Counsel, Kenya)

For the respondent:
The Attorney-General, Kenya

Re GM (an Infant)
[1957] 1 EA 714 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	4 December 1957
Case Number:	97/1957
Before:	Miles J
Sourced by:	LawAfrica

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[1] Infant – Guardianship – Both parents of Kikuyu child dead – Father's brother claiming child by virtue of native law and custom – Child living with stranger who wished to adopt it – Rights of blood relation as against stranger.

Editor's Summary

G. M. a female Kikuyu child had since February, 1955, been living with the respondent, a comparatively well-to-do Nandi woman. The child's mother had died in 1954 and the father, who was repatriated to the Native Reserve under the Emergency Powers Regulations, had also died since. The applicant applied for a writ of habaes corpus and claimed that according to native law and custom he, as brother of the deceased father, had the right to custody against all strangers and filed in support an affidavit by a Kikuyu elder. The statements contained in the affidavit had not been controverted, but the respondent contended that the welfare of the child was the paramount consideration and this required that the child should remain with the respondent. It was further contended that the applicant, not being a parent but only a guardian at the highest, did not possess the right of a parent.

Held–

(i) the court was entitled to inquire what the position of the applicant was under native law and then to inquire what would be the rights of a person in that position under English law;

(ii) this was a case where, under English law, the applicant would be held to have a legal right to the custody of the child as against all strangers.

Application granted.

Cases referred to:

(1) *R. v. Gyngall*, [1893] 2 Q.B. 232.

(2) *In re Fynn* (1848), 2 De G. & S. 457.

(3) *In re Carroll* (*J. M.*), [1931] 1 K.B. 317.

(4) *Mohamed Hassan v. Nana Binti Mzee* (1944), 11 E.A.C.A. 4.

(5) *Sibley v. Perry* (1802), 7 Ves. 523; 32 E.R. 211.

(6) *R. v. Nash* (1883), 10 Q.B.D. 454.

(7) *R. v. Clarke*, 7 E. & B. 186.

(8) *In re Andrews* (1873), L.R. 8 Q.B. 153.

Judgment

Miles J: This is an application for a writ of habeas corpus to issue in respect of the body of one G. M. a female child aged about four years. The application raises the question of the custody of this child.

The child in question is of the Kikuyu tribe. Her mother was one Jeri, who died in or about May, 1954, and her father was N. K., who died in or about the month of April, 1957, it is said, by his own hand.

In 1954 the father was repatriated to the Native Reserve under the Emergency Powers Regulations.

The child was admitted to hospital in Nairobi in 1954 and on or about January 22, 1955, was transferred to the Salvation Army Home at Nairobi. The mother having died and the father having been repatriated, this occurred. The respondent, a Nandi woman, who is a widow, obtained the custody of the child in February, 1955, through a Dr. Gregory of the "Save the Children Fund" with the concurrence of the District Commissioner . . . The child has been living with the respondent since that date up to the present time.

What right these people had to hand over the child in this matter I do not know although I have no doubt that they made the most careful inquiries as to the whereabouts of the parents and as to the suitability of the respondent. I may say also that they could hardly have found a better home for the child. Nevertheless the circumstances in which the child came to be in the possession of the respondent have in my view a material bearing on this case.

The respondent is employed by a Mr. and Mrs. Bancroft on their farm at K. and has been so employed for some twenty-three years. She receives a monthly salary of Shs. 55/- and rations in addition. She has also the use of two acres of land and a three-roomed brick built house. She possesses a savings bank account which is in credit to the extent of Shs. 11,600/- which has accrued since 1937 through the sale of cattle, maize and eggs.

The respondent has had the custody of a Kikuyu orphan named "Georgie" since 1954. She has opened a Post Office savings account in his name which at present stands at Shs. 2,000/-. The respondent has stated her intention of doing the same for G. M. She has the highest testimonial from her employer and is clearly a trust-worthy individual. It is stated by her employer that G. M. is being brought up in a manner far superior than is usual for African children.

The applicant, who is the brother of the child's father, is married with three children and is employed at the Norfolk Hotel, Nairobi, as a room boy. His wages are Shs. 90/- per month and no doubt he receives gratuities in addition.

The case for the applicant is that, according to Native law and custom he, as the brother of the deceased father, has the right to custody as against all strangers and an affidavit by a Kikuyu elder has been filed to support this.

Paragraph 5 of the affidavit states:

> "That among my tribe the paternal uncle of an orphan child has by custom the right and duty of guardianship of the said child before all others. By custom the brother of the dead father should assume custody. The right and duty of the brother of the dead father holds good against all other claimants."

The statements contained in the affidavit have not been contradicted by the respondent.

The case for the respondent is that the welfare of the child is the paramount consideration and that this requires that the child should remain where she is. It is further contended that the applicant, not being a parent but only a guardian at the highest does not possess the rights of a parent.

I am bound to say that, if it were merely a question of weighing the comparative advantages to the child the scales would come down heavily on the side of the respondent, but, as I have said, it is contended that the applicant in this case has rights which cannot be overridden.

If this case were to be determined according to English Law the position would be quite clear. The welfare of the child is the paramount consideration as between parents inter se or between strangers inter se. As between a parent and a stranger, however, the parent has a right which has been the subject of judicial definition more than once.

For instance Lord Esher, M.R., in *R. v. Gyngall* (1) ((1893) 2 Q.B. 232 at p. 242). quotes Knight Bruce, V.-C., in *re Fynn* (2) ((1848) 2 De G. & S. 457):

> "Before this jurisdiction can be called into action it . . ." (i.e. the Court) "must be satisfied, not only that it has the means of acting safely and efficiently, but also that the father has so conducted himself, or has shown himself to be a person of such a description, or is *placed in such a position* as to render it not merely better

> for the children, but essential to their safety or to their welfare, in some very serious and important respect that his rights should be treated as lost or suspended – should be superseded or interfered with. If the word 'essential' is too strong an expression, it is not much too strong."

This passage was referred to with approval by Scrutton, L.J., in *In re J. M. Carroll* (3), [1931] 1 K.B. 317 at p. 317 at p. 336. In the present case it is conceded by Mr.

Harragin on behalf of the respondent that it would not be detrimental to the interests of the child in the sense directed by Lord Esher, M.R., if the child were to be handed over to the applicant. It is not disputed that he is a perfectly respectable man who has been in regular employment for the last six years and is able to provide for the child although no doubt he is not so well off as the respondent.

On the question whether English law is applicable in this class of case there is authority in the decision of Her Majesty's Court of Appeal for Eastern Africa in the case of *Mohamed Hassan v. Nana Binti Mzee* (4) (1944), 11 E.A.C.A. 4.

The headnote in that case reads:

> "(2) That in applying the principles of English law to the custody of a child in Kenya the court should have regard to the customs of the race and community to which the child belongs."

I think that this headnote is somewhat misleading. Sir Joseph Sheridan, C.J., at p. 6 says:

> "Before concluding I should like to state my opinion that even though the principles of English law may apply to such cases as the present, in considering the all important question of the welfare of the child, the customs and habits of the community to which the child belongs, must be given serious consideration."

Similarly Sir Norman Whiteley, C.J., says (at p. 7):

> "The word 'welfare' must be taken in its widest sense . . . I would add that in my opinion this court in applying those very wise and beneficent principles as laid down by the courts in England, should in this colony have regard to the customs of the race and community to which the child belongs."

From these passages it would appear that the Court of Appeal were confining the considerations of native custom to the question of the welfare of the child and were not extending them to the question of the rights of the parties. In other words the question of the rights of the parties falls to be determined according to English law.

Article 7 of the Kenya Colony Order in Council, 1921, (Laws of Kenya, Vol. v. p. 55) provides that:

> 7. "In all cases civil and criminal to which natives are parties, every court (*a*) shall be guided by native law so far as it is applicable and is not repugnant to justice and morality or inconsistent with any Order in Council or Ordinance, or any regulation or rule made under any Order in Council or Ordinance, . . ."

I think that the joint effect of this Order in Council and *Mohamed Hassan's* case (4) is that I am entitled to inquire what the position of the applicant is under native law and then to inquire what would be the rights of a person in that position under English law.

Mr. Harragin contends that it is only a "parent" in the strict sense of the term who has any right to the custody of a child at common law. He refers to the definition of "parent" in the Shorter Oxford Dictionary (p. 1432): "a person who has begotten or borne a child; a father or mother." In *Sibley v. Perry* (5) (1802), 7 Ves. 523; 32 E.R. 211, which was the case of a will Lord Eldon, L.C., defined the word "parent" as meaning a father or mother. It is also clear on the evidence that the applicant is, under Kikuyu law, in the position of a guardian with surely all the obligations of a parent. He has greater obligations than a guardian under English law who is not bound to support a child except out of the child's estate.

It must be borne in mind that in this case the applicant is a blood relation and the respondent a complete stranger. In the *R. v. Nash* (6) (1883), 10 Q.B.D. 454 at p. 456, Jessel, M.R., said in dealing with the case of an illegitimate child:

> "The court is now governed by equitable rules, and in equity regard was always had to the mother, the

putative father, and the relations on the mother’s side. Natural relationship was thus looked to with a view to the benefit of the child.

> There is, in such a case, a sort of blood relationship, which, though not legal gives the natural relations a right to the child."

Similarly in *Gyngall's* case (1), [1893] 2 Q.B. at p. 241 Lord Esher, M.R. says:

> "The learned Lord Chief Justice said in effect that the child's consent was immaterial and that the consent of a child of that age could not take away the parent's right as between her and other persons, for that would be entirely to subvert the whole law of the family. It appears to me that that ruling was quite correct."

Lord Esher was then referring to *R. v. Clarke* (7), 7 E. & B. 186, where certain parties insisted in keeping a child ten years of age as against a parent.

English law recognises the rights of local or customary guardians, as for instance, guardians by Custom of the City of London in respect of orphans of Freeman, (see Eversley on Domestic Relations – (6th Edn.) p. 441) and the town of Berwick on Tweed. (17 Halsbury's Laws (2nd Edn.) p. 690). In *In re Andrews* (8) (1873), L.R. 8 Q.B. 153, a testamentary guardian appointed under 12 Car. 2 c. 24, s. 8 was held to stand in loco parents and had a legal right to the custody of an infant and it was decided that a common law court had no discretion to refuse him a writ of habeas corpus.

It is said that the respondent is herself a sort of guardian as having the "actual care and custody" of the child. (See 2 Halsbury's Laws (2nd Edn.) p. 436). Having regard to the circumstances in which the respondent acquired the custody of the child I do not consider that she can be regarded as a "guardian" in the legal sense of the term. It appears from the applicant's affidavit that he has made various attempts on his own behalf and on behalf of the father to get hold of the child. The respondent's position has, I think, been aptly described by Mr. Gledhill as "adverse possession." This cannot be said to give her any rights as against a person who is a blood relation such as the applicant and is a guardian recognised by Kikuyu law. In fact I do not see how the respondent can be said to have acquired any "right" in respect of the child at all.

In my opinion this is a case where, under English law, the applicant would be held to have a legal right to the custody of the child as against all strangers and I therefore order a writ of habeas corpus to issue. The respondent will pay the costs of the application. I realise that this order will cause much distress to the respondent, and also for a time to the child, but I am convinced that, in law there is no other course open to me.

Application granted.

For the applicant:
J Gledhill
Gledhill & Oulton, Nairobi

For the respondent:
WL Harragin
Hamilton Harrison & Mathews, Nairobi

Jivandas Goculdas v The Administrator General, Zanzibar, Administrator of the Estate of Amour Bin Mohamed El Muharmi Deceased

[1957] 1 EA 718 (CAZ)

Division:	Court of Appeal at Zanzibar
Date of judgment:	14 September 1957
Case Number:	30/1957
Before:	Sir Newnham Worley P, Sir Ronald Sinclair V-P and Bacon JA
Sourced by:	LawAfrica
Appeal from:	High Court of Zanzibar – Windham, C.J

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[1] Execution – Attachment of proceeds of sale of clove crop – Whether immunity from attachment of crops extends to proceeds – Construction of Land Alienation Decree, 1939*, s.* 9 (*Z.*) *– Indian Code of Civil Procedure, s.* 97 *– Civil Procedure Decree, s.* 2*, s.* 35 (1)*, s.* 47 *and s.* 73 (*Z.*) *– Debts Settlement Decree,* 1938 (*Z.*).

Editor's Summary

The respondent was the administrator of the estate of a deceased Arab resident of Zanzibar and had in his hands a fund representing the proceeds of sale of a clove crop owned by the deceased. The appellant had obtained a decree for Shs. 19, 161/38 against the deceased and having filed an application for execution of the decree by attachment of the proceeds of sale took out a summons calling on the respondent to show cause why execution should not be granted. The respondent submitted that by reason two previous decisions of the High Court of Zanzibar between the same parties the matter in issue was res judicata, and in the alternative that on a proper construction of s. 9 of the Land Alienation Decree the proceeds of sale of the produce of the land as well as the produce itself, were immune from attachment. The High Court held that the matter was not res judicata but upheld the respondent's second contention. The appellant submitted on appeal that s. 9 should not be constructed as restrictive of the general right of execution, and the respondent cross-appealed on the ground that the court was wrong in holding that the issue was not res judicata.

Held–

(i) the Civil Procedure Decree constituted the expression of the general right of a judgment creditor to execute, and the Land Alienation Decree imposed a limitation on that general right; express and unambiguous language was required to take away legal rights, and in construing s. 9 there was no justification for accepting the respondent's contention that a secondary significance existed beyond the natural meaning of the words;

(ii) the adjudication on the issue of res judicata was a determination of a question within the Civil Procedure Decree s. 35; it gave rise to a preliminary decree which the respondent was precluded by s. 73 from disputing because the present appeal was from the final decree.

Appeal allowed. Cross-appeal dismissed.

Cases referred to:

(1) *Tzamburakis and Lambrou v. Rodoussakis* (1956), 23 E.A.C.A. 247.

(2) *Magor and St. Mellons, R.D.C. v. Newport Corporation* [1952] A.C. 189; [1951] 2 All E.R. 839.

(3) *Twycross v. Grant* (1877), 2 C.P.D. 469.

September 14. The following judgment was read by direction of the court:

Judgment

Amour bin Mohamed el Muharmi, AN inhabitant of Zanzibar, (hereinafter called “the deceased”) owned the crops grown on certain shambas situated in that Protectorate. In Civil Suit No. 30 of 1948 in H.B.M. Court for Zanzibar the plaintiff Jivandas Goculdas, the present appellant, obtained a decree for Shs. 19, 161/38 against

the deceased on July 26, 1948. The latter died before any part of the decree was satisfied, and the respondent in this appeal thereafter became the administrator of his estate including a clove crop for the year 1955/56. At the hearing of the appeal the advocates on both sides – Mr. K. S. Talati for the appellant and Mr. Balsara for the respondent – agreed that there is no evidence in the record as to whether the respondent sold the crop in question on the trees or himself caused it to be picked and sold. Although we were informed from the Bar, and no doubt quite correctly, that it is usual for a proprietor in Zanzibar to auction the right to pick a clove crop rather than to pick and sell the crop himself, we cannot assume that the former was done in this instance; all we know is that the crop was picked and sold and that the proceeds of sale, namely Shs. 16,114/50, are in the hands of the respondent qua administrator of the deceased's estate.

The appeal arose in this way. The appellant, as decree-holder in the aforementioned suit, having filed an application for execution of the decree by attachment of the said proceeds of sale, took out a summons calling upon the respondent to show cause why execution should not be granted. The respondent thereupon took two objections.

The first objection was that by reason of two previous decisions of the High Court of Zanzibar the matter in issue was res judicata. The second, alternative to the first, was that the fund which it was sought to attach was immune by virtue of s. 9 of the Land Alienation Decree, 1939.

The learned chief justice, Windham, C.J., first dealt separately with the first objection, disallowing it by a decision given on November 30, 1956. While agreeing that the court (Robinson, C.J.) had in two other execution proceedings between the same parties – one in Civil Suit No. 29 of 1948, the other in Civil Suit No. 30 of 1948 itself – upheld the judgment-debtor's objection that the proceeds of certain sales of the deceased's crops were, under the Land Alienation Decree, just as immune as the crops themselves, the chief justice held that the issue as regards the proceeds of the sale of the 1955/56 clove crop was not res judicata for three reasons: first, because the crop and the fund were each distinct in all three cases; secondly, because his learned predecessor, Robinson, C.J., had expressly qualified his earlier decision (in Civil Suit No. 29 of 1948) by saying "I have stated a general rule to which I can see there could be exceptions," and because (as Windham, C.J., put it)

> "in the present case, therefore, the decree-holder might wish to show that there are such exceptional circumstances;"

and, thirdly, because the 1955/56 crop – and therefore, still more, the proceeds of its sale – were not in existence when either of the two earlier decisions was given.

The second objection was heard on December 4, 1956, and on January 29, 1957, the learned chief justice ruled thereon in the present respondent's favour; in so doing he followed the two earlier decisions of Robinson, C.J.

The formal "orders" embodying those decisions of Windham, C.J., were extracted on March 25, 1957. Meanwhile, on February 9, 1957, the appellant had filed notice of appeal against the decision of January 29, 1957. He lodged his appeal on April 6, 1957, and the record was served on the respondent on that same day. Five days later the respondent gave notice of cross-appeal against the decision of November, 1956.

At the hearing before us the appellant raised a preliminary objection that the cross-appeal was barred by limitation. We allowed the preliminary objection, dismissed the cross-appeal with costs and stated that we would give our reasons for so doing in the judgment on the appeal.

Mr. Talati's main submission in support of the preliminary objection was that in law the "order" of November 30, 1956, was a preliminary decree and the "order" of January 29, 1957, a final decree within the meaning of the definition of "decree" in s. 2 of the Civil Procedure Decree (Cap. 4), and that by the provisions of s. 73 of that Decree the respondent was precluded from disputing the correctness of the preliminary decree in an appeal from the final decree. He pointed out that the appellant had not appealed against the decision of November 30, 1956 (that decision being wholly in the appellant's favour) but only against the decision being wholly in the appellant's favour) but only against the decision of January 29, 1957.

In support of this submission he relied on the decision of this court in *Tzamburakis and Lambrou v. Rodoussakis* (1) (1956), 23 E.A.C.A. 247.

Tzamburakis and Lambrou's case (1) was an appeal from a decree of the High Court of Tanganyika. Before the main hearing of the action in the High Court two preliminary issues were dealt with by Mahon, J., namely (*a*) whether the amended plaint should be dismissed on the ground that it disclosed a new cause of action, and (*b*) whether the action was time-barred. Both those questions were answered in the negative. The main hearing later proceeded before another judge and judgment was eventually entered for the plaintiff. On appeal to this court the defendants sought to attack the decision of the High Court on the preliminary issues. It was held that the grounds of appeal which related to that decision were incompetent as the decision was the foundation for a preliminary decree and an appeal from such a decree was barred by s. 97 of the Indian Code of Civil Procedure, which section is in the same terms as s. 73 of the Civil Procedure Decree. In his judgment, with which the other members of the court concurred, Briggs, J.A., said:

> "I see no reason why this adjudication (of Mahon, J.) should not be a judgment giving rise to a preliminary decree. It is 'an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to' the two special matters which were put forward for decision as preliminary issues . . . These were not merely interlocutory questions, but would otherwise have had to be decided as substantial issues on the hearing of the suit. The Bombay cases seem to lay some stress on the need for the 'finding' to be 'embodied in the judgment and decree.' This is clearly impossible where different judges hear the preliminary issues and the remainder of the suit, as was quite properly done in this case. I think it may be that the dividing line is to be drawn where the issues are so far severable that they can properly be heard by different judges. I take it as clear that the types of preliminary decree expressly mentioned in the Code and Rules are not the only types that can be passed, that more preliminary decrees than one can be passed in a single suit, that a decree is still in law a decree even if it purports to be an order, and that an adjudication is either a decree or an order and cannot be both, or be split into component parts. On the last point, see *Ahmed Musaji v. Hashim Ebrahim*, 42 Cal. 914 (P.C.) at p. 924. It has been expressly held that it is proper to decide a question of limitation as a preliminary issue under Order XIV r. 2. *Hussain Bakhsh v. S. of S.* (1935), 22 A.I.R. Lah. 982. *Chitaley*, 5th ed. 2010, in citing *Re Palmer's Application* (1882), 22 Ch. D. 88, in his commentary on Order XIV, r. 2, obviously contemplates that a decision under this rule may be a decree and may found an appeal. Speaking for myself, and excepting the special case of an application for rejection of a plaint, I am quite unable to see how it can properly be said that the same question answered on a preliminary issue will give rise, if answered in one sense, to an order, but, if answered in the opposite sense, to a decree. In view of the distinction drawn in the definition of 'decree' between preliminary and final decrees, I think this construction is untenable. On the plain wording of the definition it is the nature of the question, not the nature of the answer, which decides whether a decree or an order results."

We thought that that decision was applicable in the instant case. The two issues which were separately tried were clearly severable and could properly have been tried by different judges. Furthermore, if the respondent had succeeded on the issue of res judicata, the execution proceedings would have been conclusively determined in his favour so far as the High Court was concerned. Mr. Balsara sought to distinguish *Tzamburakis and Lambrou's* case (1) on the ground that it related to a decision in a suit, whereas in the instant case the decision was given in execution proceedings. But, by the definition in s. 2 of the Civil Procedure Decree of Zanzibar, "decree" is "deemed to include . . . the determination of any question within s. 35," and sub-s. (1) of that section provides:

> "All questions arising between the parties to the suit in which the decree was

> passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit."

In our view the adjudication on the issue of res judicata was a determination of a question within s. 35, it gave rise to a preliminary decree and by the provisions of s. 75 the respondent was precluded from disputing the correctness of that decree in this appeal which is an appeal from the final decree passed on January 29, 1957.

We turn now to the appeal against the learned chief justice's decision that the fund in the hands of the respondent was immune from attachment by virtue of s. 9 of the Land Alienation Decree, 1939. The material part of that section, as amended, reads:

> "Notwithstanding anything contained in any other law . . . no land of an Arab . . ., or the produce of such land, shall be liable to attachment or sale in execution of a money-decree obtained in any suit for the recovery of a debt."

It was common ground that the deceased was an Arab and that the fund in question was the proceeds of sale of the clove crop concerned, which was the produce of the deceased's land. It was also undisputed that the decree in respect of which the application for execution was made was a money-decree obtained in a suit for the recovery of a debt. The only question which fell for decision was whether the expression "the produce of such land" in s. 9 included the proceeds of the sale of the 1955/56 crop. As already mentioned, the learned chief justice held that it did, just as Robinson, C.J., had twice previously held on exactly similar facts. It may be added that both those learned judges took the view that nothing purchased with the money constituting the proceeds of sale of a crop would enjoy the immunity bestowed by s. 9.

The reasoning of Robinson, C.J., which the learned chief justice adopted with approval appears in the passages from the former's decisions cited by the latter, as follows. In Civil Suit No. 29 of 1948 Robinson, C.J., said this:

> "It is said that a man and his dependants cannot live on cloves alone. He must turn cloves or other produce into cash and buy food, and it is not the intention of the Decree for him to be in peril of having the cash attached if he does so. I agree with that view. The money realized from the sale of the produce is immune from attachment. But if the Arab or African takes another step and buys a motor-car, or a radio, or a refrigerator, or such like thing, then the immunity is gone and the articles are liable to attachment. I have stated a general rule to which I can see there could be exceptions. For instance the case of a debtor who has piled up a balance of Shs. 100,000/- in his bank from the sale of produce and is refusing to pay his debts and yet is not using the money for anything else. Circumstances alter cases and there is nothing specific in the Decree against it."

And in the earlier proceedings in the suit with which we are now concerned Robinson, C.J., said this:

> "In Civil Suit No. 29 of 1948 I held that the money realized from the sale of the produce is immune from attachment. I am bound by that decision, and, in spite of the attractive argument put up by Mr. Talati, I think it is right-to hold otherwise would mean that the Arab or African shamba owner who always sells his crop on the trees together with a licence to pick, because of old age or sickness, for instance, has no immunity under the decree, whereas the owner who harvests himself does have immunity. And this does not mean that the judgment-creditor is defenceless. It he can prove that the debtor has ample means to pay, the debtor can be sent to prison on a judgment summons."

Very briefly to summarize the learned chief justice's own argument which led him to conclude the question in the respondent's favour, he reasoned that to hold otherwise would not afford an Arab debtor the intended protection, for the moment he sold his crop his creditors could starve him by attaching the

proceeds; that the protection of the proceeds “may well be presumed to have been in the mind of the Legislature;”

that "produce . . . in s. 9 can properly be construed as including money" into which the fruits of the land are "converted;" that the right of a decree-holder to attach the property of his judgment-debtor is merely conferred by another statutory enactment, s. 47 of the Civil Procedure Decree, and s. 9 itself, which further restricts the right of attachment, should therefore not be construed in favour of the decree-holder; but that, according to the ordinary rules as to the interpretation of statutes, the expression "produce of such land" in s. 9

> "can be construed as extending not only to its fruits but to the purchase price of such fruits"

as long as the money in question is earmarked as such price. The learned chief justice's decision turned, of course, on the view he took of the appropriate meaning of the noun "produce" in that section. The culminating step in his reasoning was this:

> "Undoubtedly the primary meaning of the word 'produce' in relation to land would be its actual fruits. But among the meanings given to the words in Werster's Dictionary, 2nd Edn., are 'amount produced; return . . .' And the purchase price fetched by the fruits culled from a piece of land can, without any undue stretch of language, be considered as the 'return' from that land, and thus by definition can be included in the expression 'the produce of such land.' "

Mr. Talati for the appellant submitted that the Land Alienation Decree, 1939, is an enactment which encroaches on the general right of execution on a judgment debt. That general right, he argued, is enjoyed in the case of the appellant – an Indian subject who sued, not in H.H. the Sultan's Court, but in Her Britannic Majesty's Court – by virtue of the application of the common law to Zanzibar by s. 24 of the Zanzibar Order in Council, 1924, and of the application, in its turn, of Muslim law by the common law, as regards matters relating to land. Section 47 of the Civil Procedure Decree is, said Mr. Talati, when it provides that lands are liable to attachment in execution, merely declaring or ratifying an already existing right under Muslim law. From all that it follows, he said, that the Land Alienation Decree must be construed strictly against the curtailment of the general right to execute.

Mr. Balsara countered by arguing that the Land Alienation Decree is a "remedial statute" and therefore wide open to a generous construction in the land-owner's favour. He referred us to an enactment which had preceded this Decree, namely the Debts Settlement Decree, 1938 (Decree No. 2 of 1938), observing that that Decree also was a "remedial" one. Accordingly, he contended, an extended meaning must be given to the word "produce," for otherwise the intended remedy would be cast away.

In our view Mr. Talati's major premise is correct, although we do not find it necessary to support it, as he did, upon the common law or upon Muslim law. We think it is sufficient to point out that s. 47 of the Civil Procedure Decree (whether it be declaratory or not) constitutes the expression of the general right of a judgment-creditor to execute, and that the Land Alienation Decree imposes a limitation on that general right. The description of an enactment as "remedial" is often a snare and a delusion: a remedy from one man's point of view is a restriction from another's; an enactment such as the Land Alienation Decree which affords, so to speak, a remedy to an Arab landowner against his judgment creditors just as clearly deprives the latter of the much-desired privilege of pursuing their legal rights to a practical conclusion. We do not think that the Land Alienation Decree is properly describable as a remedial enactment at all. We add that we are fortified in this respect by the scathing comments on so-called remedial statutes contained in Craies (5th Edn.) at pp. 58–59. We therefore abandon all thought of stretching the language of s. 9 of the enactment in question in favour of the respondent here. The words must be given their ordinary and natural sense, for thus is declared the intention of the legislature better than by any other means. We cannot "travel outside" the words enacted in order to give effect to what

might even very plausibly be said to have been the object which the legislature had in mind: see per Lord Simonds, L.C., in *Magor and St. Mellons R.D.C. v. Newport Corporation* (2), [1952] A.C. 189 at p. 191.

We think, then, with respect that the learned chief justice and his learned predecessor were over-tempted to lend such protection to Arab landowners as was not, upon a true construction of the Decree, given them by the law as enacted, whatever may or may not have been the virtuous intentions of those who fostered its enacting. “The produce of such land” must in our opinion bear its primary and natural meaning, namely the fruits and crops which the land produces. Inasmuch as this Decree is in truth already a brake on the justifiable impetus of judgment-creditors who seek satisfaction in palpable form, we must decline to interpret the straightforward terms of s. 9 so as to impose an even more harsh restraint than the plain sense of the words demands. It is the duty of the courts so to construe an enactment as to suppress the mischief at which it is aimed and to advance the remedy which it affords: see, e.g., per Cockburn, C.J., in *Twycross v. Grant* (3) (1877), 2 C.P.D. 469, at pp. 530–531. But we are not for either of those purposes entitled to look beyond the Decree itself, and where, as here, we find clear and sensible phraseology which, given its ordinary meaning, effectively shields Arab landowners against the perils of enforced sales of their lands or crops, we should not be justified in accepting the respondent’s invitation to give to a plain expression a secondary significance which is certainly beyond its normal sense and which would inevitably lead us at once into considerable difficulties of the kind foreseen by the learned chief justices in their judgments to which we have referred. Express and unambiguous language is indispensable in enactments passed for the purpose of taking away legal rights: see Craies (5th Edn.) 106.

Mr. Balsara further submitted an ingenious alternative reason for upholding the decision under appeal. His argument was briefly as follows. The word “land” in s. 9 of the Decree must be interpreted in accordance with its definition in s. 2, which is this:

> “ ‘Land’ means all land in the Protectorate outside the limits of towns declared as such by notice under the Towns Decree, and includes:
>
> (*a*) the sites of buildings or other structures on such land;
>
> (*b*) a share in the profits of an estate or holding;
>
> (*c*) a right to receive rent;
>
> (*d*) any right of permanent tenancy; and
>
> (*e*) all trees growing on the land.”

Therefore the reference in s. 9 to “the produce of such land” must be construed against the background of that definition. Since “land” is defined as including “a right to receive rent,” that is to say a right to receive money, “produce” must include that which accrues from “land” in its meaning of “a right to receive rent” and therefore includes rent-money. Thus the word “produce” has a much wider significance than that of fruits and crops alone. This view, it was argued, is supported by s. 5 and s. 6 of the Decree, under which, *inter alia*, a Land Alienation Board may withhold its consent to a permanent alienation, or to the granting of a lease, by an Arab of his land if in the opinion of the Board the proposed disposition would deprive the Arab of sufficient resources for certain specified purposes.

It is unnecessary to determine the general merits of that argument, for in our view it falls to the ground in the instant case by reason of the absence (to which we referred at the outset in this judgment) of evidence that the right to pick and retain the crop in question was leased to a third person. There is no such evidence in the record, nor, incidentally, did the learned chief justice ever purport to arrive at such a finding. That being so, we cannot take the view that there was a “lease” as defined in s. 2 of the Decree (which there includes the grant of a licence to pick growing crops), and accordingly the fund in the hands of the respondent is not shown to be in the nature of rent.

We therefore hold that this appeal must be allowed with costs. There will be an order to that effect. We also order that the decision and "order" under appeal, dated January 29, 1957, be set aside except to the extent that the latter affirms the order as to costs contained in the "order" of the High Court dated November 30, 1956. The appellant is to have his taxed costs of the execution proceedings in the High Court.

We conclude by expressing our appreciation of the industry of the advocates and of the careful and exhaustive arguments which they submitted to this court.

Appeal allowed. Cross-appeal dismissed.

For the appellant:
KS Talati
Wiggins & Stephens, Zanzibar

For the respondent:
JS Balsara
The Administrator-General, Zanzibar

Charles Hermenegildo Dias v Hasham Jiwa and another
[1957] 1 EA 724 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	8 February 1957
Case Number:	421/1956
Before:	Connell J
Sourced by:	LawAfrica

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[1] Costs – Taxation – Refusal of taxing officer to adjourn taxation – Objection referred to judge in chambers – Period within which party can object – Civil Procedure Ordinance, s. 95 (*K*) *– Remuneration of Advocates Order,* 1955, *r.* 10, *r.* 73 *and r.* 77, (*K*) *– Indian Limitation Act,* 1877.

Editor's Summary

These proceedings arose from a mortgage suit in which the plaintiff sued the first defendant as first mortgagee, and the second defendant was added as a party as he was a second mortgagee. The advocates for the first defendant wrote to the registrar requesting an adjournment of the taxation as it was not possible for counsel to attend. The taxing officer refused the request and proceeded with the taxation *ex parte* on December 20, 1956. The advocates concerned then took out a summons, which was accepted by the Supreme Court on January 11, 1957, objecting to the taxing officer's decision to proceed *ex parte* and for allowing, *inter alia*, an excessive instruction fee. At the hearing of the summons counsel for the second defendant took the preliminary objection that the summons was filed out of time and relied on r. 10 of the Remuneration of Advocates Order, 1955, which provides that a party objecting to a decision of the taxing officer "may" within seven days of such decision refer his objection to a judge; and that since a notice of taxation had been served on the advocates' predecessors under r. 73 of the Order, of which the advocates were aware, the taxing officer was entitled to tax the bill *ex parte* under r. 77. Counsel for the

first defendant argued that vacation time was to be excluded or, alternatively, that if the running time of seven days expired during the vacation i.e. on December 27, he could have filed the application.

Held–

(i) the application, so far as it related to referring the objection for the decision of a judge was in time as the period was one of thirty days under Art. 164 of the Indian Limitation Act, 1877;

(ii) the question of adjournment was a discretionary matter and there was no reason to interfere with the decision of the taxing officer to tax the bill *ex parte*.

Summons dismissed with costs.

No cases referred to in judgment

Judgment

Connell J: This is a chamber summons taken out by Messrs. Ishani and Ishani and filed and accepted by the Supreme Court on January 11, 1957, for orders (I quote some of the wording):

1. on the hearing of objections by defendant No. 1, Hasham Jiwa,

   (*a*) to the decision on December 20, 1956, of the deputy registrar to proceed *ex parte* to taxation,

   (*b*) for allowing excessive instruction fees and other items, which objections are referred to the decision of a judge.

In other words the summons is an application as I understand it,

(*a*) to set aside the *ex parte* taxation,

(*b*) to this court to decide the objections.

It is admitted (1) that the summons was filed on January 11, (2) that the decision of the taxing master was made on December 20, 1956, (3) that the Christmas vacation was from December 21 till January 6 (both dates inclusive).

It is not admitted by Mr. Khanna for the second defendant, respondent to this application, that the summons was filed in time; Mr. Khanna relies on r. 10 of the Remuneration of Advocates order which says that a party objecting to a decision of the taxing officer "may" within seven days of such decision refer his objection to a judge.

If the vacation time is to be excluded then the application was, I find, filed within the requisite seven days, for excluding December 20 it was filed on the fifth day (computing January 7 till January 11 as five days).

Mr. Ishani argued that vacation time was to be excluded or alternatively that if the running time of seven days for the application expired during the vacation, i.e. on December 27, he could have filed the application.

Order 49, r. 3A provides that unless otherwise directed by the court the period between December 24 and January 5 shall not be reckoned in the computation of time appointed or allowed *by these rules* for amending, delivering or filing any pleading or for doing any other act.

Rule 5 of the same order gives the court power to enlarge time where a limited time has been fixed for doing any act or taking any proceedings *under these rules*. These rules however do not assist the applicant as (*a*) he has not applied, except orally to extend the time for filing objections, (*b*) the enabling procedure to file objections to taxation is contained not in the Civil Procedure Rules but in the Advocates Remuneration Order, 1955.

Nor in my view does s. 95 of the Civil Procedure Ordinance apply; this section allows the court only to enlarge the period where any period is fixed or granted by the "court" for the doing of an act prescribed or allowed by "this Ordinance". Section 65 (2) of the Civil Procedure Ordinance allowing a period of thirty days to appeal from a subordinate court cannot apply for the simple reason that the present application is not an appeal.

In my view therefore regarding the second part of the summons, in so far as it asks the court to rehear objections, if that part of the summons stood alone, that part of the application would clearly be out of time.

As regards the first part of the summons, if I rightly understood it, to set aside the deputy registrar's *ex parte* taxation of December 20, it is urged by Mr. Khanna that even for that type of application the limit of seven days for referring objections contained in r. 10 of the Advocates Remuneration Order also applies. I should perhaps have requested further arguments on that point, but speaking for myself my own view is that for the first part of the application the period is one of thirty days under Art. 164 of the Limitation Ordinance (see also Mulla's notes to O. 9 r. 13). If that view is correct then the application is in time.

Mr. Khanna however has argued that as the deputy registrar issued a notice of taxation for December 20 to Messrs. Khanna and Khanna and Messrs. Khetani and Winayak under r. 73, Advocates Remuneration Order and as in fact neither Messrs. Khetani and Winayak nor their successors Ishani and Ishani appeared on December

20, the deputy registrar was entitled to tax the bill *ex parte* under r. 77 of the same Order. Under the same rule the deputy registrar is given power to tax *ex parte* in default of either party or their advocate and to extend time and to adjourn for proper cause. What occurred was that Messrs. Ishani and Ishani wrote to the registrar on December 18 (the letter was received on 19) stating that Khetani and Winayak had passed on the bill of taxation to Mr. O'Donovan who had been acting for the first defendant and who was then in Zanzibar; the letter then asks that on "his" presumably Mr. O'Donovan's request an adjournment be granted and a fresh date fixed for Mr. O'Donovan to attend at the taxation. The deputy registrar proceeded to tax the bill *ex parte*, having noted during Mr. Khanna's speech "No appearance of first defendant."

The difficulty I find myself in is this, that in fact one does not know expressly from the record how far the deputy registrar directed his mind to the letter of December 18 as he did not in fact record whether he thought there was no ground for adjournment. It must be taken that that was what the deputy registrar did think. An adjournment of course is a discretionary matter and I am bound to say that if I myself had perused the letter of December 18 I should have been extremely loath to grant an adjournment. After considering the point I see no reason to interfere with the deputy registrar's decision to tax the bill *ex parte*.

In order, however to endeavour to do full justice to the matter I allowed Mr. Khanna and Mr. Ishani to address me shortly on the "objections"; I have paid full regard to these arguments and I am by no means satisfied that there is any merit in the objections; it is true the case was settled but I am satisfied that the final consent order was drawn up only after very considerable discussions; the amounts involved were very large indeed and Mr. Khanna has satisfied me that legal points of complexity and difficulty were involved in arriving at a settlement. As in the case of all settlements a vast amount of costs was saved by not proceeding to contest.

There are no grounds in my view for remitting the taxation to the deputy registrar, and the summons is dismissed with costs.

Summons dismissed with costs.

For the plaintiff:
SC Gautama
Shah & Gautama, Nairobi

For the first defendant:
GK Ishani
Ishani & Ishani, Nairobi

For the second defendant:
DN Khanna
DN & RN Khanna, Nairobi

Mashavu Binti Nassor v Meyya Binti Said Khalid

[1957] 1 EA 727 (SCZ)

Division:	His Highness The Sultan's Court for Zanzibar at Zanzibar
Date of judgment:	30 September 1957
Case Number:	15/1957
Before:	Windham CJ
Sourced by:	LawAfrica

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[1] Mohamedan law – Hiba-bil-iwaz – Whether transaction a gift or sale – Non-compliance with Land Alienation Decree, 1939*, s.* 4 (1) *and s.* 4 (3) (*Z*).

Editor's Summary

The respondent had obtained from a magistrate a declaration of title against the appellant to a certain shamba. In support of his claim the appellant had relied on a document, whereby the respondent's original vendor, an Arab, had transferred to his wife (through whom the appellant claimed) a portion of this shamba

> "in payment of dowry to her which is shillings one hundred only . . . as an outright gift with effect from now . . ."

The magistrate held that this transaction amounted to what is known as a hiba-bil-iwaz of India, that is to say, it was not a true hiba-bil-iwaz which is an exchange of gifts, but was a "single gift for a consideration" which has been held to amount to a sale. Having so decided he held the document to be of no effect, and that the appellant's title accordingly had not been substantiated, because the transaction had never received the consent of the Land Alienation Board as required by s. 4 (1) of the Land Alienation Decree nor had the document been registered as required by s. 4 (3) of that Decree. On appeal it was submitted that the magistrate ought not to have held the transaction to be what is known as hiba-bil-iwaz of India, which upon the authorities, is in reality a sale, but ought to have held it to be a true hiba-bil-iwaz, which is not a sale but a gift.

Held–

(i) the reading into the document of an initial and notional gift by the wife to the husband, in the form of foregoing her right to dowry, was far fetched and was quite incompatible with one of the necessary features of true hiba-bil-iwaz, namely that there must be an actual delivery of possession both of the first gift and of the return gift, and accordingly the document could not constitute a true hiba-bil-iwaz.

(ii) the magistrate was right in holding as he did that the transaction was in effect a sale, and accordingly that it was invalid, since it never received the approval of the Land Alienation Board and was never registered.

Appeal dismissed.

Cases referred to:

(1) *Mahabir Prasad v. Syed Mustafa Husain* (1937), 168 I.C. 418.

(2) *Muhammed Esuph v. Pattamsa Ammal* (1899), 23 Mad. 70.

(3) *Gulam Abbas v. Mt. Razia Begum and Others* (1951), A.I.R. All 86.

Judgment

Windham CJ: This is an appeal by an unsuccessful defendant against whom the plaintiff-respondent obtained a declaration of title to a certain shamba in an action brought in the 1st class magistrate's court. In support of his claim to title the appellant relied on a document, exhibit (1), whereby the respondent's original vendor, an Arab, transferred to his wife (through whom the appellant claimed) a portion of this shamba

> "in payment of dowry due to her which is shillings one hundred only . . . as an outright gift with effect right from now . . ."

The learned magistrate, after considering the relevant authorities, held that this transaction amounted to what is known as a hiba-bil-iwaz of India, that is to say that

it was not a true hiba-bil-iwaz which is an exchange of gifts, but was a "single gift for a consideration" which has been held to amount to a sale. Having so decided, he held the document to be of no effect, and the appellant's title accordingly not to be substantiated, because the transaction had admittedly never received the consent of the Land Alienation Board as required by s. 4 (1) of the Land Alienation Decree, 1939, in the case of sales of land by Arabs, nor had the document been registered as required by s. 4 (3) of that Decree. If the transaction had been a gift and not a sale, then it would have been exempt from registration and from the necessity of the Land Alienation Board's consent, by virtue of proviso (*a*) to s. 4 (1), which exempts from the requirements of the section "gifts during lifetime in favour of near relatives." It is contended for the appellant, and it is the sole point argued on this appeal, that the learned magistrate ought not to have held the transaction to be what is known as a hiba-bil-iwaz of India, which upon the authorities is in reality a sale, but ought to have held it to be a true hiba-bil-iwaz, which is not a sale but a gift.

Now a true hiba-bil-iwaz, in the sense recognized by the older Muslim jurists, consists of a gift (hiba) by A to B followed by a gift (iwaz) from B to A where there was no stipulation by A that B should make him a return gift but where B expresses his gift to be a return gift. Its nature will be found explained in Mulla's Mohamedan Law (14th Edn.), at p. 158. It is contended that in the document exhibit (1) in the present case a gift by A (the wife) to B (her husband) is to be implied, namely a foregoing by her of her right to dowry, and that the transfer of the shamba by the husband to the wife, expressed to be "in payment of dowry due" is the return gift, expressed later in the document to be an outright gift. This reading into the document of an initial and notional gift by the wife to the husband, in the form of a foregoing of her right to dowry is, however, not only far fetched, but it is quite incompatible with one of the necessary features of a true hiba-bil-iwaz, namely that there must be an actual delivery of possession both of the first gift and of the return gift (vide the passage in Mulla to which I have referred); for it is of course quite impossible to deliver possession of such an intangible thing as a foregoing of a right to dowry. Clearly in a true hiba-bil-iwaz both gifts must be of tangible things, whether they be movable or immovable, and the document exhibit (1) cannot therefore constitute a true hiba-bil-iwaz.

The real nature of the transaction is far more simple. It is no more and no less than a transfer of property by husband to wife in lieu of dower. And such a transaction has been held, in Muslim law, to amount to a sale. The cases relied on in this connection by the learned trial magistrate, in a passage in his judgment taken from pp. 157–158 of Mulla's Mohamedan Law (*supra*), make this quite clear. There was at one time some difference of opinion on the point as between various High Courts in India; but the Privy Council have expressed clearly their view (though in a passage which is admittedly no more than obiter) that such a transaction is to be treated as a sale: vide *Mahabir Prasad v. Syed Mustafa Husain* (1) (1937), 168 I.C. 418, where at p. 421 their lordships observed of a gift of his estate by a husband to his wife in lieu of dower that "such a transaction, as the cases show, has been treated as a sale." In *Muhammad Esuph v. Pattamsa Ammal* (2) (1899), 23 Mad. 70, it had earlier been held that such a transaction, even where there had been no delivery of possession of the immovable property to the wife, was nevertheless valid as a hiba-bil-iwaz since it was of the kind which is a "gift for a consideration", that is to say the kind which we have termed hiba-bil-iwaz of India and which is in reality a sale; for if it had been what we have called a true hiba-bil-iwaz, actual delivery of possession of the land would (as we have seen) have been necessary to make it effective. The wife's foregoing of her right to dowry, though as I have said it cannot be held to be a gift by her (since that would necessitate delivery of possession), is held to constitute the consideration moving from her for her husband's gift of the immovable property to her, and it for this reason that the whole transaction is deemed to be a sale; for a "gift for a

consideration", which expression is strictly speaking a contradiction in terms, amounts in effect to a sale. In the last of the numerous relevant Indian decisions which I am able to lay my hands on, *Ghulam Abbas v. Mt. Razia Begum* (3) (1951), A.I.R. All.

86, it was similarly held in explicit terms, in an exhaustive judgment reviewing most of the earlier authorities, that a transfer of immovable property in consideration of a dower-debt is, under the Mohamedan law, a hiba-bil-iwaz of the modern or "Indian" kind as opposed to the earlier or true hiba-bil-iwaz, and that as such it amounts to a sale and possesses all the incidents of a sale. It is the long line of decisions to this effect which was in 1937 approved by the Privy Council in *Mahabir Parsad v. Syed Mustafa Husein* (1).

In the light of these decisions I hold that the learned trial magistrate was right in holding as he did that the transaction in the present case was in effect a sale, and that accordingly it was invalid in that it never received the approval of the Land Alienation Board and was never registered as required by sub-s. (1) and sub-s. (3) respectively of the Land Alienation Decree, 1939. For these reasons this appeal must be dismissed with costs.

Appeal dismissed.

For the appellant:
AA Lakha
Balsara & Lakha, Zanzibar

For the respondent:
OM Sameja
Mukri & Sameja, Zanzibar

The Municipal Council of Dar-Es-Salaam v Joao Franco Paes
[1957] 1 EA 729 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	13 September 1957
Case Number:	38/1957
Before:	Sir Newnham Worley P, Sir Ronald Sinclair V-P and Abernethy J
Sourced by:	LawAfrica
Appeal from	H.M. High Court of Tanganyika – Lowe, J

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[1] Highway – Construction – Road charges – Apportionment by local authority based on frontage – Whether plotholder can object on ground of benefit – Upanga Area (*Planning and Development*) *Ordinance* (*Cap.* 283), *s.* 40, *s.* 41, *s.* 42 *and s.* 44 (*T.*) *– Private Street Works Act*, 1892, *s.* 6, *s.* 7, *s.* 8 *and s.* 10 *– Public Health Act*, 1875, *s.* 268.

Editor's Summary

Under the Upanga Area (Planning and Development) Ordinance (Cap. 283) the main object of which was to establish a committee to prepare and carry into effect a scheme for the planning and development of the Upanga area of Dar-es-Salaam, the Municipal Council of Dar-es-Salaam was required to construct new roads. By s. 40 sub-s. (2) the council could also apportion the expenses incurred by it among *inter alia* the frontagers. Sub-s. (4) provided that the owner of any premises charged may within a limited time object to the proposals of the Council on limited grounds, the relevant one to this appeal being ground (*d*) which reads as follows:

> "(*d*) that the provisional apportionment is incorrect in respect of some matter of fact to be specified in the objection or (where the provisional apportionment is made with regard to other considerations than frontage) in respect of the degree of benefit to be derived by any persons, or the amount or value of any work already done by the owner or occupier of any premises."

Sub-s. (5) provided as follows:

> "(5) The Council shall consider all objections received by it under sub-s. (4) of this section and after consulting all persons whom it considers likely to be affected, shall determine the same and shall make such adjustments, if any, in the plans, sections, estimates and provisional apportionments or any of them, as it considers expedient."

Section 44 which is referred to in s. 40 (2) introduces the proviso that the Council may, if it thinks it just, in setting the apportionment, have regard, *inter alia*, to the "benefit to be derived by any premises from such works." On August 29, 1955, the Council resolved that

> "the new road forming an extension of Upanga Road . . . be constructed . . . and that the Council do contribute a sum of £3,316 towards the expenses incurred in executing such works,"

and provisional apportionment was made according to the frontage of the respective premises without regard to the degree of benefit to be derived by any of the premises. The respondent objected, contending that his premises ought to be excluded from the provisional apportionment on the grounds that his premises did not front or adjoin or abut on the new road and that his premises would not derive any benefit from the new road. The respondent did not appear at the hearing of the objection by the sub-committee of the Council's Highways and Works Committee which dismissed the objection after considering it. Thereupon the respondent appealed to the High Court on three grounds, namely (*a*) that the road was not a new road but a realignment of an old road; (*b*) that the works would not benefit his premises, and (*c*) the Council did not have regard to the benefit to be derived by his premises from the works and on this basis should have reduced his apportionment to nothing. The High Court held that the road was a new road but that the apportionment should have been based on the degree of benefit to be derived by frontagers from the proposed work and remitted the matter to the Council. The Council appealed on the grounds that the judge was wrong in holding that apportionment of road charges should be based on the degree of benefit to be derived by frontagers; that this criterion was a domestic matter to be decided by the Council when settling the provisional apportionment; that if the Council does not decide to have regard to the degree of benefit, an objection cannot be founded on this ground and the High Court cannot say that the Council should have had regard to the aspect of benefit. The respondent on the other hand argued that even if the question of benefit was not considered by the Council, the High Court in view of the wide powers given to it by s. 42 (4) had jurisdiction to do so. The respondent also cross-appealed on the ground that the judge laid down an erroneous method for arriving at a proper apportionment.

Held–

(i) since the Council acting in its administrative capacity under s. 41 (1) did not have regard to the degree of benefit when making the provisional apportionment, no objection could be founded on this ground; *Bridgwater Corporation v. Stone* (1908), 99 L.T. 806 applied.

(ii) section 42 does not empower the High Court to interfere with the administrative decisions of the Council except in respect of those matters to which objection can be made under s. 41 (4).

Appeal allowed with costs. Cross-appeal dismissed.

Cases referred to:

(1) *Hornchurch U.D.C. v. Allen*, [1938] 2 All E.R. 431.

(2) *Hornchurch U.D.C. v. Webber*, [1938] 1 All E.R. 309.

(3) *Twickenham U.D.C. v. Munton*, [1899] 2 Ch. 603.

(4) *Bridgwater Corporation v. Stone* (1908), 99 L.T. 806.

(5) *R. v. Minister of Health, Ex parte Aldridge*, [1925] 2 K.B. 363.

September 13. The following judgments were read by direction of the court:

Judgment

Sir Ronald Sinclair V-P: This is an appeal by the Municipal Council of Dar-es-Salaam from a decree of the High Court of Tanganyika allowing in part an appeal brought by a frontager under s. 42 of the Upanga Area (Planning and Development) Ordinance, (Cap. 283).

The main object of the Upanga Area (Planning and Development) Ordinance was to establish a committee to prepare and carry into effect a scheme for the planning and development of the Upanga Area of Dar-es-Salaam. The provisions of the Ordinance which are relevant to this appeal are s. 40, s. 41, s. 42 and s. 44. Section 40 provides:

> "40. (1) The Council (i.e. the appellant Council) is hereby required to cause all new roads shown in the approved scheme to be constructed and may in respect of any such road cause to be executed any or all of the following works, that is to say, to sewer, level, pave, metal, flag, channel or make good such road or part of such road.
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> (2) The Council may, subject to the provisions of s. 44, apportion the expenses incurred by it under sub-s. (1) of this section in respect of any road or part of a road on the premises fronting, adjoining, or abutting on such road or part of a road, including premises vested in the Governor."

Sub-s. (1) of s. 41 requires the Council to cause to be prepared in respect of each new road in the approved scheme:

> (*a*) a specification of the works which it proposes to execute under sub-s. (1) of s. 40, with plans and sections (if applicable);
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> (*b*) an estimate of the probable expenses of the works; and
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> (*c*) a provisional apportionment of the estimated expenses among the premises liable to be charged therewith under the Ordinance.

Sub-s. (2) and sub-s. (3) of that section provide for service of notice of the provisional apportionment on the owners of the premises shown therein as liable to be charged and for inspection of the documents mentioned in sub-s. (1). By sub-s. (4) it is provided that the owner of any premises shown as liable to be charged may within a limited time object to the proposals of the Council on any of the following grounds:

> . . . . . .
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> (*a*) that there has been some material informality, defect or error in or in respect of the plans, sections or estimate;
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> (*b*) that the proposed works are insufficient or unreasonable, or that the estimated expenses are excessive;
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> (*c*) that any premises ought to be excluded from or inserted in the provisional apportionment;
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> (*d*) that the provisional apportionment is incorrect in respect of some matter of fact to be specified in the objection or (where he provisional apportionment is made with regard to other considerations than frontage) in respect of the degree of benefit to be derived by any persons, or the amount or value of any work already done by the owner or occupier of any premises."

Sub-s. (5) is as follows:

> "(5) The Council shall consider all objections received by it under sub-s. (4) of this section and after

consulting all persons whom it considers likely to be affected, shall determine the same and shall make such adjustments, if any, in the plans, sections, estimates and provisional apportionments or any of them, as it considers expedient."

Section 44 which is referred to in sub-s. (2) of s. 40 reads:

"44. In a provisional apportionment of expenses of road works under s. 40 the apportionment of expenses against the premises fronting, adjoining, or abutting on the road or part of a road in respect of which the expenses are incurred shall be according to the frontage of the respective premises:

> "Provided that the Council may, if it thinks it just, in settling the apportionment, have regard to:
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> (*a*) the greater or less degree or benefit to be derived by any premises from such works; and
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> (*b*) the amount and value of any works already done by the owners or occupiers of any such premises.
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> "The Council may also, if it thinks it just, include any premises which do not front, adjoin, or abut on the road or part of a road, but access to which is obtained from the road by or through a court or passage, or otherwise, and which in its opinion will be benefited by the works, and may fix the sum or proportion to be charged against any such premises accordingly."

On August 29, 1955, the Council resolved:

> "That the new road forming an extension of Upanga Road from the vicinity of its junction with Sea View Road to its junction with Ocean Road being one of the new roads specified in cl. 19 of the Upanga Area (Planning and Development) Scheme, 1951 . . . be constructed, sewered, levelled, paved, metalled, flagged, channelled and made good . . . and that the council do contribute a sum of £3,316 towards the expenses incurred in executing such works, and that the remainder of the expenses incurred in executing such works, be apportioned upon the premises fronting, adjoining or abutting on the said road according to the respective frontages of such premises."

On the same day the Council approved plans and specifications of the proposed works and a provisional apportionment of the estimated expenses. The provisional apportionment was made according to the frontage of the respective premises without regard to the degree of benefit to be derived by any of the premises.

Notice of the provisional apportionment was served on the respondent who was one of the owners of premises shown therein as liable to be charged. The respondent thereupon served on the Council a written notice under s. 41 (4) objecting that his premises ought to be excluded from the provisional apportionment on the following grounds:

> "That my said premises do not front or adjoin or abut on the new road or part of the new road described in your above notice and that my said premises will not derive any benefit from the said new road nor is any access obtained to my said premises from the said road by or through a court or passage or otherwise."

The Council referred the objection to a sub-committee of its Highways and Works Committee which reported as follows (see Annexure I):

> "This objector did not appear before the sub-committee. The sub-committee examined the relevant map, on which it is shown that the plot in question fronts, adjoins and abuts on the new road. The sub-committee recommends that the objection in respect of plot 307 be dismissed."

On March 6, 1956, the Council by resolution adopted the report of the sub-committee.

The respondent then appealed to the High Court under the provisions of s. 42, sub-s. (4) of which reads:

> "42. (4) The High Court may make such order on the appeal as the circumstances may require and may make such adjustments, if any, in the plans, sections, estimates and provisional apportionments or any of them, as it considers expedient."

The grounds of appeal were in substance:

(1) that the road on which, when reconstructed according to the approved scheme, the respondent's premises will front is not a new road but a re-alignment of the present road;

(2) that the works in respect of which the provisional apportionment was made will not benefit the

respondent’s premises; and

(3) that the Council did not have proper regard to the degree of benefit to be derived by the premises from the said works, but should have reduced the apportionment to nothing by reason that no benefit will be derived.

The learned first appellate judge rejected the contention that the road on which, when it is re-aligned and reconstructed, the respondent's premises will front, is not a new road; but he held that the apportionment should have been based on the degree of benefit to be derived by frontagers from the proposed works. Accordingly, since he considered that the premises which will front on the re-aligned portion of the new road will derive less benefit from the proposed works than other premises on the new road, he remitted the matter to the Council, with a direction, in effect, to estimate the cost of the re-aligned portion of the road and to apportion such cost against each of the premises fronting on the realigned portion according to their respective frontages. The Council appeals against that decision on the ground that the learned judge was wrong in holding that apportionment of the road charges should be based on the degree of benefit to be derived by frontagers from the proposed works. The respondent cross-appeals on the ground that the learned judge laid down an erroneous method for arriving at a proper apportionment, since the method ordered to be adopted would not be likely to result in a reduction of the apportionment against the respondent's premises. We were informed by counsel that under the method of apportionment directed by the learned judge the respondent will be required to pay £84 more than under the original apportionment.

The ratio decidendi of that part of the judgment of the learned judge of which the appellant Council complains is summarised in the following two passages:

> "The whole case seems to me to depend on the interpretation of the proviso to s. 44 of the Ordinance. This, at first glance, would appear to be entirely permissive in that the proviso commences 'Provided that the Council may, if it thinks it just.' I do not consider it to be so. Upon the receipt of an objection, a question of the degree of benefit to those members of the public who are relevant plotholders immediately arises. The Council cannot, according to its whim, make a cursory determination on the objection without giving consideration as to whether or not it is just to have regard to the matters mentioned in the proviso. When those matters arise by way of objection the apparently permissive provision becomes mandatory and the Council must act judicially and give careful consideration to the objections raised. It has no option but to do so. It must arrive at a reasonable determination after judicial consideration of the question in issue and it could not, in the circumstances of the objection lodged by the appellant, merely brush that objection aside by looking at a plan and formulating a resolution merely on what the plan showed. That is not a consideration as to the justice of the matters raised in the objection and although the proviso says that the Council 'may' do these things that word has effect as if it were 'shall' in the instant case. It would be permissive if no or no proper objection were received. In such a case the Council could have regard to the degree of benefit or not as it wished."
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> "The objection having been made the Council must, as I have stated, have regard to the quantum of the degree of benefit to be derived. It must consider judicially whether or not it is just so to do, but it has little option in this latter instance, if the objection *prima facie* raises a just claim, and is bound to go fully into the objection raised and determine judicially whether or not the objector is entitled to some relief from the provisional apportionment. That this was the intention of the legislature seems to be made clear in the words of s. 41 (5): 'The Council shall consider all objection . . . and shall determine the same . . .' In dealing with matters of the nature raised by this appeal the Council or its duly appointed committee becomes a quasi-judicial body and must act judicially throughout its deliberations. If the Council does so and arrives at a determination which is contrary to the facts (all of which should be recorded fully in every instance) its decision could be challenged."

On behalf of the appellant Council it was contended that the question whether regard shall be had to the degree of benefit to be derived by any premises from proposed road works is a domestic matter to be decided by the Council when settling the provisional apportionment: that if the Council does not decide to have regard to the degree of benefit, an objection cannot be founded on the degree of benefit to be derived by any premises and the High Court cannot say that the Council should have had regard to the degree of benefit. We were referred to *Hornchurch U.D.C. v. Allen* (1), [1938] 2 All E.R. 431; *Hornchurch U.D.C. v. Webber* (2), [1938] 1 All E.R. 309; *Twickenham U.D.C. v. Munton* (3), [1899] 2 Ch. 603 and *Bridgwater Corporation v. Stone* (4) (1809), 99 L.T. 806, all of which were decisions on the Private Street Works Act, 1892.

It is necessary to refer briefly to the relevant provisions of the Private Street Works Act, 1892, in order to determine how far, if at all, the above decisions are in point in the instant case. Section 6 (1) of the Act provides that, in certain circumstances, an urban authority may resolve, with respect to certain streets or part of streets, to do certain works and that:

> "the expenses incurred by the urban authority in executing private works shall be apportioned (subject as in this Act mentioned) on the premises fronting, adjoining, or abutting on such street or part of a street."

By sub-s. (2) of that section is provided that a specification is to be made, that an estimate of the probable expense is to be prepared, and that a provisional apportionment of the expenses among the premises liable to be charged therewith is to be prepared by the surveyor. Sub-s. (3) is in similar terms to sub-s. (2) and sub-s. (3) of the Ordinance. There it is provided by s. 7 that certain objections may within a limited time be made by written notice served upon the urban authority. The possible heads of objection are enumerated in para. (*a*) to para. (*f*) and para. (*f*) reads:

> "That the provisional apportionment is incorrect in respect of some matter of fact to be specified in the objection or (where the provisional apportionment is made with regard to other considerations than frontage as hereinafter provided) in respect of the degree of benefit to be derived by any persons, or the amount or value of any work already done by the owner or occupier of any premises."

So far there is no material difference between the provisions of the Act and the corresponding provisions of the Ordinance. In s. 8 it is provided that the urban authority, after the expiration of a certain time, may apply to a court of summary jurisdiction to appoint a time for determining the matter of all objections and that the court:

> "may quash in whole or in part or may amend the resolution, plans, sections, estimates, and provisional apportionments, or any of them, on the application either of any objector or of the urban authority."

The words "subject as in this Act mentioned" in s. 6 (1) refer by anticipation to the provisions of s. 10 which reads:

> "10. In a provisional apportionment of expenses of private street works the apportionment of expenses against the premises fronting, adjoining, or abutting on the street or part of a street in respect of which the expenses are to be incurred shall, unless the urban authority otherwise resolve, be apportioned according to the frontage of the respective premises; but the urban authority may, if they think just, resolve that in settling the apportionment regard shall be had to the following considerations; (that is to say)
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> (*a*) The greater or less degree of benefit to be derived by any premises from such works;
>
> (*b*) The amount and value of any work already done by the owners or occupiers of any such premises.
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> They may also, if they think just, include any premises which do not front, adjoin, or abut on the street or part

of a street, but access to which is obtained from the street through a court, passage, or otherwise, and which in their opinion

> will be benefited by the works, and may fix the sum or proportion to be charged against any such premises accordingly."

It is clear from the authorities that it is for the urban authority to decide whether the powers under s. 10 of the Act shall be exercised and that in the absence of a resolution the justices cannot entertain an objection that it should have been passed and apportioned otherwise than according to frontage. In *Bridgwater Corporation v. Stone* (4) *supra* the headnote of the report states:

> "Where an urban authority has not resolved under s. 10 of the Private Street Works Act, 1892, that in settling the apportionment regard is to be had to the greater or less degree of benefit to be derived by any premises from the works, or to the amount and value of any work already done by the owners or occupiers of such premises, the justices have no jurisdiction, when determining objections under s. 8 (1) of that Act, to have regard to those matters and to reduce the apportionment in respect thereof."

In that case the urban authority did not resolve that, in settling the provisional apportionment, regard should be had to any consideration other than the frontage of the respective premises fronting, adjoining, or abutting on the street; but, notwithstanding the absence of that resolution, the justices considered they were empowered to alter and amend the provisional apportionment as if that resolution had been passed. Lord Alverstone, L.C.J., delivering the judgment of the court, in which the other judges concurred, said:

> "It seems to us that the authority to decide whether the apportionment is to be based on any other consideration than that of frontage, is not the justices but the urban authority, who under s. 10 of the Private Street Works Act, 1892, can pass a resolution that the apportionment shall be otherwise than according to frontage. Now that section provides:" [His lordship read the section and continued:]. "That that was meant to be left to the urban authority is also confirmed by the provisions of s. 7 (*f*) which refers to the objections which an owner may take." [His lordship read that section and continued:]. "That indicates that the objections as to degree of benefit or value of work done can only be raised where there has been a resolution that the apportionment is to be otherwise than by frontage. Therefore the justices had no jurisdiction to cut down the measurement fronting, adjoining, or abutting to the hypothetical figure of sixteen foot; and therefore they exceeded their jurisdiction. In the absence of a resolution, which the urban authority might have passed, the respondents' remedy, if any, is by appeal to the Local Government Board under s. 268 of the Public Health Act, 1875, and not by objections taken before justices under s. 7 of the Public Works Act, 1892."

That construction of s. 10 of the Act was followed in *Hornchurch U.D.C. v. Webber* (2), *supra* and *Hornchurch U.D.C. v. Allen* (1), *supra*. In the latter case Lord Hewart, L.C.J., said ([1938] 2 All E.R. at p. 433):

> "The rule, the standard, the normal procedure, is that the apportionment of expenses against the premises fronting, adjoining or abutting shall be apportioned according to the frontage of the respective premises. That general rule having been laid down, however, the section goes on to provide for certain possible variations, which are optional. They are optional at the choice, that is to say, within the discretion of the urban authority itself. Three of them are enumerated. It does not in the least follow that, if one is adopted, the other must also be adopted, or that any of the others must be adopted. The matter is left, and, in my opinion, most deliberately left, within the discretion of the urban authority."

The learned judge was of the opinion that those decisions were not of assistance in the instant case because of the differences between s. 10 of the Act and s. 44 of the Ordinance which he stated to be as follows:

> "A difference will be noted that whereas in s. 44 the Council is bound to apportion according to the frontage of the premises, in s. 10 of the Act the urban

> authority is empowered to pass a resolution to the contrary and apportion in a manner otherwise than is required in s. 44 of the Ordinance. Also the local government authority acting under s. 10 has authority and option to pass a resolution to consider the degree of benefit. Not so in the Ordinance."

With respect to the learned judge, I cannot see any material difference between the two sections. In effect each section provides that the expenses shall be apportioned according to the frontage of the respective premises unless in the one case the urban authority, and in the other case the Council, thinks it just to have regard to the considerations set out in para. (*a*) and para. (*b*) of the respective sections. The words "unless the urban authority otherwise resolves" in s. 10 clearly relate to the power to resolve that regard shall be had to the considerations set out in para. (*a*) and para. (*b*). In *R. v. The Minister of Health, Ex parte Aldridge* (5), [1925] 2 K.B. 363 at p. 369, Lord Hewart, L.C.J., referring to s. 10 of the Act, said:

> "In that part of the section, however, the words are inserted 'unless the urban authority otherwise resolve,' and the section then goes on to provide 'but the local authority may, if they think just, resolve that in settling the apportionment regard shall be had to the following considerations; (that is to say)
>
> (*a*) the greater or less degree of benefit to be derived by any premises from such works;
>
> (*b*) the amount and value of any work already done by the owners or occupiers of any such premises.'
>
> "The section thus provides that unless the urban authority resolve to take a particular course the expenses are to be apportioned without qualification according to the frontage of the respective premises; but that the urban authority may resolve to take that course and to apportion with regard to the considerations mentioned."

I do not think any significance can be attached to the absence of the word "resolve" in s. 44. If the proviso to that section were to read

> "Provided that the Council may, if it thinks just, resolve that in settling the apportionment, regard shall be had to–,"

I think it would have precisely the same effect as the existing proviso since a resolution is necessary to give effect to a decision of the Council. Support for the view I have taken is to be found in *Hornchurch U.D.C. v. Webber* (2), where it was held that, notwithstanding the absence of the word "resolve" in the last paragraph of s. 10, the urban authority is empowered, in the exercise of its discretion, to include premises which do not front, adjoin, or abut on the street and that if they refrain from passing a resolution of that kind, the justices cannot entertain an objection that premises which do not front, adjoin, or abut should be included. In my view, therefore, the decisions on s. 10 of the Act cannot be said to have no application to the instant case because of differences between that section and s. 44 of the Ordinance.

The essential difference between the Act and the Ordinance is the manner in which objections are dealt with. Under the Act objections are heard and determined by a court of summary jurisdiction. But under the Ordinance it is the Council which hears and determines the objections. The Council, therefore, acts in a dual capacity, first, in an administrative capacity when determining questions of policy and, secondly, in a quasi-judicial capacity when hearing objections. As I have understood the judgment of the learned judge, he held that once an objection has been made, the Council must have regard to the degree of benefit. Mr. Thornton for the respondent did not go as far as that. He submitted that it is the duty of the Council to consider whether regard should be had to the degree of benefit derived by any premises and that duty arises when the provisional apportionment is being settled. If an objector raises a question of the degree of benefit derived, the duty of the Council, if it has not resolved to have regard to the degree of benefit, relates back to the time when the provisional apportionment was settled, and when hearing the objection in its quasi-judicial

capacity, the Council must consider whether regard should be had to that factor. This, he said, the Council did not do.

In my view the administrative and the quasi-judicial functions of the Council under the Ordinance are as distinct and separate as they would be if they were exercised by entirely different bodies, and I think that when the Council is exercising its administrative functions under the Ordinance it is in the same position as an urban authority under the Act, and that when it is exercising its quasi-judicial functions under s. 41 (5), it is in the same position as a court of summary jurisdiction under s. 6 of the Act. I think the same construction should be put on the provisions of the Ordinance, and s. 44 in particular, as has been put on the corresponding provisions of the Private Street Works Act, 1892. It seems from the provisions of s. 40 (2), s. 41 and s. 44 that the time when the Council may decide to have regard to the greater or less degree of benefit is when setting the provisional apportionment under s. 41 (1). At that time the Council is exercising administrative functions and the question whether regard should be had to the greater or less degree of benefit is one of policy and discretion for the Council. To my mind the provisions of para. (*d*) of sub-s. (4) of s. 41 put the matter beyond doubt. The clear implication from that paragraph is that an objection cannot be made to the provisional apportionment on the ground of the degree of benefit derived unless the apportionment has been made with regard to other considerations than frontage. Applying the principle laid down in *Bridgwater Corporation v. Stone* (4), I have come to the conclusion that, since the Council in its administrative capacity did not in the instant case have regard to the degree of benefit when making the provisional apportionment, it had no jurisdiction in its quasi-judicial capacity under s. 41 (5) to consider that factor.

Mr. Thornton, however, contended that even if the Council did not have jurisdiction to consider the degree of benefit, the High Court, in view of the wide powers given to it by s. 42 (4), had jurisdiction to do so. He relied on the decision in *R. v. The Minister of Health, Ex parte Aldridge* (5), *supra*. The headnote of that case states:

> "Section 268 of the Public Health Act, 1875, has not been superseded or rendered nugatory by s. 8, sub-s. 2, or by any other provision, of the Private Street Works Act, 1892, or otherwise, as regards objections to an apportionment of the expenses of private street works, other than objections admissible under the latter Act; and, consequently, a frontager, who takes an objection not so admissible to an apportionment of that kind, is entitled under the section first above mentioned to address a memorial to the Minister of Health, as the successor of the Local Government Board, stating the objection, and the Minister is entitled thereunder to make such order in the matter as to him may seem equitable."

By s. 268 of the Public Health Act, 1875, it is provided that:

> "Where any person deems himself aggrieved by the decision of the local authority in any case in which the local authority are empowered to recover in a summary manner any expenses incurred by them, or to declare such expenses to be private improvement expenses, he may, within twenty-one days after notice of such decision, address a memorial to the Local Government Board, stating the grounds of his complaint, and shall deliver a copy thereof to the local authority; the Local Government Board may make such order in the matter as to the said Board may seem equitable, and the order so made shall be binding and conclusive on all parties."

It appears from the judgment of Lord Hewart, L.C.J., in *R. v. The Minister of Health, Ex parte Aldridge* (5), that the Minister has power under that section to make an equitable order taking into account the matters mentioned in para. (*a*) and para. (*b*) of s. 10 of the Private Street Works Act, 1892, notwithstanding the absence of a resolution. Mr. Thornton submitted that the High Court has similar powers under s. 42 (4) of the Ordinance. I am unable to accept that contention. Section 268 of the Public

Health Act clearly empowers the minister to vary the decision of a local authority. But I do not think that s. 42 empowers the High Court to interfere with

the administrative decisions of the Council except in respect of those matters to which objection can be made under s. 41 (4). I have held that no objection to the apportionment on the ground of the degree of benefit could be made in this case by the respondent. The learned judge took the same view of the powers of the High Court for he said:

> "I should, perhaps, make it clear that in appeals such as this a plotholder, being confined as to the nature of his objections to those specifically permitted in s. 41 (4) (*a*) to (*d*) of the Ordinance, it follows that an appeal to this court under s. 42 against the Council's determination is likewise restricted."

I would therefore allow this appeal, set aside the decree of the High Court and restore the decision of the Council dismissing the respondent's objection. I would dismiss the cross-appeal. I think the appellant Council should have its costs of the appeal to the High Court and to this court. I would make no order on the costs of the cross-appeal.

Sir Newnham Worley P: I agree that this appeal must be allowed and that orders should be made as proposed by the learned vice-president. I have had the advantage of reading the judgment he has prepared and am in entire agreement with it: but as we are differing from the learned judge in the court below on the construction of the relevant enactments, I shall add some words of my own on some aspects of the matter. The facts and the relevant statutory provisions are fully set out in the judgment which has been read and I shall not repeat them except so far as may be necessary to explain my opinions.

It is common ground that the appellant Council in making the apportionment upon the respondent's premises under s. 40 (2) of the Ordinance, calculated it by the normal procedure prescribed by s. 44, i.e. according to the frontage of the premises, vide Annexures A and B. The relevant portion of the Resolution of the Highways and Works Committee, subsequently adopted by the Council reads:

> "the Council do contribute a sum of £3,316 towards the expenses incurred in executing such works, and that the remainder of the expenses . . . be apportioned upon the premises fronting, adjoining or abutting on the said road according to the respective frontages of such premises."

Mr. Thornton has contended that this resolution is incomplete in that it does not show that the Council had resolved not to have regard to any or all of the discretionary factors prescribed in s. 44. He cited no authority for this proposition and I am unable to accept it as valid. It is quite clear, both from the wording of s. 44 of the Ordinance and from the decisions on the analogous s. 10 of the Public Health Act, 1892 (e.g. *Hornchurch U.D.C. v. Webber* (2), [1938] 1 All E.R. 309: *Hornchurch U.D.C. v. Allen* (1), [1938] 2 All E.R. 431) that if the Council thinks it just to have regard to any of these discretionary matters in fixing the provisional apportionment, it must embody the decision in a resolution. Although the notice served on the owner does not show how the apportionment is arrived at, an interested owner can inspect the relevant documents and, if he wishes, challenge the exercise of the discretion by objection under s. 41 (4) (*d*). But I do not think the converse holds true. Mr. Thornion contended, if I understood him correctly, that if there were on record what I may for convenience call a "negative resolution," it could be attacked by means of an objection. That appears to me to be fallacious: only a "positive resolution" to have regard to benefit or work done will ground a valid objection under s. 41 (4) (*d*): *Bridgewater Corporation v. Stone* (4) (1908), 99 L.T. 806 at p. 808. In the case cited, the Divisional Court said:

> "In the absence of a resolution which the urban authority might have passed, the respondent's remedy, if any, is by appeal to the Local Government Board under s. 268 of the Public Health Act, 1875 and not by objections taken before the justices under s. 7 of the Private Street Works Act, 1892."

And see *R. v. Minister of Health: Ex parte Aldridge* (5), [1925] 2 K.B. 363. There is no equivalent to this procedure in the legislation of Tanganyika, but it may well

be that, in a proper case and at the proper stage, an owner could obtain an order of mandamus to compel the Council to consider whether or not it would be just to have regard to benefit or works done.

The conduct of the respondent in the instant case was very ill-advised. His objection was made in a letter, apparently drafted without legal advice and signed by himself. In form the objection appeared to be made under s. 41 (4) (*c*), namely, that the premises in suit ought to be excluded from the provisional apportionment on the grounds that they do not front or adjoin or abut on the new road or part of the new road, that they will not derive any benefit from the new road nor is there any access to the premises from the new road by or through a court or passage or otherwise. He did not attend, nor was he represented at, the meeting of the sub-committee appointed to enquire into his and other objections. In his absence, the sub-committee after examining the relevant map recommended that this objection be dismissed, which recommendation was subsequently adopted by the Council. It was therefore not until the matter came before the High Court that the respondent's objections were clearly formulated and argued.

The learned judge was of opinion that

> "the plotholder, being confined as to the nature of his objections to those specifically permitted in s. 41 (4) (*a*) to (*d*) of the Ordinance, it follows that an appeal to this court under s. 42 against the Council's determination is likewise restricted."

I respectfully agree. Mr. Thornton did not, I think, accept this as the correct position. He referred to *Ex parte Aldridge* (5) *supra* and argued that the powers conferred on the High Court ought to be construed as comprehensively as were the provisions of s. 268 of the Public Health Act, 1875, in that case. I can see no analogy between the two enactments. *Ex parte Aldridge* (5) decided that s. 268 created an entirely distinct right of appeal to the minister which was not superseded or rendered nugatory by the provisions as to objections contained in the Private Street Works Act, 1892, and that it was open to a frontager to appeal to the minister to take an equitable order for apportionment, notwithstanding that no resolution had been passed under s. 10 of the 1892 Act. In other words, the appeal to the minister was not confined to matters which could properly be made matters of objection under the Act of 1892. I think it would be contrary to all canons of construction and to the intention of the legislature to interpret s. 42 (4) in this way. The powers conferred on the High Court by s. 42 (4) can only be exercised in respect of matters properly made the subject-matter of an objection.

This leads me to a question to which I can find no precise answer in the judgment appealed from. If the factor of degree of benefit could not properly have been made the subject of an objection in this case, then the Council was not under any obligation to consider it under s. 41 (5) nor could it be made the subject of an appeal under s. 42 (1). For the reasons I have given above, as well as for those given in the judgment of the learned vice-president, I am of the opinion that the respondent's objection, so far as it related to degree of benefit was incompetent.

The learned judge does not appear to have considered this aspect of the matter, but on the assumption that the objection was valid, held that the Council was bound to consider it. The relevant passages in the judgment have been cited by my lord the vice-president and I need not repeat them. The conclusion expressed in those passages was reached by varying the construction of the proviso to s. 44 according to the circumstances. As I understand the judgment, the learned judge held that the proviso is purely permissive and discretionary when the Council is making the provisional apportionment; but when an objection is lodged then the word "may" is to be read as "shall" so that the whole expression reads

> "the Council shall, if it thinks it just, in settling the apportionment, have regard to . . ."

It is at least unusual to find a word of compulsion linked with words clearly importing

a discretion; but this seems an inescapable consequence of the view that the owner can by way of objection require the Council to consider the question of benefit though it has not originally thought fit to do so.

I only wish to add one further comment on Mr. Thornton's submission that even if the Council did not have jurisdiction on the objection to consider the degree of benefit, the High Court had such jurisdiction under the wide powers conferred on it by section 42 (4). I am not going to attempt to define the limits of those powers but I think it advisable to point out that in their exercise the High Court must always have regard to the effect produced on other frontagers who are not or may not be partners to the appeal. If the appellant's apportionment is reduced there will be a deficiency for which some provision must be made in the court's order. In the instant case, the High Court made an order which affected the apportionment of four or five frontagers who were not parties to the appeal. The learned judge's intention was to reduce the apportionment on their plots but he made no provision for the deficiency which would thereby be created. In fact, as we were informed, the effect of his order was to increase the charges not only on the respondent's plot but also on the adjoining plots. Such an order could clearly not be made without first making the adjoining frontagers parties to the appeal which had not been done. For that reason alone, therefore, the decision appealed from could not have stood.

Abernethy J: I have had the advantage of reading the judgment prepared by the learned vice-president and also the judgment of the learned president. I concur with the opinions expressed in both these judgments to which there is nothing further I can usefully add.

Appeal allowed with costs.

For the appellant:
OT Hamlyn
OT Hamlyn, Dar-es-Salaam

For the respondent:
RS Thornton
Fraser Murray Thornton & Co, Dar-es-Salaam

Paul Hecht v ST Morgan
[1957] 1 EA 741 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	15 June 1957
Case Number:	31/1956
Before:	MacDuff J
Sourced by:	LawAfrica

[1] Landlord and tenant – Construction of written agreement – Whether tenancy or licence created – Admissibility of extrinsic evidence – Increase of Rent (*Restriction*) *Ordinance,* 1949, *s.* 9 (*K.*) *– Indian Evidence Act,* 1872, *s.* 92 (2).

Editor's Summary

In 1956 the respondent lodged a complaint with the Central Rent Control Board against his landlord, the present appellant. At the hearing the board rejected the appellant's defence that the subsisting agreement created only a licence and made an order in favour of the respondent. The grounds of appeal which were substantially the same as those urged before the board, were that once the existence of a tenancy was in dispute the board had no jurisdiction to proceed with the application, the board had wrongly admitted and relied on certain remarks of the respondent, it had erred in going behind the terms of the written agreement, and that on the facts the board was wrong in holding that the respondent had exclusive possession of the suit premises and was a tenant.

Held–

(i) it is elementary that when certain conditions are required to give the board jurisdiction and one of those conditions is in dispute, the board is not precluded from trying and deciding on the facts from which its jurisdiction will stem.

(ii) from the board's judgment it was clear that the remarks complained of were not allowed to contradict, add to, substract from or otherwise vary the terms of the written agreement.

(iii) the agreement did not purport to set out the full terms of the respondent's occupation of the premises, and the board in order to ascertain the true status of the respondent rightly admitted and considered evidence additional to that contained in the agreement.

(iv) although it may have been the appellant's intention to create a licence the respondent had not accepted that intention; the self-contained nature of the flat, its separate entrances, and the terms as to notice were consistent with the agreement constituting a tenancy, and the appellant's provision of certain services and his occasional use of the flat's bathroom were not inconsistent therewith.

Appeal dismissed.

Cases referred to:

(1) *Sumantlal Chunilal Desai v. McFee and Cooper* (1950), 24 K.L.R. 32.

(2) *Booker v. Palmer,* [1942] 2 All E.R. 674.

(3) *Marcroft Wagons Ltd. v. Smith,* [1951] 2 All E.R. 271.

(4) *Cobb v. Lane,* [1952] 1 All E.R. 1119.

(5) *Baker v. Turner,* [1950] 1 All E.R. 834; [1950] A.C. 401.

Judgment

MacDuff J: On September 12, 1956, the Central Rent Control Board (hereinafter called the board) notified the appellant that it intended to take action of its own motion, in pursuance of the powers vested in it by s. 9 of the Increase of Rent (Restriction) Ordinance, 1949, in respect of the tenancy (or otherwise) existing between the appellant as landlord and the present respondent as tenant.

Apparently some application had been filed by the present respondent dated July 3, 1956 (which I have been unable to find in the record) to which the appellant as respondent filed an answer dated August 3, 1956. However, the hearing proceeded on the board's motion, the defences of the appellant to the motion being substantially the same as have been urged before this court. They were:

1. The respondent states that the applicant was a mere licensee in law and not a tenant as alleged by him in his application. The respondent annexes hereto copy of the written contract signed by the applicant and the respondent (marked "A") which contract clarifies the relationship that subsisted between the applicant and the respondent.
2. In the light of the contents of the preceding paragraph the respondent submits that the Central Rent Control Board has no jurisdiction to entertain the applicant's application for the assessment of a standard rent.
3. Without prejudice to the foregoing the respondent states that the applicant had at the most a permissive occupation falling short of a tenancy and as such the board has no jurisdiction to entertain his application.

The written contract referred to was exhibited, although only an unsigned copy remains on the record. This was in the following terms:

P.O. Box 5694,

Nairobi. January 19, 1956.

Mr. and Mrs. S.T. Morgan,

P.O. Box 111,

Nairobi.

Dear Sir and Madam,

Agreement.

I have pleasure in confirming our recent conversation agreeing that I shall take you and your child as paying guests with effect from March 7, 1956.

The price is monthly Shs. 600/- payable in advance per month without bed linen and towels and without breakfast, but including early morning tea, electric power, water and bath as well as part service.

Notice may be given by either party four weeks prior to the last day of the month.

It is further agreed that the sum of Shs. 100/- in addition to the above rent will be paid for the first seven months only and that thereafter the rent shall be Shs. 600/-.

Yours faithfully,

(Sgd.) Paul Hecht,

Nairobi. January 19, 1956.

I agree with the above conditions.

(Sgd.) S.T. Morgan,

P.O. Box 111, Nairobi.

Mr. Winayak for the appellant urged the above grounds before the board; the board, however, continued to take evidence of the parties and eventually decided that despite the provisions of the agreement of January 19, 1956, present respondent was a tenant of the appellant and not a licensee. It accordingly made consequential orders. It is against that decision and the consequential orders that the present appeal is preferred.

The memorandum of appeal sets out seven grounds of appeal, some of which overlap and some of which are mere repetition. As Mr. Winayak developed his argument I took his real grounds of appeal to be the following:

(1) That once a dispute occurred before the board as to whether there was a tenancy or merely a licence

the board had no jurisdiction to consider the application.

(2) That the board wrongly admitted certain evidence which was inadmissible as being contrary to the provisions of s. 62 of the Indian Evidence Act, and relied on such evidence in arriving at its decision.

(3) (*a*) That the board erred in going behind the terms of the agreement of January 19, 1956, which clearly showed the position of the present respondent to be that of a licensee.

(3) (*b*) That taking the surrounding facts into account in addition to the terms of the agreement of January 19, 1956, as expressing the intention of the parties the board has erred in holding that the present respondent had exclusive possession of the suit premises and was a tenant and not a licensee.

The first of these grounds of appeal appears to me not only to be misconceived but also not to be covered by the grounds set out in the appellant's memorandum of appeal. The first ground in that memorandum does not deny the board jurisdiction on a dispute arising but sets out merely that the board erred in holding that it had jurisdiction in the face of the wording of the agreement of January 19, 1956. However, apart from that point, this ground, as Mr. Winayak has attempted to raise it and argue it, in my view has no merit. He has referred to the decision in *Sumantlal Chunilal Desai v. McFee and Cooper* (1) (1950), 24 K.L.R., 32, as authority for his submission that the Supreme Court alone had jurisdiction to decide the question as to whether the present respondent was a tenant or a licensee. Again in my view that case is no such authority. That was a case filed in the original jurisdiction of the Supreme Court without reference to the Increase of Rent (Restriction) Ordinance. Mr. Wynayak has been unable to refer me to any direct authority which supports his submission. Nor do I think he would be able to find one. It appears to me elementary that when certain conditions are required to give the board jurisdiction, and one of those conditions is in dispute, the board is not precluded from trying and coming to a decision on the facts out of which its jurisdiction will stem.

The second ground to which I have referred raises the question of the admission of certain evidence. The only evidence to which objection has been taken before this court was one sentence in reply to a question put to the present respondent by the board when he said "I was desperate for accommodation and willing to sign anything." There are other statements of a similar nature explaining why the present respondent signed the agreement of January 19, 1956, in the terms and containing the provisions it did. In referring to this the board in its judgment says:

> "The applicant states that he signed this agreement because he was desperate for accommodation and, therefore, paid no attention to the facts that he was described as a 'paying guest,' although he knew he could not be so considered. The applicant agrees that he is an experienced law clerk.
>
> "The board has come to the conclusion that the only satisfactory way to assess the applicant's status in the suit premises is to examine the conditions under which he occupied the premises, and that the question of applicant's status cannot be decided by the terms of the agreement signed by him."

In so far as the board have taken into account any of these remarks of the present respondent in arriving at the terms of the agreement or the intention of the parties it would be wrong in so doing. The wording of this part of the board's judgment would seem to indicate that it may have done so. In my opinion, however, I think that the wording itself and the fact that the board's conclusion follows the earlier part of the statement complained of is no more than unfortunate. The board later in its judgment refers to the correct law on the question of tenant qua licensee and came to its eventual decision following that law. Again it appears to me, perusing the evidence before the board, and its judgment as a whole, that no attempt has been made by the evidence complained of to contradict, vary, add to or subtract from the terms of the written agreement of January 19, 1956. The present respondent admits having signed that agreement, being well aware of its contents, and also admits that his occupation of the premises followed the terms of the contract. The only variation of the terms of the written agreement would appear to be what the board have found to be a supplementary agreement providing for the use, on two occasions a week, by the appellant of the bathroom in the premises occupied by the present respondent. In my opinion, further the board has not made any use of this particular evidence in coming to its decision.

This leaves then the third and real ground of appeal. The first leg on which the appeal stands is that the agreement of January 19, 1956, is clear and settles the

position of the parties to that agreement. It is conceded that the jurisdiction of the board under the Increase of Rent (Restriction) Ordinance, 1949, is ousted in the event of this present occupation being found to be a licence and not a tenancy. The board came to the conclusion that

> "the question of the applicant's status could not be decided by the terms of the agreement signed by him,"

to this conclusion I think the board should have added the word "solely." It appears to me that the so-called agreement of January 19, 1956, does not purport to set out the full terms of the occupation taken by the present respondent. The premises to be occupied are not set out in specific detail, as from the evidence it appears they were agreed. In the event of objection being taken to such evidence, which it was not, proviso (2) to s. 92 of the Indian Evidence Act would justify its admission. The like would apply to the agreement for the use by the appellant of present respondent's bathroom.

What the appellant urges really is that the use of the term "paying guest" (whatever that may mean in law) in the agreement of January 19, 1956, together with the supply of morning tea and part services as provided in that agreement makes the present respondent a licensee without more ado. With that I cannot agree. The law as to the interpretation of such an agreement is clear:

> "In deciding whether a grant amounts to a lease, or is only a licence, regard must be had to the substance of the agreement."
>
> (20 Halsbury's Laws (2nd Edn.), p. 9.)
>
> "In deciding whether a grant amounts to a lease, or is only a licence, regard must be had to the substance rather than the form of the agreement, for the law will not impute an intention to enter into the legal relation of landlord and tenant where circumstances and conduct negative that intention. The fact that the agreement contains a clause that no tenancy is to be created will not, of itself, preclude the instrument from being a lease."
>
> (Hill and Redman's Law of Landlord and Tenant (12th Edn.) at p. 11.)

Again the use of the term "rent" in an agreement will not of itself constitute the occupancy a tenancy. From this statement of the law it would appear that the mere description of the appellant as a "paying guest," if that were intended to imply "licensee," may be denied by the true substance of the agreement itself. It may also be denied by any terms of the occupation on which the agreement itself is silent. I would therefore hold that the position of the present respondent as set out in the agreement is not clear and I would agree with the board that to ascertain the position of the present respondent in law further evidence of the whole of the circumstances must be considered in addition to those terms set out in the agreement.

This brings me to the second leg of the appellant's final ground of appeal – which is briefly whether considering all the circumstances, including the agreement of January 19 in particular as evidencing the intention of the parties, the board has erred in holding the present respondent to be a tenant and not a licensee. I have been referred to a number of authorities on the difference between a tenancy and a licence, most of which are complicated by the fact that they refer to rating or electoral qualifications. The present law is set out in Hill and Redman's Law of Landlord and Tenant at p. 11 as follows:

> "It is essential to the creation of a tenancy of a corporal hereditament that the tenant should have the right to the exclusive possession of the premises. A grant under which the grantee takes only the right to use the premises without being entitled to exclusive possession operates as a licence, and not as a lease; but the test of exclusive possession is not conclusive, for the result of the recent cases is that, although a person who is let into exclusive possession is *prima facie* to be considered a tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy."

In support of the latter part of the above statement I have been referred to the dicta

of Lord Greene, M.R., in *Booker v. Palmer* (2), [1942] 2 All E.R. 674 at p. 676, to the effect that

> "Whether or not parties intend to create as between themselves the relationship of landlord and tenant, under which an estate is created in the tenant and certain mutual obligations arise by implication of law, must in the last resort be a question of intention. Where the parties enter into a formal document the intention to enter into formal legal relationship is obvious; but when all that happens is a quite casual conversation on the telephone, it is very much more difficult to infer that the parties are really contemplating entering into any legal relationship at all and in particular, such a special relationship as that of landlord and tenant."

In like manner – Denning, L.J., in *Macroft Waggons Ltd. v. Smith* (3), [1951] 2 All E.R. 271 at p. 277, says:

> "The test to be applied in Rent Act cases is the same test as that laid down in *Doe d. Cheny v. Batten* (7) by Lord Mansfield in cases of holding over (1 Cowp. 245):
>
> > " 'The question therefore is, quo animo the rent was received, and what the real intention of both parties was? "

Again I am referred to *Cobb v. Lane* (4), [1952] 1 All E.R. 1199, the headnote of which reads:

> "The fact of the exclusive occupation of property for an indefinite period is no longer inconsistent with the occupier being a licensee and not a tenant at will. Whether or not a relationship of landlord and tenant has been created depends on the intention of the parties, and in ascertaining that intention the court must consider the circumstances in which the person claiming to be a tenant at will went into occupation and whether the conduct of the parties shows that the occupier was intended to have an interest in the land or merely a personal privilege without any such interest."

It must, however, be remembered that each of these authorities are concerned with a somewhat special set of circumstances, and in none of them did the occupation follow a "letting" to the other party. They are of the nature of "possessory licences" (Megarry – The Rents Acts (8th Edn.) at p. 45).

Megarry (*supra*) then goes on to cite certain overlapping factors which may be relevant in determining whether a transaction creates a tenancy or a licence. In addition to the intention of the parties, for which the above-cited cases are authority, he refers to the terms of any agreement and in that regard he summarises the authorities at p. 47 in these words:

> "If the rights in issue are granted by a written agreement, it is a 'question largely of construction of the agreement whether the rights of the occupier are those of a tenant or a licensee.' Thus the insertion of provisions consistent only with a tenancy may prevent the agreement from being held to constitute a licence, as where there are provisions against assignment and sub-letting, and an authority to the grantor to enter the premises to inspect and repair them. Such an agreement may be held to create a tenancy even if it is described as a licence, and even if it is framed as a contract of employment and expressly provides that nothing in it 'shall be construed to create a tenancy'; for the question is not a mere matter of words, and if the operative parts of the agreement establish a tenancy, an express provision negativing a tenancy is ineffective. The court 'must look not so much at the words as the substance of the agreement'; the relationship of the parties 'is determined by the law and not by the label which they choose to put on it,' so that 'parties cannot turn a tenancy into a licence merely by calling it one'."

At p. 50 Megarry refers to "surrounding circumstances" of which in the present case I should refer to his statement that

> "A further consideration is whether or not at the time of the transaction the occupier is already in the premises, for the inferences to be drawn where the transaction gives de novo the right of exclusive possession are *prima facie* very different from those to be drawn where the occupant has, e.g. lived on the premises with the former tenant for many years and has an arguable right to remain. In the former case a tenancy will usually arise, whereas in the latter case it is less difficult to infer a licence, although if the occupier pays rent, the longer the relationship continues 'the more likely it is that the court will infer that a new tenancy has been in fact created'."

Mr. Winayak has submitted first that the terms of the written agreement and the whole of the facts may show exclusive user but not exclusive possession. The board found that the facts before them established exclusive possession. Those facts appear to be that the appellant agreed to accept the present respondent, his wife and child as "paying guests" at a "price" of Shs. 600/- per month. I quote those words as I propose to refer to them later when considering the intention of the parties. For this he gave the present respondent what may be described as the exclusive use of a self-contained lock-up flat consisting of a living room, bedroom, bathroom and kitchen. The door between this portion of the building and the remainder of the building which was occupied by the appellant, was permanently locked. This flat had a separate front door leading into the living room and a separate back door leading into the kitchen. No bed linen or towels were supplied. The agreement and evidence is silent as to whether crockery and kitchen utensils were supplied or not. Electric power, water and bath, early morning tea and part service were provided. Part service apparently consisted of the appellant's house boy sweeping out the flat and making the beds. Provision was made for the termination of the occupation by either party giving notice four weeks prior to the last day of the month. Apparently there were verbal additions to the written agreement by which the appellant reserved to himself the right to use the bath in the flat on two occasions each week and the present respondent, not being allowed to keep his own refrigerator, was entitled to use the appellant's refrigerator for that purpose. The self-contained nature of the flat, its separate entrances, and the terms as to notice, would ordinarily be consistent with the agreement constituting a tenancy not a licence. The only circumstances which may possibly mitigate against that view are:

(*a*) the appellant's use of the bathroom;

(*b*) the fact that the present respondent was not allowed to keep a refrigerator;

(*c*) the supply by the appellant of water, electricity and part service;

(*d*) the supply of morning tea.

In respect of the use of the bathroom the board utilised the dictum of Porter, L.J., in *Baker v. Turner* (5), [1950] A.C. 401, at p. 415. If that dictum were applied by the board to the facts it would have found that the present respondent was in control of the bathroom, it being within the confines of his lock-up flat, and by agreement the appellant was entitled to use it on two occasions a week only. This agreement I would hold to be consistent with the letting being in the nature of a tenancy and not a licence. The refusal to allow a refrigerator I would consider in ordinary circumstances to be in derogation to a tenant's exclusive possession, but I would have to take account of a general knowledge that restrictive practices do exist even in tenancies, and one of this nature may not be held to be unreasonable or out of the way where through circumstances the landlord pays the electricity bill. The supply of water, electricity and conservancy, under the existing circumstances I would not consider to be in any way inconsistent with a tenancy. The supply of part service I do not regard as being in any way inconsistent with the occupation being a tenancy. In the first place it is general knowledge that there are in existence "service flats" which are let as tenancies. Again that same sort of service is contemplated by the Ordinance itself as being consistent with a tenancy is evidenced by the wording of s. 26 (1) prohibiting a landlord from depriving a

tenant of “water, light, conservancy, sweeper or other service.” The part service supplied by the landlord I would consider to be within the term “other

service" used in s. 26 (1). There remains the problem of the morning tea. This to my mind would be more consistent with the occupants being "lodgers" and therefore licensees, than with their being tenants. It is probably along these lines that the mind of the appellant was working when he insisted on the supply of morning tea, although the present respondent had the means of supplying himself with it, and in describing the present respondent and his family as "paying guests." The legislation in England is not quite the same as in this colony on this point. There a dwelling house may be excluded from the general provisions of the Acts by being bona fide let at a rent which includes payments in respect of board, attendance or use of furniture. It is, however, of interest to note that

> "It has been said that the term 'board' of itself suggests a sufficiency and not merely an early morning cup of tea . . . In practice the dividing line appears to fall between the early morning cup of tea on the one hand and 'bed and breakfast' on the other."
>
> (Megarry (*supra*), p. 123.)

In his argument Mr. Winayak has utilised the description of the present respondent used in the agreement – "paying guest." I am unable to ascertain what exactly a paying guest is. It appears to me to correspond with the better known term "lodger" for the reason that a lodger has always been held to be a licensee. Hill and Redman (*supra*), at p. 17, sets out the law in regard to lodgers in these words:

> "A lodger who has a separate apartment has not in law an exclusive occupation, and is therefore in the position of a licensee, if the landlord retains the general control and dominion of the house, including the part occupied by the lodger; but if in fact the landlord retains no control over the lodger's separate apartment, the occupier is a tenant. The occupier does not, however, become a lodger merely by reason of the fact that the landlord resides on the premises and retains control of the passages and staircases and other parts used in common."

The board considered this proposition and held that in fact the present respondent had a separate apartment and that the landlord retained no control over that separate apartment. While that was an inference from the facts proved before them I see no reason to disagree with it. To go further in regard to the supply of morning tea I would hold that to be within the term "service" and in no way to establish either that "board" was supplied or that it gave the landlord any control over the separate apartment. The board found that the present respondent was in exclusive occupation of the suit premises and I agree with that finding.

There is, however, one further point for consideration, that is the intention of the parties. A suggestion was made before the board that the supply of services and morning tea was a deliberate attempt by the appellant to take himself out of the provisions of the Ordinance. The board refused to consider whether this was so. I include it, for the benefit of the appellant, as indicating his intention in entering into this agreement. I don't think, bearing in mind the use of the words "paying guest" and "price" and the inclusion of the wife and child in the wording, and the unwanted supply of morning tea, that the appellant was trying to do anything else than try to create a licence as against a tenancy. There is nothing against his trying to get round the provisions of the Ordinance or of taking advantage of a loop-hole if one exists. Here I propose to adopt the reasoning of Megarry (*supra*), at p. 51, to the effect that

> "If landlords could escape the control of the Acts by the simple expedient of granting a licence in place of a tenancy, the Acts could easily be evaded. The fact that a licence is outside the Acts may be some ground for inferring that the grantor never intended to grant a tenancy, yet it is uncertain how far the grantor's intention will ultimately prevail. On one view, if the intention of the grantor, accepted by the grantee, is to create a licence and no tenancy, it would be wrong for the court to extract from the grantor an estate or interest in land in the teeth of the intention of the parties, at all events if the words or document by which the transaction was

effected are apt for a licence and not for a tenancy."

There was here, in my view, an intention on the part of the appellant, as grantor, to create a licence, but the facts before the Board show that the present respondent, as grantee, did not accept that intention. Again I would go further and hold that even were the intention of the appellant to create a licence, by the agreement itself he failed to do so. The whole effect of the agreement of January 19 was to create not a licence but a tenancy. I therefore agree with the board in its decision first that the present respondent was in exclusive occupation, second that the present respondent was not a "paying guest" or "lodger" and finally that, despite the intention of the appellant, the circumstances including the written agreement constituted the occupation by the present respondent a tenancy and not a licence.

The appeal is dismissed with costs.

Appeal dismissed.

For the appellant:
JK Winayak
Khetani & Winayak, Nairobi

For the respondent:
JA Couldrey
Kaplan & Stratton, Nairobi

Chunibhai J Patel and another v P F Hayes and others
[1957] 1 EA 748 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	13 December 1957
Case Number:	37/1957
Before:	Briggs Ag V-P, Forbes JA and Bennett Ag CJ
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – O'Connor, C.J

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[1] Fatal accident – Damages – Assessment – Whether widow's subsequent earnings to be taken into account – Fatal Accidents Ordinance, s. 4 (*K.*).

Editor's Summary

The respondents, a widow and her two infant children, had been awarded damages in the Supreme Court for the death of her husband and for their own injuries arising from a motor accident caused by the appellants' negligence. On appeal against the quantum of damages awarded, it was contended that as the widow had obtained employment after the accident her earnings should be regarded as a direct

consequence of the death, or in the alternative that as her employment was with a company of which her husband was the only substantial shareholder her earnings should be regarded as profits from the deceased's estate to which she had succeeded, and in either case damages should be reduced accordingly.

Held–

(i) the earnings of the widow were an adventitious benefit and were not receivable as a direct or natural consequence of the death;

(ii) whether the widow's income was regarded as her personal earnings or as income received from the assets of the deceased's estate it was proper to disregard it, because allowance had correctly been made for the capital value of the estate and the income received therefrom could not again be taken into account.

Appeal dismissed.

No cases referred to in judgment

December 13. The following judgment was read by direction of the court.

Judgment

The respondents are respectively the widow and administratrix, and the two infant daughters, of one Henry Albert Hayes, deceased: they obtained judgment for damages in the Supreme Court of Kenya in respect of his death and injuries to themselves caused by the negligence of the appellants. General damages of £12,000, apportioned as to £6,000 to the first respondent and £3,000 each to the second and third, were awarded under s. 4 of the Fatal Accidents Ordinance (Cap. 9) and against this portion only of the judgment the appellants appealed. We dismissed the appeal with costs and now give our reasons.

The principles which the learned chief justice, as he then was, applied in assessing those damages appear from the following passage of his judgment:

> "The court should find the age and expectation of working life of the deceased, and consider the ages and expectations of life of his dependants, the net earning power of the deceased (i.e. his income less tax) and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase. The multiplier will bear a relation to the expectation of earning life of the deceased and the expectation of life and dependency of the widow and children. The capital sum so reached should be discounted to allow for the possibility or probability of the re-marriage of the widow and, in certain cases, of the acceleration of the receipt by the widow of what her husband left her, as a result of his premature death. A deduction must be made for the value of the estate of the deceased because the dependants will get the benefit of that. The resulting sum (which must depend upon a number of estimates and imponderables) will be the lump sum the court should apportion among the various dependants."

The appeal turned, not so much on any dispute as to these principles, but on the learned chief justice's application of one of them to the facts. He found as facts that the capital value of the estate of the deceased was £2,000, that his notional future net income would have been £1,800 a year, that two-thirds of this sum, or £1,200, was the proportion to be attributed to his dependants, and that his expectation of future earning life was fifteen years at least, and consequently the sum of £1,200 should be capitalized at fifteen years purchase, or £18,000. After deducting £2,000, the value of the estate and making a further "fairly substantial" deduction in respect of the possibility of re-marriage, the learned chief justice said:

> "Neither do I propose to make a deduction because Mrs. Hayes has now been appointed Managing Director of the Kedowa Estates Ltd., at a salary of £1,200 a year. This is probably a method of giving her an income essential for her support. I am not sure that this would be a legitimate deduction, any more than it would be a legitimate deduction to take into account the salary of, say, the widow of a professional man who had, since his decease, supported herself by secretarial work. It may be mentioned that since the deceased's death the company has had to maintain two resident managers who did not have to be employed while Mr. Hayes was alive, and their salaries and the salary paid to Mrs. Hayes will have to come out of the profits and will therefore reduce the money available for dividends and indirectly decreases the value of Mrs. Hayes' shares in the company. Mrs. Hayes and the other dependants are therefore in effect, paying her salary."

It was principally on this passage of the judgment that the appellants based their sole ground of appeal, which was as follows:

> "That the learned chief justice erred in law and in fact in failing to hold that the fact that the respondent Mrs.

Peggy Hayes has since the death of Henry Albert Hayes been in receipt of an income of £100 per month as a director of Kedowa Estate Limited is relevant to the amount of damages to which respondents are entitled."

The argument of Mr. Wilkinson for the appellants was rather more widely based than might have been expected from these words, and we felt some doubt whether it all fell within them. That, however, is not now material, since we heard and considered all his submissions.

They fell under two headings, first, that all income of the widow after the husband's death should be taken into account in assessing damages under the Ordinance, and secondly, that independently of that more general proposition the sum of £1,200 per annum now being paid to her by the company stands on a special footing and must be taken into account for special reasons. No authorities were cited to us on either of these propositions, but the learned chief justice has referred in his judgment to all those which appear to be at all relevant.

Mr. Wilkinson argued his first proposition on the basis that damages flowing from the husband's death depend on the diminution of income of the dependants, or of physical benefits derived from the deceased's income by them. If, therefore, there is no diminution of income or of physical benefits, there is no damage. He sought to show that in this case the wife and children were no worse off, and might be a little better off, than they had been before the death.

We agreed in part with this submission, but we think there is an important qualification, namely, that the court should take into account only such benefits as the dependants may receive as a direct and natural consequence of the death. Such benefits would include income from a trust which the deceased had previously enjoyed as lifetenant, or income from a pension payable to the widow. We think that in the ordinary way earnings of the wife are an adventitious benefit, and not receivable as a direct or natural consequence of the death. It may be that economic necessity obliges her to work and earn, but that consideration does not bring her earnings within the meaning of the rule. We therefore rejected Mr. Wilkinson's first submission.

His second submission depended on the relations between the first respondent and the company. The deceased was the only substantial shareholder, and after his death intestate his shares became vested in the first respondent, as to one-third beneficially, and as to one-third each in trust for her daughters. She has effective control of the company, though she must exercise that control for the daughters' benefit as well as her own. Mr. Wilkinson asked us to say that in view of the employment of two European managers her post as managing director must be more or less a sinecure, and that the sum of £1,200 per annum should be regarded, not as earnings, but as profits of the farm. He said the evidence showed that the farm's prospects were good and profits might be expected to increase. The net income receivable by the dependants from the farm should not be less than they had previously enjoyed through the deceased, or might have expected to receive through him had he survived.

We were by no means satisfied that the facts were as Mr. Wilkinson suggested. It was proved that after the death the first respondent had been so actively employed on the farm that her health suffered. It is quite possible that even now the £1,200 per annum is no more than fair remuneration for the work she does. There was no direct finding on this point. But, if the first respondent were in fact making use of her position in the company to obtain a gratuitous payment of £1,200 per annum to herself, she would be guilty of a breach of trust. We saw no reason to assume that this was the case, and considered that the appeal must fail for this reason. Nevertheless we also considered the case on the footing that Mr. Wilkinson's contention on the facts was right.

The capital value of the deceased's estate was found to be £2,000, nearly all of which represented the value of his shares in the company. It is apparent that, if the capital value of those shares and also the

income which they might be expected to produce had both been taken into account, two deductions would have been made in respect of the same assets. The £2,000 had been deducted already. *Prima facie* no allowance should have been made in respect of the probable income. Mr. Wilkinson, however, argued that, in merely deducting the capital sum of £2,000, the learned chief justice had acted on a wrong principle, since the true basis of assessment

was a deduction from notional income, had the deceased survived, of actual probable income, having regard to his death. He argued that here the actual probable income was much greater than was to be expected from a capital sum of £2,000. In principle there was much to be said in favour of this view, but we thought that there was an overriding reason for rejecting it. The assessment of damages of this kind must always, as the learned chief justice said, "depend upon a number of estimates and imponderables"; but it is clearly desirable that wherever possible the court should act upon facts rather than probabilities. The value of a deceased person's estate at the time of his death is a matter of ascertainable fact, but the probable income to be derived from that estate is a matter of speculation. If it were necessary, an estimate of it could be made, but it would introduce one more element of uncertainty. We thought that such an estimate should not be made, and that it was correct to make a deduction of the proved capital value. To accede to Mr. Wilkinson's argument would be, in effect, to set aside the proved figure of capital value and to substitute a new notional capital value based on future probable income of the estate. It would have been open to the appellants to attack in the Supreme Court the correctness of the figure of £2,000, which appeared to the learned chief justice to be low; but no attempt was made then to show that it was incorrect, and no such attempt could be made before us. On the evidence it was the only figure which could have been found.

It may be useful to point to some of the difficulties which would arise if Mr. Wilkinson's submission were accepted. Shares in the company are presumably not a trustee investment, and the first respondent would presumably have to obtain leave of the court if she wished to retain those shares for her infant daughters. Such leave might well be refused, and on a forced sale the shares might well realise even less than the value assessed for estate duty. The income from the purchase price reinvested would be very small. The first respondent would no longer control the company and might lose her employment. The company has never paid dividends and, unless it did so, the first respondent would have no income from the estate. In any attempt to assess probable future income to be derived from the deceased's estate, all these factors would deserve just as much consideration as the probabilities based on continuing control and prosperity of the farm. Mr. Wilkinson conceded that findings on all these matters were lacking, and that a partial retrial would probably be necessary, if his submissions were accepted. He relied, however, on the learned chief justice's finding that the notional probable net income of the deceased, had he survived, would have been £1,800, and put this forward as an indication of the probable profits of the farm since the death. This argument ignored the fact that the figure of £1,800 was made up of two elements, first, notional remuneration for the whole time employment of the deceased on the company's business, and secondly, notional return on his investment. It was not necessary for the learned chief justice to distinguish between these two elements, or to find how much of the total was attributable to each, and he did not do so. The fact that during his lifetime the deceased had taken all his income from the company in the form of salary does not affect this. Even if the large assumption is made that the farm is likely to be equally profitable without the efforts of the man who created it, there is still no finding as to the probable amount of future profits in the circumstances which now obtain.

We were accordingly of opinion that the method of assessment of damages adopted by the learned chief justice was correct. Whether the sum of £1,200 per annum now received by the first respondent was rightly to be regarded as her personal earnings or as income received from the assets of the deceased's estate, it was proper to disregard it. The correct deduction was made in respect of the capital value of the estate, and this sufficiently allowed for future income from the estate, whatever it might be.

Appeal dismissed.

For the appellants:
PJ Wilkinson
Carson Gentles & Co, Nakuru

For the respondents:
B O'Donovan
Geoffrey White & Co, Nakuru

Trevor Price and another v Raymond Kelsall
[1957] 1 EA 752 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	30 December 1957
Case Number:	81/1957
Before:	Sir Kenneth O'Connor P, Briggs Ag V-P and Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Uganda – Lyon, J

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[1] Appeal – Evidence – Failure of trial judge fully to appreciate and evaluate evidence – Power of appellate court to evaluate evidence and draw inferences.

[2] Company – Contract made before incorporation – Whether company after incorporation can ratify or make new contract to same effect.

[3] Company – Director – Fiduciary position of director – When director's conduct creates constructive or resulting trust.

Editor's Summary

The first appellant and the respondent were the directors and only substantial shareholders of the appellant company which was incorporated in Uganda in 1947. Until the lease expired in about 1943, the respondent was lessee of 150 acres of wholly undeveloped land at Toro known as Kiko Estate. In 1946 the first appellant, who was then visiting Uganda and had funds to invest, met and discussed with the respondent a scheme for forming the appellant company. The respondent stated that he had two tea estates comprising 455 acres, contiguous to Kiko and hoped to obtain another 150 acres i.e. Kiko. The first appellant agreed to finance the project and the respondent agreed to apply for a new lease of Kiko for the projected company, disclosing that the first appellant was backing the venture. Later in 1947 the respondent wrote to the land office for a new lease of Kiko for the company, and on the same date an agreement was prepared between the respondent and the appellant company for the purchase of the two estates by the company, but Kiko was not therein referred to. At a meeting of directors on the same date it was resolved not to carry into effect this agreement until a lease of an additional 150 acres for which

the respondent had “applied to the land office had been granted,” it being intended that he should transfer such 150 acres to the company and that the transfer of all three estates should take place contemporaneously. In 1948 the appellant company was granted a licence to plant tea on Kiko, one of the conditions of which was the erection of a tea factory. Between 1948 and 1952 the respondent successfully negotiated a new lease of Kiko but in 1952 he asked that the lease be issued in his own name and this was done in 1953. One of the terms of the lease was that the lessee should plant tea and erect a factory in accordance with the licence held by the company. In 1955 the respondents asked the first appellant for a larger share interest in the company. To this the first appellant did not agree, and thereafter relations between these two directors deteriorated. According to the first appellant, he learnt for the first time in December, 1956, that Kiko was not in the name of the company, and early in 1957 proceedings were begun by the appellants. At the trial it was established that in the company’s balance sheets from 1948 onwards, which the respondent had signed, an item was included for Kiko estate which, apart from one or two payments made by the respondent personally, had been developed with the company’s funds. At the conclusion of the case for the plaintiffs, a submission was made that if as pleaded there was an oral agreement for the transfer of Kiko to the appellant company, that agreement was made before the company’s formation and the company could not ratify it when it came into existence. This submission was upheld by the trial judge, who then gave judgment for the respondent against the appellant company, and he went on to treat a claim of the first appellant against the respondent as one for specific performance of a contract to sell Kiko to the company. He held that the terms of the alleged contract were not clear and that the parties were not ad idem and dismissed the suit. On appeal, in addition to arguments whether the trial judge had correctly appreciated the evidence and drawn the right conclusions therefrom, it

was contended that the respondent was in a fiduciary position relative to the company as director and manager and that in the circumstances established a constructive or resulting trust in favour of the company.

Held–

(i) where it is apparent that the evidence has not been subjected to adequate scrutiny by the trial court before expressing a view, derived from demeanour, of the reliability of a witness, it is open to an appellate court to find that the view of the trial judge regarding the witness is ill-founded and, where wrong inferences have been drawn from the evidence, it is the duty of an appellate court to evaluate the evidence itself.

Yuill v. Yuill, [1945] 1 All E.R. 183 applied.

(ii) from the evidence the inference was inescapable that the respondent had for years deliberately concealed from the company, of which he was a director and manager, from its accountant and auditor and from his co-director that he had in 1953 obtained a lease of Kiko in his own name.

(iii) the trial judge had erred in treating the claim of the first appellant simply as a claim for specific performance of a contract to sell Kiko to the company.

(iv) a company cannot ratify a contract made before its incorporation but there may be circumstances from which it can be inferred that a company, after incorporation, has made a new contract to the effect of the previous contract.

Dictum of Jessel, M.R., in *In re Empress Engineering Co*. (1880), 16 Ch. D. 125 at p. 128 adopted.

(v) the respondent was in a fiduciary position vis-à-vis the company from the start; in order to obtain the lease he made use of the licence issued to the company, he spent the company's money on development and in breach of duty acquired a title to Kiko in his own name. Accordingly the respondent held the title to Kiko on trust for the company.

Appeal allowed.

Declaration that Kiko estate was held by the respondent on trust for the appellant company absolutely. Order that the respondent should endeavour to obtain the consent of the Governor of Uganda to an assignment of Kiko to the company and, if consent obtained, that the respondent assign the lease against payment by the appellant company to the respondent of Shs. 4,528/30 in respect of monies spent by the respondent in obtaining the lease, etc.

Cases referred to:

(1) *Yuill v. Yuill*, [1945], 1 All E.R. 183.

(2) *North Sydney Investment and Tramway Co. Ltd. v. Higgins* [1899] A.C. 263.

(3) *In re Empress Engineering Co*. (1880), 16 Ch. D. 125.

(4) *Howard v. Patent Ivory Manufacturing Co*. (1888), 38 Ch. D. 156.

(5) *In re Northumberland Avenue Hotel Co*. (1886), 33 Ch. D. 16.

(6) *Hasmani* (*H. D.*) *v. The National Bank of India Ltd*. (1937), 4 E.A.C.A. 55.

(7) *Erlanger v. New Sombrero Phosphate Co*. (1878), 3 App. Cas. 1218.

(8) *Gluckstein v. Barnes*, [1900] A.C. 240.

December 30. The following judgments were read by direction of the court:

Judgment

Sir Kenneth O'Connor P: This is an appeal from the judgment of the High Court of Uganda dismissing a suit by the first and second appellants claiming, as against the respondent, a declaration that a leasehold tea estate known as Kiko Estate standing in the name of the respondent was held by the respondent on trust for the second appellant, and praying for an order directing the respondent to transfer the estate to the second appellant or, alternatively for damages, and for costs and other relief.

The second appellant is a limited company incorporated in Uganda. The first appellant and the respondent have, at all material times from the date of the

incorporation of the company, been its directors and only substantial shareholders. The respondent was, at all material times, also the salaried manager of the company.

The memorandum of appeal raises various questions as to the inferences to be drawn from the facts and the legal effect of the documents in the case and of the actions of the parties over a period of about thirteen years. It is impossible to appreciate these issues without first setting out the history of the matter. The history, so far as material, is as under:

The respondent was, prior to October, 1944 lessee of 154.09 acres known as the Kiko Estate, Toro (hereinafter called "Kiko") which he held on Crown Lease No. 19074. That lease expired some time in 1943. The land was at that time entirely undeveloped. It was cattle country.

On October 21, 1944, the respondent applied for a renewal of the lease. On October 26, 1944, the land officer, Entebbe, replied that a renewal of the lease could not be considered at that time; and that the respondent was at liberty to apply for new lease when he was in a position to occupy the land.

In 1946, the respondent owned two tea estates contiguous to Kiko, by name Nyambinambu and Lwongonera.

The first appellant lives in England, but has interests in Uganda and visits Uganda periodically. He visited Uganda in 1946 and met the respondent. The first appellant had just sold an interest in a tea estate for a considerable sum and was looking for an investment for the proceeds. According to the first appellant, the respondent said that he had 455 acres and hoped to obtain another 150; the first appellant explained that the extra 150 acres was vital if a factory was to be built; Kiko was the 150 acres referred to. The respondent undertook to apply for the land and the first appellant agreed that the respondent could promise to plant tea (which the respondent was not himself in a financial position to undertake) and mention that he had the first appellant's backing and that he, the first appellant, would find the finance.

On February 24, 1947, the respondent and the first appellant signed a

> "Preliminary scheme for the formation of a limited liability company to acquire from Mr. Raymond Kelsall his freehold and leasehold estates in Toro known as Nyambinambu and Lwongonera respectively."

By that preliminary agreement it was *inter alia* agreed that a private company should be formed to acquire the freehold estate of Nyambinambu and the leasehold estate of Lwongonera then belonging to the respondent. The name of the company was to be Portal Tea Company or Ruwenzori Tea Company. The preliminary scheme provided further that the capital of the company should be Shs. 300,000/- divided into fifteen thousand ordinary shares of Shs. 20/- each. The respondent was to sell his freehold estate of Nyambinambu and his leasehold estate of Lwongonera to the company for a total sum of Shs. 28,000/-. There was a conflict of evidence in the lower court as to whether that sum represented the cost of the estates to the respondent or their market price. The first appellant said that they were brought in at cost. The respondent said in examination-in-chief that their price was a market price, but in cross-examination said

> "I agreed early on that neither Price nor I should make a profit on estates put into the company."

The amount of Shs. 28,000/- was to be satisfied by the issue to the respondent of one thousand four hundred paid ordinary shares of Shs. 20/- each in the company. The first appellant was to subscribe for six thousand shares of Shs. 20/- each. The respondent was to have the right to apply for not more than eight hundred additional shares per annum until Shs. 120,000/- of the unissued capital of the company

had been issued to him. The first appellant and the respondent were to have an option to take up any further shares which might be issued in proportion to their respective share holdings. The respondent was to serve the company as manager at the salary mentioned. The articles of the company were to provide *inter alia* that the first appellant and the respondent should each be a director for life of the company so long as he held one share.

This preliminary scheme did not mention Kiko which was, as already stated, an area of about 150 acres lying between Nyambinambu and Lwongonera, of which the respondent had formerly held a lease, but to which in February, 1947, he had no title. According to the evidence and the documents filed, it was the opinion of both the respondent and the first appellant that it was necessary to get a lease of Kiko in order to make the three estates an economic proposition justifying the erection of a tea factory. Correspondence ensued between the respondent and the district commissioner, Fort Portal, the chief secretary and the district commissioner, Toro. The respondent was trying to get a lease of Kiko. He represented, in letters dated May 22, 1947, and October 18, 1947, that without Kiko he had not enough land for his cultivation programme: if he had Kiko this would make an economic block justifying the erection of a tea factory. He admitted in evidence that he had said that the development of the two estates Lwongonera and Nyambinambu could not be satisfactorily carried out unless he was granted an agricultural lease of Kiko.

On October 16, 1947, the district commissioner, Toro, pointed out to the respondent that, on the expiry of his former lease, the estate had reverted to the Crown unconditionally and that his present application must, therefore, be regarded as a new one.

On August 12, 1947, the company was incorporated under the name of the Ruwenzori Tea Company Limited.

On November 13, 1947, an agreement was made between the respondent and the second appellant (the company) by which it was agreed that the respondent should sell and the company should purchase Nyambinambu and Lwongonera estates. The consideration was to be Shs. 28,000/- to be satisfied by the issue of paid up shares in the company. By cl. 3, values were set for purposes of stamp duty. Provision was made for registration of this agreement, which constituted the respondent's title to shares allotted otherwise than for cash, pursuant to s. 43 (now s. 44) of the Companies Ordinance.

It should be noted that neither in this agreement nor in the preliminary scheme for the formation of the company was Kiko mentioned. At that stage the respondent had no title to Kiko and could not bring it in, and it does not appear that he had as yet incurred any expenditure on it which would justify his being reimbursed by an issue of shares. The first appellant said in his evidence that this might have been the reason why Kiko was not mentioned in the agreement. If it was contemplated that title to Kiko should be obtained in the company's name, there was no need to provide for a transfer of Kiko from the respondent to the company. The other two estates provided the consideration for the issue of shares otherwise than for cash and an agreement relating to them was all that was necessary to be registered under he Companies Ordinance.

Transfers of Government leases require the consent of the Governor. The Agreement of November 13, 1947, contained a clause binding the respondent to use his best endeavours to obtain the Governor's consent to the transfer of Nyambinambu and Lwongonera and, if such consent could not be conveniently obtained, to execute a declaration of trust of those properties in favour of the company or otherwise deal with them as the company should direct. It was a matter of comment in the court below that no similar clause was inserted relating to Kiko. As already mentioned, while the respondent had, at that time, a title to Nyambinambu and Lwongonera, he had no title to Kiko, and accordingly, no question of obtaining the Governor's consent to a transfer then arose. Moreover, it seems to have been contemplated that the lease ot Kiko might be taken to the company direct. The respondent could, nevertheless, have been required to use his best endeavours to obtain a title to Kiko for the company, or for himself and to hold it on trust for the company, and it is, perhaps, remarkable that no such provision was inserted in the agreement. Such a

provision was not, however, essential and might have increased the stamp duty.

On the same day, November 13, 1947, the first meeting of directors of the company was held at Kampala. This the first plaintiff and the respondent attended. It is noted in the minutes of that meeting that the draft agreement was read and considered

and it was resolved that the company should enter into it and it was sealed. There follows a paragraph:

> "It was resolved that the agreement be not carried into effect by the execution of transfers of Mr. Kelsall's estates until a lease of an additional 150 acres for which Mr. Kelsall has applied to the land office had been granted to him, it being intended that he should transfer such 150 acres to the company and it was resolved that such transfer should take place contemporaneously with the transfer of the estates referred to in the agreement."

The agreement referred to was the agreement of November 13, 1947, already mentioned.

On March 11, 1948, a licence to plant tea on Kiko was granted to the Ruwenzori Tea Company Ltd. (referred to in the licence as "the licensee"). The licensee was required to fulfil certain conditions, contained in the licence, requiring it to plant tea and erect a tea factory. Condition six forbade the licensee to dispose of its tea estate or tea factory without the consent in writing of the Director of Agriculture.

On March 25, 1948, the land officer notified the respondent that his application for releasing Kiko had been approved and offered him a lease of 74 years and 6 months at a rent for the first 33 years of Shs. 1/- per acre, subject to re-assessment at the end of that time. No premium was demanded. Development of the estate for agricultural purposes was to be in accordance with the conditions laid down by the Director of Agriculture contained in the licence to plant tea dated March 11, 1948, and a tea factory was to be erected in accordance with para. 4 of the licence. A deposit of Shs. 600/- to cover survey fees was required.

On April 7, 1948, the respondent replied to the land officer accepting the offer of a lease of Kiko and enclosing a cheque for Shs. 600/- "for survey, rent and other fees." It is common case that this was paid out of the monies of the company of which the respondent was a director and the salaried manager and whose bank account he operated. The respondent added

> "I would be grateful if, when making the lease out, you would put the estate in the name of the Ruwenzori Tea Company Ltd., and not in my personal name."

The land officer replied on April 19, 1948, acknowledging receipt of the respondent's letter and cheque and confirming that the lease would be prepared in the name of the company.

On February 19, 1951, the respondent wrote to the land officer on the notepaper of the company asking to be informed when he could survey Kiko as he (the respondent) had about half the land cleared and ready for planting. It seems that at least up to this date it was clear that the company should have Kiko.

On April 30, 1952, the respondent wrote to the land officer saying that the estate had been surveyed during August, 1951, and asking when he could expect to receive the deeds. He added

> "And will you please have the deeds prepared in the name of Raymond Kelsall as arrangements with the Ruwenzori Tea Company are not completed yet."

It is plain that at some time between April 7, 1948, and April 30, 1952, and almost certainly after February 19, 1951, the respondent departed from his original intention of obtaining a title to Kiko in the name of the company and conceived a plan of obtaining a title to Kiko in his own name. He said in his evidence that he "lost faith in Price."

On May 16, 1952, the land officer wrote requiring payment of a sum of Shs. 4,528/30 for survey fees, preparation of the leases etc., and rent from March 1, 1948 to the end of 1952. Credit was given for the

Shs. 600/- previously received.

The respondent replied on June 2, 1952, enclosing a cheque for Shs. 4,528/30. This money was paid by the respondent out of his own funds and it is admitted by the appellants that he is entitled to have this amount repaid to him by the company.

On June 16 the respondent wrote again pointing out that the receipt had been issued in the name of the Ruwenzori Tea Company Ltd. per R. Kelsall Esq., but that the

cheque was from him personally and asking again that the deeds should be prepared in the name of Raymond Kelsall

> "as arrangements with the Ruwenzori Tea Company Ltd., re this land are not completed yet."

On January 2, 1953, the respondent wrote to the land officer sending him back the documents signed and witnessed.

On March 30, 1953, the land officer wrote to the company (not to the respondent) to the effect that the lease of Kiko had been registered. He sent a certificate of title. The lease was a lease of Kiko from His Excellency the Governor to R. Kelsall. Under para. 2 (*b*) and para. 2 (*e*) the lessee covenanted *inter alia* to erect on the land a tea factory in accordance with para. 4 of the licence to plant tea and to develop the land in accordance with conditions specified by the director of Agriculture and contained in the licence. The licence, as already mentioned, was in the name of the company. The remarkable position was thus created that the respondent as lessee was bound to comply with conditions imposed on the company as licensee and the company as licensee was subject to obligations and restrictions which could only be performed by the title holder. The respondent did not then inform the company or its accountant and auditor or his fellow director, the first appellant, that he had obtained a lease of Kiko or that he had personally made any payment in respect thereof.

The Certificate of Title was dated February 26, 1953, and was in the name of the respondent.

On December 22, 1953, the land officer wrote to the respondent that the rent of Kiko was outstanding from January 1, 1949 to December 12, 1953, and demanding Shs. 770/-. On January 5, 1954, the respondent wrote enclosing a cheque for this amount. This was his own money.

Each of the company's balance sheets from 1948 onwards has attached to it a "Land Account." Each of these land accounts shows an item for Kiko in which "tenure" and "date of expiry of lease" are entered as "to be arranged." This is continued in the same form in the land accounts for 1949, 1950, 1951, 1952, 1953 and 1954. In the land account for 1955, the tenure and date of expiry of lease of Kiko are entered as "not known." It will be recalled that the respondent had, in fact, obtained a lease of Kiko on or about March 30, 1953. The explanation of the fact that, notwithstanding this, the "tenure" and "date of expiry of lease" of Kiko continued to be entered in the company's accounts long after that date as "to be arranged" or "not known" appears from the following correspondence. On April 21, 1954, Mr. Shelton, the company's accountant and auditor, wrote to the respondent:

> "The land schedule at December 31, 1954" (presumably "1953" was intended) "showed an area of 150 acres called Kiko for which no title deeds have been issued. What is the present position?"

To which the respondent replied on April 29, 1954:

> "To be arranged, same as last balance sheet."

On May 20, 1954, Mr. Shelton wrote again to the respondent:

> "Have you anything in writing regarding the ownership and arrangements re Kiko? If so, may I please see those papers?"

To which the respondent replied on May 29, 1954:

> "Re Kiko, yes, I have it in writing granted by His Excellency the Governor and the Lukiko. I started fighting for this long before, the company was thought about, the trouble was that the twenty one years lease elapsed and they would not renew it, anyhow it is all fixed up now, I do not see that it is any use sending the file down to you as it might get lost."

Notwithstanding that the lease of Kiko "might get lost" if sent to Mr. Shelton, the respondent wrote to him on February 23, 1955, sending the deeds of the original two properties. He added:

> "Re Kiko Estate, please put this down as in the past 'to be arranged.' Nothing

> has been said about this estate yet, and I want to see what is going to happen before I bring the subject up."

The inference is inescapable that the respondent was, over a period of several years, engaged in deliberately and actively concealing from the company of which he was a director and manager, from its accountant and auditor, and from his fellow director the fact that he had, early in 1953, obtained a lease of Kiko in his own name. All the relevant balance sheets were signed by the respondent as director. By February 23, 1955 it appears that the respondent suspected the first appellant of going back on the arrangement contained in the preliminary scheme for the formation of the company, under which the respondent was to be permitted to take up eight hundred shares per annum. He may have thought earlier that he was going to have difficulty with the first appellant and have conceived the idea of surreptitiously obtaining a title to Kiko and keeping it as a weapon in his own hand.

The next document of interest is a memorandum on agreements reached at an informal meeting of the company held at the office of Mr. Shelton at Kampala on March 14 1955, at which the first appellant, the respondent and Mr. Shelton were present. Paragraph 8 of this memorandum reads:

> "No sale of the following land is to take place without the consent of all share-holders . . . Kiko (tenure to be arranged) 150 acres. This arrangement to be effective for ten years from the date hereof."

It will be noted (*a*) that the respondent, who was present, agreed that no sale of Kiko was to take place without the consent of all shareholders of the company, a remarkable agreement if the beneficial interest as well as the legal title to Kiko was in him; and (*b*) that the respondent was still apparently concealing the fact that the tenure of Kiko had long ago been "arranged."

On July 27, 1955, the respondent wrote a letter to the first appellant in which he said, among other things, "I have started developing Kiko as you wanted me to do." He also said

> "I want a bigger share, say five thousand more shares to give me an interest in the work . . ."

The first appellant replied suggesting an arrangement by which the company should make a proportionate free issue of shares and the first appellant should sell some of his holding to the respondent. The respondent did not agree to this suggestion and relations between him and the first appellant seem to have got progressively worse, until litigation ensued.

Kiko was developed from 1948 onwards with the company's money at a cost estimated by the first appellant of about £10,000. But an exact figure cannot be ascertained, as Kiko and the other two estates were developed as one unit. The company has prospered and made large capital, and small trading, profits.

The first appellant said in evidence that he only discovered in December, 1956, that Kiko had been put into the name of the respondent and not into the name of the company: the respondent suddenly told him this when they were discussing estate matters and a case which the respondent had started against him.

The plaint in this suit was filed on February 1, 1957. It pleaded *inter alia* a verbal agreement that a lease of Kiko should, when granted, be transferred by the defendant (respondent) to the company "without payment." An amendment added the words

> "or should be taken out by the defendant in the name of the second plaintiff (the company)."

It was explained to us that the reason for the averment of an agreement to transfer "without payment" was that the agreement was to transfer at cost, but that at the date when the plaint was filed the first plaintiff (first appellant) did not know that the defendant (respondent) had incurred any cost on Kiko, the

expenses of obtaining title to which, he thought, had been paid for, and the estate entirely developed, with the company's money. The facts that the respondent had paid survey fees etc. and rent only emerged when discovery was obtained.

At the trial, after the close of the plaintiff's case, a submission was made to the learned judge by counsel for the defendant (respondent). He referred to the pleading in para. 4 of the plaint that a verbal agreement between the first appellant and the defendant, entered into before the incorporation of the company, that the lease of Kiko when granted should be transferred to the company, or should be taken out by the defendant in the name of the company, had been "ratified" by the company after its incorporation. He argued that a contract made in furtherance of the projects of an intended company not actually formed could not be ratified by the company when it came into existence. Counsel for the plaintiffs then applied to amend his pleading by substituting for the averment of ratification of the agreement, an averment that the agreement had been adopted by the company as a new agreement between it and the respondent. This amendment, however, was not permitted; and the learned judge held that the plaint disclosed no cause of action by the company and gave judgment for the respondent against the company with costs.

The learned judge, in his judgment, treated the claim of the remaining plaintiff (the first appellant) as a claim for specific performance of a contract to sell Kiko to the company. He said:

> "The question here for decision is whether the plaintiff has completely satisfied me that there was a concluded oral contract between Kelsall and himself for the former to transfer Kiko to the company on terms which were also clearly agreed. And if so what those terms were. In other words the onus of proof is upon the plaintiff on that question. Moreover the onus in this type of case, where it is alleged that under an oral agreement a valuable leasehold should be conveyed to a third party, is very heavy."

With respect, I do not think it was quite correct to treat this suit as an action for specific performance of an oral contract to transfer Kiko to the company. In form the suit was for a declaration that Kiko was held on trust for the company and for an order to transfer it. Though the effect, if the claim succeeded, would, no doubt, be substantially the same, the law which governs an action for specific performance of a contract is not in all respects the same as that which governs a claim for a declaration of trust.

After examining some of the evidence the learned judge was satisfied that the respondent intended that Kiko should become the property of the company. Indeed, the respondent himself admitted in evidence "I told the first appellant that I would put Kiko in, but at a market price." The learned judge said

> "there is in my opinion only one contest: was it ever agreed what consideration Kelsall should receive for transferring Kiko to the company? What was the consideration?"

After examining the respondent's evidence, the learned judge said:

> "On the whole case I do not feel justified in rejecting Kelsall's evidence concerning what he had in mind regarding payment for Kiko. He may well have thought he was to be paid the market price; and that was never fixed or discussed.
>
> "Price may have thought Kelsall would put the estate in the company at cost. However that may be, the two were never ad idem. I am unable to find precisely what consideration Kelsall was to receive. The terms are not clear; and I hold there was no concluded and enforceable contract."

He, accordingly, dismissed the suit. He did not deal with the counter-claim. It is, once more, apparent that the learned judge was treating the suit as solely a suit for specific performance of a contract. He had dismissed the second plaintiff's argument that a constructive trust had arisen by reason of the fiduciary relationship of the respondent to the company in one line: "There could be no cause of action on this basis."

With respect, I think that it cannot be said that this approach was correct. Moreover I do not think that

the learned judge has correctly appreciated all aspects of

the evidence or drawn correct conclusions thereform. For instance, on p. 6 of his judgment (p. 412 of the record) he says:

> "There is a curious factor in this case which I have carefully considered as evidence of the intention of the parties. Kelsall received a letter of March 25, 1948, from the land officer giving him the right to re-occupy Kiko, if he accepted the conditions there set out:
>
> '(10) (*f*) Development of the estate for agricultural purposes, shall be in accordance with the conditions laid down by the Director of Agriculture and contained in licence to plant tea dated March 11, 1948, a copy of which will be annexed to the lease.'
>
> He accepted on April 7, 1948. Yet on, March 11, 1948, the Director of Agriculture issued that licence to plant tea in Kiko to the company. That is unexplained."

In fact the explanation is contained in the last paragraph of the respondent's letter of acceptance dated April 7, 1948, to which the learned judge refers. There the respondent wrote

> "I should be grateful if when making the lease out you would put the estate in the name of the Ruwenzori Tea Company Ltd., and not in my personal name."

I think the inference is clear that the respondent's intention that licence and lease (which are or should be complementary) should be in the name of the company had been formed at some time prior to March 11, 1948 and that the land officer had been informed by the respondent before that date that it was intended that Kiko should be owned and developed by the company, and had therefore authorised the issue by the Director of Agriculture of the licence in the company's name. The learned judge notices the respondent's instructions to the land officer on April 7, 1948, that the lease of Kiko should be in the company's name, but does not seem to consider this to be any indication that at that date there was a concluded agreement that Kiko should belong to the company.

The learned judge comments on the words "to be arranged" which at the respondent's instance appeared in the company's land accounts under the headings "Tenure" and "Expiry of Lease." He says

> "Those words 'to be arranged' might be construed as meaning 'terms of transfer to be arranged.' "

In my view, this is a serious misdirection. "Tenure" is not equivalent to "terms of transfer." The course of events most clearly showed that the respondent was deliberately concealing from the company that the tenure and date of expiry of the lease had, long before, been "arranged" by him.

On p. 9 of the judgment (p. 415 of the record) the learned judge quotes a passage from the evidence of the respondent in cross-examination.

> "I agreed early on that neither the plaintiff nor I would make a profit on estates put in to the company. But Kiko came later."

It was not true that consideration of Kiko came later, though its lease was obtained later. Price's evidence was that at the very first interview between him and the respondent Kiko was mentioned and that its inclusion was a vital factor, and, as already mentioned, in October, 1947, the respondent was writing to the authorities that development of the other two estates could not be satisfactorily carried out without Kiko. The learned judge does not seem to have appreciated the significance of this passage in the respondent's evidence. Neither did he comment on the further admission of the respondent in cross-examination

> "When we handed over estates, it was understood the vendor would make no profit from the company,"

or on his admission that he would not have been financially able to plant even Kiko himself, or on the

admitted fact that the fees for surveying Kiko were paid by the

respondent out of the company's money, an occurrence which the respondent described in his evidence as "a mistake" when, in truth, in the same letter he was asking for the lease to be put in the company's name.

Neither is any inference drawn from the fact that, if the respondent expected to be paid for Kiko at anything but cost to him, he never suggested a price, but himself developed Kiko with the company's money.

The respondent said in cross-examination that he was sure that Price knew that the Kiko lease was in his name; but, in re-examination, said

> "Price never offered me anything for Kiko. He thought it was in the company's name."

This contradiction is not referred to in the judgment. If the admission by the respondent in re-examination is correct, and it is supported by the evidence of Price and Shelton and by the course of events, it is of some importance.

The learned judge said

> "Defendant may perhaps be criticised for not making it quite clear to Price and the company that he held the lease of Kiko in his own name."

With respect, this was not a case of mere omission to make the position as to the title quite plain. The documents lead to the inescapable conclusion that there was deliberate concealment of the position by the respondent. The respondent was engaged, over a number of years, in expending moneys of the company of which he was a director and agent on the development, and in enhancing the capital value, of property to which he had, unknown to the company, obtained the legal title and which, unless it was purchased at a "market price," he intended to claim as his own. This was not a matter of an owner of property standing by and permitting a stranger to spend money on his property under a misapprehension as to the title: the parties were not strangers, the money of the company was being spent by the agent of the company who was actively concealing from the principal, towards whom he stood in a fiduciary position, the true state of affairs. It is true that the proceeds of the tea were paid to the company, but those profits were directly attributable to the sums paid by the company in developing the estate.

Had the learned judge appreciated the significance of all these matters, it may well be that they would have affected his assessment, presumably derived from demeanour, of the respondent as an honest witness. Where it is apparent that the evidence has not been subjected to an adequate scrutiny by the trial court before expressing a view, derived from demeanour, of the reliability of a witness, it is open to an appellate court to find that the view of the trial judge as to the demeanour of the witness, is ill-founded, *Yuill v. Yuill* (1) (1945), 1 All E.R. 183. And when it is apparent that wrong inferences have been drawn from the evidence, it is the duty of an appellate court to evaluate the evidence itself.

The main oral evidence on the point as to whether or not there was an oral agreement between the first appellant and the respondent that Kiko should, when a title was obtained, be brought in as one of the properties of the company, may be summarised as under: Price says that there was an agreement to bring in Kiko, and that Kiko was vital: there was no question of payment other than out of pocket expenses. Kelsall said in examination in chief that there was no agreement to bring in Kiko without payment: it was his intention to put Kiko in the name of the company: there were no terms mentioned, he expected to be paid a market price, "a big price," "a handsome sum." But he said in cross-examination, in relation to two estates which Price had brought in at cost,

> “When we handed over estates to the company it was understood the vendor would make no profit from the company,”

and

> “I agreed early on that neither Price nor I would make a profit on estates put in to the company. But Kiko came later.”

As already mentioned, it was only the title to Kiko which "came later." Kiko was under discussion from the start. In my view, notwithstanding the absence of express mention of Kiko from the preliminary scheme for the formation of the company, and from the agreement of November 13, 1947, this evidence and the course of events as revealed in the documents show clearly that there was a concluded oral agreement between the first appellant and the respondent that the title to Kiko should be obtained for the company which should pay "out of pocket expenses" only. It was in pursuance of this agreement that, on April 7, 1948, the respondent wrote to the land officer asking for the lease to be put in the name of the company and paid Shs. 600/- towards survey fees with the company's money. At some subsequent date, apparently after February 19, 1951, he changed his mind and decided to take the lease in his own name, to put up the rest of the expense of obtaining the lease and the rent from his own funds, and to conceal the true position from the company.

I will now deal with the arguments raised before us on appeal. The first point argued by Mr. Troughton, for the appellants, was that the learned judge was wrong in holding that the plaint disclosed no cause of action in the second plaintiff and in refusing leave to amend the averment in para. 5 of the plaint relating to a ratification of the preliminary oral agreement and in dismissing the second plaintiff's claim against the defendant. Mr. Troughton conceded that the company could not ratify an agreement made before incorporation of the company and that the use in para. 5 of the plaint, of the words "ratify" and "ratification" was wrong; but he argued that the quotation in extenso of the minute of the meeting of the company, in effect, pleaded a new agreement to which the company was a party. He referred to O. 6 r. 18 of the Civil Procedure Rules and said that an amendment should have been allowed, so that the real question in controversy between the parties could be determined. He went on to argue that para. 6 and para. 7 of the plaint pleaded facts which, if correct, established that the defendant was a constructive trustee for the company, and that para. 8 averred that Kiko belonged in equity to the company by reason of the constructive trust arising from the matters pleaded in para. 6 and para. 7.

Mr. Lockhart-Smith, for the respondent, argued that a company cannot ratify a contract purporting to be made by someone on its behalf before its incorporation: but he conceded that there may be circumstances from which it may be inferred that the company, after its incorporation has made a new contract to the effect of the previous agreement. This seems to me to be a correct statement of the law, and I did not understand Mr. Troughton to challenge it. The mere adoption and confirmation by directors of a contract made before the formation of a company by persons purporting to act on behalf of the company creates no contractual relation whatever between the company and the other party to the contract. *North Sydney Investment & Tramway Co. Ltd. v. Higgins* (2), [1899] A.C. 263. But

> "It does not follow from that that acts may not be done by the company after its formation which make a new contract to the same effect as the old one."

Per Jessel, M.R., in *In re Empress Engineering Co.* (3) (1880), 16 Ch. D. 125 at p. 128; and *Howard v. Patent Ivory Manufacturing Co.* (4) (1888), 38 Ch. D. 156. The question whether there was a new contract or not is one of fact, and each case must depend on its own facts. (*Howard's* case (4) *supra* at p. 165).

Mr. Lockhart-Smith went on to submit that a new contract could not be inferred from the acts of the company where there was a mistaken belief that the previous contract was binding. I think it would be more exact to say that no new contract can be inferred where all the subsequent acts of the company are referable to the previous agreement which the directors erroneously suppose to be binding. (*In re Northumberland Avenue Hotel Co.* (5) (1886), 33 Ch. D. 16, per Lindley, L.J., at p. 21). Mr.

Lockhart-Smith mainly relied on the *Northumberland* case (5), but it is clearly distinguishable from the present case because, in the *Northumberland* case (5), no fresh agreement was signed or sealed on behalf of the company. What happened in the present case was that, at the first meeting of directors held on November 13, 1947, a draft agreement between Mr. Kelsall and the company (not Mr. Kelsall and

Mr. Price) relating to Nyambinambu and Lwongonera was received and considered and it was resolved that the company should enter into it and an engrossment was sealed with the common seal of the company and signed by Messrs. Kelsall and Price. It is clear that the directors did not suppose that the previous oral agreement between Price and Kelsall relating to Nyambinambu and Lwongonera was binding, or they would not have executed a new agreement to the same effect and sealed it with the company's seal. Moreover, the directors, having signed and sealed the agreement between the respondent and the company which related to Nyambinambu and Lwongonera, immediately proceeded to modify it by a resolution that the transfers of those estates should not be carried into effect until a transfer of Kiko could be simultaneously effected. This was a resolution of the company, made after its incorporation, assented to by the respondent who was present. It was a variation of the agreement between the company and the respondent and the clear inference is that it was an act of the company, not only in relation to Nyambinambu and Lwongonera, but also in relation to Kiko. In my view, there was nothing in this course of procedure to show that the directors supposed that the prior oral arrangements between the first appellant and the respondent relating to Kiko were binding on the company. The effect of the transaction was wrongly pleaded in para. 5 of the plaint by the averment that the verbal agreement was "ratified" by the company, but the quotation of a portion of the minutes of the directors' meeting of November 13, 1947, sufficiently showed that there was a new agreement by the company relating to Kiko. I should hesitate to differ from the learned judge on a question of fact involving consideration of oral evidence, but this involves only consideration of the minutes of the company which are not disputed, and the inference to be drawn from the procedure followed.

I think that Mr. Troughton was also right in his submission that para. 6 and para. 7 of the plaint pleaded facts which, if correct, raised an issue whether the defendant was a constructive trustee for the company, and that para. 8 averred that Kiko belonged in equity to the company by reason of the constructive trust arising from the matters pleaded in para. 6 and para. 7. In my opinion, there was an issue raised here to which the company was a party and which should have been decided. The company should not have been dismissed from the suit. It may be mentioned in passing that the effect of dismissing the company from the suit and failing to deal with the counter-claim was to deprive the successful respondent of the revenue from Kiko which he claimed and to deprive the company of the refund of the development expenses which the respondent conceded to be due to it.

Mr. Lockhart-Smith argued that a plaint which discloses no cause of action cannot be amended (*H. D. Hasmani v. National Bank of India Ltd*. (6) (1937), 4 E.A.C.A. 55). No one will gainsay that proposition; but in my view, the plaint did disclose a cause of action. In my opinion, with respect, the amendment asked for by the plaintiffs should have been allowed, if necessary upon terms as to an adjournment and costs, in order that the real questions in controversy between the parties could be determined (O. 6 r. 18 Civil Procedure Rules).

On ground three of the memorandum of appeal Mr. Troughton submitted that the learned judge erred in not finding that there was a concluded oral contract between the first appellant on behalf of the company and the respondent that the lease of Kiko when obtained should be granted to the company by the Governor, or alternatively, granted to the respondent and transferred to the company. Mr. Troughton argued that this agreement was made at the first meeting of the directors on November 13, 1947, as evidenced by the minutes: the company was not a party to the previous oral arrangement between the first appellant and the respondent. Mr. Lockhart-Smith argued contra. As I have already indicated, I think that the minutes of the meeting and the evidence clearly support Mr. Troughton's submission that there was a completed oral contract. The arrangement by which the company was to defray the costs of obtaining

title, to develop Kiko and employ the respondent provided ample consideration moving from the company. It was pursuant to this contract that the

respondent originally asked for the lease to be put in the company's name and paid survey fees with the company's money, and that the company permitted its money to be used by the respondent in developing Kiko. It was intended that the company should pay the costs of obtaining the title and any other costs incurred by the respondent and these it is conceded that the respondent is entitled to have refunded.

Ground 4 of the memorandum of appeal reads as follows:

> "4. The learned judge erred in not finding that the effect of
>
> (*a*) the respondent's original application that the lease of the Kiko estate be granted in the name of the second appellant;
>
> (*b*) the respondent's acceptance of the tea licence in the name of the second appellant;
>
> (*c*) his operation as the manager of the second appellant with the second appellant's money of the Kiko estate as the property of the second appellant;
>
> (*d*) his failure to ensure the segregation of expenditure on Kiko in the second appellant's account;
>
> (*e*) the payment by him of the survey fees and later the tea cess in respect of the Kiko estate from the second appellant's funds;
>
> (*f*) his acquiescence over a period of years in the appearance of the Kiko estate as an asset of the second appellant's annual balance sheets and;
>
> (*g*) his failure to make clear to his fellow directors or the auditor of the second appellant that the lease of Kiko estate had been obtained by him in his name
>
> confirm that he had agreed with both appellants or alternatively with the first appellant on behalf of the second appellant to take all steps necessary to obtain for the second appellant a lease of the Kiko estate and that as from the date of his obtaining such lease of the said Kiko estate the respondent held the same in trust for the second appellant."

Mr. Troughton submitted that the respondent was in a fiduciary capacity towards the company and that the circumstances referred to in ground 4 were sufficient to raise a constructive, or resulting, trust in the company's favour. Mr. Lockhart-Smith contended that no resulting trust arose: a constructive trust could conceivably have arisen; but, in his submission, none did: the respondent's position throughout was "I will transfer Kiko when I am paid a market price for it."

The principle is well known and is stated in Lewin on Trusts (15th Edn.) at p. 155:

> "A *constructive trust* is raised by a court of equity wherever a person clothed with a fiduciary character, gains some personal advantage by availing himself of his situation as trustee; for as it is impossible that a trustee should be allowed to make a profit by his office, it follows that so soon as the advantage in question is shown to have been acquired through the medium of a trust, the trustee, however good a *legal* title he may have, will be decreed in equity to hold for the benefit of his cestui que trust."

and at p. 161:

> "The principle upon which a court of equity elicits constructive trusts might be pursued into numerous other instances; as if a factor, agent, partner, promoter of a company or other person in a fiduciary position, acquire any pecuniary advantage to himself through the medium of his fiduciary character, he is accountable as a constructive trustee for those profits to his employer or other person whose interest he was bound to advance . . ."

In my opinion the respondent was in a fiduciary position vis-à-vis the company from the start. He was one of its promoters. Lord Cairns, L.C., said in *Erlanger v. New Sombrero Phosphate Co*. (7) (1878), 3 App. Cas. 1218 at p. 1236, of the position of promoters with reference to the company which they

propose to form "They stand, in my opinion, undoubtedly in a fiduciary position." As Lord Robertson said in *Gluckstein v. Barnes* (8), [1900] A.C. 240, at p. 256:

> ". . . where speculators have formed, exclusively of themselves, the directorate

> of a company to be immediately floated for the purpose of buying the property which those same individuals are associated to acquire and resell, they have brought themselves directly within Lord Cairns' statement of the law in *Erlanger's* case."

and at p. 257:

> "The facts are here that the company had so far been organised that its executive was provisionally appointed. The directors of a company are its executive organ; to them its interests are confided; and in the present instance the company, even in this its inchoate stage, was identifiable through its executive. I hold that from the moment this step was taken the coming directors stood in a fiduciary relation to the company whose interests were to be in their sole hands."

In the present case the respondent, as one of the promoters and intended first directors of the company, stood in a fiduciary position to the company as regards Kiko from the time when it was agreed between him and the first appellant (as I have found that it was agreed) that the title to Kiko should be obtained for the company. If I am wrong in thinking that the respondent stood in a fiduciary position towards the company as a promoter even before its formation, he certainly stood in a fiduciary position vis-à-vis the company from his appointment as one of its directors and as its resident manager. The respondent was not in a position himself to develop Kiko as a tea estate. In order to obtain the lease, he made use of the licence which had been issued, not to him, but to the company. In breach of his agreement with the first appellant and the company and in breach of his duty towards the company, he acquired a title to Kiko in his own name concealing that transaction. He spent the company's money on development. He attempted to make out of this a pecuniary advantage for himself. It seems clear to me that a court of equity should decree that he holds the title to Kiko on trust for the company.

Mr. Thacker for the respondent quoted authorities to the effect that a contract for the sale of land, to be specifically performed, must be certain as to all its material parts and in particular as to price: and that a plaintiff in an action for specific performance must be, and must plead that he is, ready and willing to perform his part of the contract. The present suit is not, however, a claim for specific performance and the price to be paid for Kiko was, in my opinion, certain or ascertainable, that is to say it was the cost, if any, at the time, of Kiko to the respondent.

It remains briefly to notice ground 5 of the memorandum of appeal. Mr. Troughton argued that the learned judge had misdirected himself on the facts in holding that Kiko was a valuable leasehold estate at the date when the company agreed to purchase it and in failing to hold that it was then undeveloped and of little value and only became of value as a tea estate in bearing after it had been developed with the company's money. I see no reason to suppose that the learned judge did not realise that Kiko greatly appreciated in value when developed and that its value when undeveloped was nothing like so great. I think he used "valuable" in the sense of potentially valuable.

I would allow the appeal and make (i) a declaration that Kiko estate now standing in the name of the respondent is held by the respondent on trust for the second appellant absolutely; and (ii) an order that the respondent use his best endeavours to obtain the consent of the Governor of Uganda to an assignment of the lease of Kiko dated February 26, 1953, (registered as instrument 112661) from himself to the second appellant; and, if such consent be obtained and on payment to the respondent by the second appellant of the sum of Shs. 4,528/30 moneys expended by the respondent on behalf of the second appellant for balance of survey fees, preparation of lease, rent, etc., of Kiko, as set out in the land officer's letter dated May 16, 1952, plus the sums paid by the respondent for rent of Kiko, do assign the said lease for all the unexpired residue thereof and transfer the estate to the second appellant.

There should be liberty to apply.

The appellant should have their costs against the respondent both here and below, to be taxed.

Briggs Ag V-P: I have had the advantage of reading the judgment of the learned president. I agree with his reasoning and with his conclusions, and desire only to add some remarks on one aspect of the appeal.

I agree that any rights which the company later obtained over Kiko had their origin in a contract between the first appellant and the respondent and that it was for the first appellant to prove the existence and terms of that contract. I agree also that the company's rights prior to 1948 depended on a contract alleged to have been made between the respondent and the company, and that on that issue the onus was similarly on the company. I think that contract was also sufficiently proved, and that the case could properly be disposed of on the basis of a trust springing from those contracts or one of them. But if I am wrong in this view, and no enforceable contract existed between either appellant and the respondent at the end of 1947, I think the company would still be entitled to succeed on the basis of a trust arising merely from the conduct and relations of the parties. Looking at events from March 1948 onwards, and relating those events only to the negotiations between the first appellant and the respondent and to the respondent's position as director and manager of the company, I think that the respondent, having obtained the licence in the company's name and asked for the title to be issued in the company's name, and thereafter having expended the company's money on the development of the land, had, before 1952, whether consciously or unconsciously, finally and irrevocably constituted himself a constructive trustee for the company of any rights over Kiko which he might thereafter obtain. When in 1952 he asked that the title should be issued to him, he was acting in breach of his duties as trustee. In view of this I think it is extremely doubtful whether, if the matter were contested, he would be able to recover the sums which he expended for survey fees, issue of title and rent, since these were laid out, not on the company's behalf or for its benefit, but in furtherance of his scheme to deprive the company of its property. That, however, is not now of importance.

The important point, as I see it, is this. From the time of the issue of the title, and as between the company and the respondent, Kiko must for all purposes be considered to have been the property in equity of the company. Its right to a transfer of the legal estate, subject to the Governor's consent, is beyond all question. The respondent substantially admits this, but alleges that the transfer was to be on condition of payment by the company of some unspecified, but large, sum of money in cash or shares. If the trust were held to have arisen apart from contract, I think the onus of proving the existence of that condition would be on him, and in that case it was for him to prove, not only that a sum of money was to be paid, but what the sum was to be, or how it was to be ascertained. I do not think he ever proved the former fact, and he never attempted to prove the latter. The conclusion would be that the trust in the company's favour was not subject to any condition at all. Repayment to the respondent of monies disbursed by him is not, in my view, a condition of the execution of the constructive trust, but a mere concession by the company. Although these points were not put to us directly in argument, they are, I think, sufficiently pleaded and afford an additional reason for dissenting from the learned trial judge's view that the case must fail since the first appellant and the respondent were not shown to have been ad idem.

It seems to me that the company may on this basis have been on much stronger ground than the first appellant. It was not a volunteer, but had given consideration, not only by expenditure on Kiko which enured in part to the respondent's benefit, but also in the form of remuneration directly paid to the respondent. I think that in the circumstances the company would be entitled to the court's assistance in having the trust executed without reference to any initial contract between the company and the respondent.

Forbes JA: I agree with the two judgments which have been read.

Appeal allowed.

For the appellants:
JFG Troughton
Hunter & Greig, Kampala

For the respondents:
RS Thacker QC and *WJ Lockhart Smith*
RS Thacker, Kampala

R v Bhagubhai Nagarbhai Patel and others

[1957] 1 EA 767 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	18 December 1957
Case Number:	261/1957
Before:	MacDuff J
Sourced by:	LawAfrica

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[1] Criminal law – Motion to quash information – Notice of offences charged – Disclosure in dispositions.

Editor's Summary

The accused had been charged on a first information with conspiring to effect an unlawful purpose contrary to the Penal Code, s. 396 (6) but as the trial judge found that the information disclosed no offence it was quashed. The present information charged three offences, the first being the same substantive offence as before but with a radical change in the unlawful purpose alleged, the second count charged a conspiracy to commit a misdemeanour contrary to s. 395 of the Code, and the third count charged a conspiracy to defeat the course of justice contrary to s. 112 of the Code. Three of the accused moved to quash this second information principally on the grounds that they had had no express notice of the second and third charges, and that none of the charges was disclosed on the depositions taken in the court below.

Held–

(i) express notice of the present three counts, if disclosed on the depositions, was not required but the first information was a direct negation of the three offences now charged in that whereas the first information rested on the third accused being a creditor of the first accused, the basis of the present charges was that he was not a creditor of the first accused; the court must take the view that the Attorney-General's first opinion formed on the depositions precluded the same depositions

disclosing offences dependent on facts directly negatived by those alleged in that first opinion; and the court found that the depositions did not disclose the offences charged.

Information quashed. Accused discharged.

Cases referred to in judgment:

(1) *Burgh v. Legg* (1839), 8 L.J. Ex. 258.

Judgment

MacDuff J: The first, third and fourth accused have now moved to quash the information at present before this court on a number of grounds. The first is that the accused have had no notice of the offences now charged therein either at or before the preliminary hearing in the court below or at any time prior to the filing of the said information.

Again Mr. Quass, for the third accused, has led the attack. As I understand his argument he relies on the wording of s. 272 of the Criminal Procedure Code, which says:

> "272. If any information does not state, and cannot by any amendment authorised by the last preceding section be made to state, any offence of which the accused has had notice, it shall be quashed . . . "

He then submits that the accused have been charged on the present information with three offences of which the information itself is the first notice they have received and that by virtue of the provisions of the above section they are entitled to notice of the offences before the filing of the information. Where what he contends to be three offences of which the accused have never been previously apprised are charged he contends that the notice envisaged by this section must be express notice, i.e. notice in writing to each accused. Mr. Khanna for the fourth accused has expanded this

argument by contending that the information itself cannot be notice of the offence and that prior to the filing and service of the information the only offences of which the accused had had notice were either those read to the accused at the commencement of the preliminary inquiry or the charge framed by the committing magistrate on which the accused were committed for trial.

The charges before the preliminary inquiry were first conspiracy to defraud contrary to s. 312 of the Penal Code and in the alternative conspiracy to effect an unlawful purpose contrary to s. 396 (6) of the Penal Code. The first count quite obviously dropped from sight prior to the preliminary inquiry being commenced and has not been heard of again. The four accused were eventually committed for trial in respect of the second and alternative count.

When the first information was filed in the Supreme Court it charged the same substantive offence as that on which the accused had been committed. That information was quashed by my learned brother, Templeton, J., for the reason that it did not disclose any offence.

The present information charges three offences. The first is the same substantive charge as before – i.e. conspiracy contrary to s. 396 (6) of the Penal Code – but the particulars have been changed, the unlawful purpose now alleged being

> "with intent to defraud the creditors of B. N. Patel to cause a transfer to be made of the property of the said B. N. Patel in expectation of the said B. N. Patel being adjudged bankrupt contrary to the provisions of the Bankruptcy Ordinance."

Accepting Mr. Quass' contention that the provisions of the Bankruptcy Ordinance referred to can only be those contained in s. 139 (1) (*b*) of that Ordinance, and that contention was not controverted by the prosecution in my view, with such a radical change in the unlawful purpose alleged, it must be held that the accused have not had, in respect of this count, express notice of the nature envisaged by counsel for the accused. The second count charges a conspiracy to commit a misdemeanour contrary to s. 395 of the Penal Code, and the third count charges a conspiracy to defeat the course of justice contrary to s. 112 of the Penal Code. These two charges appear now for the first time and again there has been no express notice of them.

For the prosecution it has been argued that the notice required by s. 272 is that contained in the information itself. With that I cannot agree; to do so is to ignore completely the wording of that section. In the alternative the prosecution submits that the notice required by this section means notice in the sense that an accused has notice of all offences as are disclosed in the depositions taken at the preliminary inquiry. Against this submission it is contended for the accused that this submission amounts to no more than that an accused has knowledge of the facts on which any such offences may be based but that such knowledge is not notice to him. As authority for this principle *Burgh v. Legg* (1) (1839), 8 L.J. Ex. 258, and a number of authorities cited in Stroud's Judicial Dictionary (3rd Edn.) under the heading of "notice" have been relied on. I have perused the authorities to which I have been referred, all of which deal with civil law. In practically every case where notice has been interpreted to mean express notice that interpretation has been dependent on sections of Acts requiring express notice as a condition precedent to the attachment of liability. In bankruptcy, however, notice of an act of bankruptcy has been interpreted to mean knowledge of that act. This again shows a real difference in the "giving of notice" and the "having had notice" when it comes to interpreting the meaning to the word "notice." In my view, therefore, the authorities relied on by counsel cannot be accepted as authority that in criminal law, and particularly in the case of s. 272 of the Criminal Procedure Code, does notice necessarily mean express notice.

Section 252 (2) of the Criminal Procedure Code enables the attorney-general to charge an accused person with any offences which in his opinion are disclosed by the depositions either in addition to or in substitution for the offence upon which the accused person has been committed for trial. To uphold the accuseds' submission would be to hold that each offence so added or substituted would require to be the

subject of express notice prior to the filing or service of the information. That is not and as far as I can ascertain never has been the practice in his court nor in the courts of adjoining territories. It would appear then that the words used in s. 272 of the Criminal Procedure Code "has had notice" have in the past been interpreted to mean "of which an accused has had knowledge" and that again can only mean

> "has had knowledge from the facts set forth in the depositions and which were deposed to in his presence at the preliminary inquiry."

Nor do I consider that to be an unreasonable interpretation under the circumstances existent in this colony. Counsel has made some capital out of the necessity for some express notice in the case of illiterate natives. I think, however, he has paid little heed to the fact that in numerous cases, and more so when these sections were first included in the Criminal Procedure Code, preliminary inquiries are conducted by what one may refer to as lay magistrates. It is then necessary to empower an attorney-general to decide on the facts contained in the depositions what if any offence is disclosed. The accused has knowledge, and in my view notice, of the facts contained in the depositions and it is not unreasonable to require him to meet any offence based on those facts, subject of course to the consideration that he should in case of surprise be given adequate opportunity to prepare his defence. I hold therefore that the accused have had notice of any offence disclosed on the depositions and that any express notice of the present three counts, if they are disclosed on the depositions, is not required.

The second ground of the motion is that the offences charged are not and were not disclosed in the depositions taken in the court below. Leading counsel for the third accused has argued this ground along the lines that the prosecution at the preliminary inquiry abandoned its first charge, that of conspiracy to defraud, and proceeded with the charge of conspiracy to effect an unlawful purpose which was for the first accused to suffer a judicial proceeding with a view to giving a creditor, the third accused, a fraudulent preference over other creditors. He goes on to submit that the whole of the evidence adduced by the prosecution was led in support of that allegation and that in view of that there are no signs of the present three charges on the depositions. This argument when based on general lines in my opinion does not go sufficiently far. The mere fact that a prosecuting officer may open his case in the expectation of a certain line of evidence which may not eventuate, or may take a mistaken view of the law, in view of the wide powers given to the attorney-general under s. 250 of the Criminal Procedure Code, cannot deprive the attorney-general of charging any offence which in his opinion is disclosed on the depositions.

In my view the submission should be taken further to the effect that if the first information filed by the attorney-general is a negation of the charges contained in the subsequent information filed, can it be said that those second offences are in the opinion of the attorney-general disclosed on the same depositions. It is from this angle that I propose to examine the charges contained in the two informations. The first information has charged a conspiracy to effect an unlawful purpose, that purpose being

> "that the said B. N. Patel being unable to pay his debts when they became due from his own money should suffer a judicial proceeding with a view to giving a creditor, namely the said N. R. Patel, a fraudulent preference over the other creditors of the said B. N. Patel."

It will be remembered that this wording is identical with the second and alternative charge preferred at the preliminary inquiry, and the charge on which the accused was committed. It must be held then that within the terms of s. 250 of the Criminal Procedure Code this was the offence which in the opinion of the attorney-general was disclosed on the depositions. The facts required to support this allegation were in the main that the first accused was unable to pay his debts, that he suffered a judicial proceeding, the object of which was to give his father, a creditor, a fraudulent preference.

The unlawful purpose alleged in the first count of the present information is

> "with intent to defraud the creditors of the said B. N. Patel to cause a transfer to be made of the property of the said B. N. Patel in the expectation of the said B. N. Patel being adjudged bankrupt contrary to the provisions of the Bankruptcy Ordinance."

To sustain this allegation the facts required to be proved would be that the first accused caused his property to be transferred, to someone, as we know from counsel, to the third accused, in expectation of bankruptcy, this being an offence against the Bankruptcy Ordinance. This differs on the face of it from the first information in that it is now impliedly alleged that the third accused was not a creditor of the first accused, and that the property was transferred in fraud of all the creditors of the first accused and again impliedly, although as appears in the subsequent counts expressly, by virtue of a collusive action by the third accused against the first accused. To the extent of these particulars of the unlawful purpose I am of opinion that the first information is a direct negation of the unlawful purpose now alleged.

It is again clear that the prosecution now allege that their first information was not based on the same facts as is this count. Counsel at the commencement of his argument on this ground referred me to exhibit 80 as his evidence showing that far from the third accused being a creditor of the first accused in actual fact the reverse was the case.

The present second count charges a conspiracy to commit a misdemeanour, namely that the said B. N. Patel should transfer or cause to be transferred part of his property to the said N. R. Patel with intent to defraud the creditors of the said B. N. Patel. This again, with the exception of the fact that this is not an offence against the Bankruptcy Ordinance, is dependent on the same facts as is the first count charged on the present information. That this is so is borne out by the evidence to which counsel has referred in support of his contention that the depositions disclose the present offences. And again to that extent I am of opinion that the facts constituting the unlawful purpose in the first information are a negation of the facts on which the prosecution apparently rely to prove the misdemeanour now charged.

On the third count the accused are now charged with conspiracy to defeat the course of justice, the facts alleged being that the said B. N. Patel failed to enter an appearance to a collusive action instituted by his father, the said N. R. Patel, and thereby submitting to judgment with intent to defeat the claim of the creditors of the said B. N. Patel. The whole basis of this offence is that the action by the third accused against the first accused is collusive, and that again can only be sustained by proof of the fact that the third accused was not in fact a creditor of the first accused. Mr. O'Beirne for the first accused has drawn the attention of the court to exhibit 35. He has also referred to conflicting evidence in respect of the other counts. These to my mind do not go to the question of whether the depositions disclose an offence but to the weight to be attached to evidence. If there is conflicting evidence and the attorney-general in his wisdom decides that he is going to rely on one particular part, then the fact that there may be conflicting evidence on the depositions becomes then no more than a matter of assessing the value of such evidence, if it is presented before the trial court. In other words it is not for this court to assess the value of evidence on the depositions, it is only concerned with the question as to whether or not there is evidence to support the offence charged. Returning to what I consider to be the basic problem again I am of opinion that the particulars of offence charged in the first information are a negation of those required to establish the offence charged on this count.

The position at which we now arrive then is that the attorney-general having received his copy of the depositions is of opinion that those depositions disclose facts on which he has charged an offence. That having been quashed he now says, not that the depositions in his opinion disclose offences in addition to

the one he originally charged, which in my view he could properly do, but that in his opinion they disclose facts in direct antithesis to those on which he formed his first opinion, as a result of which in his opinion offences of an entirely different nature, dependent on basic facts directly

negatived by his first opinion have been alleged. In my view this court must take the position that the attorney-general's first opinion formed on the depositions of itself precludes the same depositions disclosing offences dependent on facts directly negatived by those alleged in that first opinion on which the first information was filed. For that reason I would hold that the depositions do not disclose the present offences charged and must be quashed.

I therefore find it unnecessary to refer to the remaining two grounds. The present information is quashed and the four accused are discharged.

Information quashed. Accused discharged.

For the Crown:
KC Brookes (Crown Counsel, Kenya)
The Attorney-General, Kenya

For the first accused:
DPR O'Beirne and *TR Johar*
Tilak R Johar, Nairobi

Second accused in person.

For the third accused:
P Quass QC (of the English Bar) and *GR Mandavia*
GR Mandavia, Nairobi

For the fourth accused:
DN Khanna and *SC Gautama*
Shah & Gautama, Nairobi

Naumann, Gepp (East Africa) Ltd v Ranchhodbhai Baberbhai Patel and others

[1957] 1 EA 771 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	9 August 1957
Case Number:	1148/1956
Before:	Rudd Ag CJ
Sourced by:	LawAfrica

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[1] Contract – Time of performance – Cause of delay within plaintiff's control.

Editor's Summary

The plaintiff company sued the defendants for Shs. 5,580/90 for the balance of work done and materials supplied in paving the showroom and office floors of a building in course of erection for which the defendants were the main contractors. No completion date was fixed in the sub-contract between the plaintiff and the defendants, but the latter under the terms of their contract with the owner became liable for delay in completion of the building after December 31, 1955, and of this the plaintiff was aware. The nature of the paving required the laying of a screed base, and one conforming to the plaintiff's specification was made ready by the defendants in November, 1955. Once the men and materials were on the site the paving could be completed in less than a week but despite the defendants' several requests the plaintiff failed to complete the work satisfactorily until the following February by which time the defendants were paying liquidated damages to the owner. The primary cause of the plaintiff company's delay was its initial failure to realise that dampness prevented the paving from binding. The defendants counterclaimed for Shs. 5,000/- for delay and negligent performance.

Held – although no completion date was agreed in the sub-contract, and the plaintiff was not bound by the contract between the defendants and the owner, the understanding between the plaintiff and defendants was that the work would be completed within a reasonable time; it was not so completed and as the cause of delay was within the plaintiff's control, it must be held to have failed in its obligation; the defendants were entitled to Shs. 5,000/- damages, and the plaintiff company to the amount of its claim, and the amounts of claim and counterclaim would be set off in the usual way.

Order accordingly.

Cases referred to:

(1) *Hydraulic Engineering Co., Ltd. v. McHaffie, Goslett & Co*. (1878), 4 Q.B.D. 670.

(2) *Elbinger Actien-Gesellschafft v. Armstrong* (1874), L.R. 9 Q.B. 473.

Judgment

Rudd Ag CJ: read the following judgment of the court: The plaintiff in this case sues the defendants for Shs. 5580/90 as the balance due to the plaintiff for work done and materials supplied in supplying and fixing Marley tiles to pave a showroom and offices in a building erected by the defendants for the Kenya Farmers' Association at Nanyuki. The defendants counterclaim for damages on the ground that the work was performed negligently, that performance by the plaintiff was delayed whereby the defendants incurred a penalty of Shs. 5,000/- at the instance of the building owner, and that some of the tiles were not properly fixed and became loose, but that the plaintiffs had not refixed them.

There is little dispute as to the physical facts and I am glad to be able to say that I consider that every witness in the case gave his evidence honestly and to the best of his recollection.

The defendants were the main contractors for the erection of the building and had power to employ sub-contractors, provided that they were approved by the architect. Sub sub-contractors were called nominated sub-contractors in the defendant's contract with the owner. That contract contained provisions which purported to define the rights and liabilities of nominated sub-contractors, but the plaintiffs were not parties to that contract, the terms of that contract were not embodied in any contract between the plaintiffs and the defendants, and the plaintiff and the defendants did not contract with each other on the terms of the contract between the defendants and the owner. It is therefore clear that the terms of the contract between the defendants and the owner were *res inter alios acta* as regards the plaintiff.

The plaintiffs did, however, know that there was a contract between the defendants and the owner, and that they were employed by the defendants as sub-contractors to perform some of the work under that contract. They knew that in the ordinary course of such a contract the defendants would be subject to a clause specifying a date for the completion of the building and provision for liquidated damages payable by the defendants to the owner in the event of failure to complete the building by the date specified in the contract. I accept Mr. Patel's evidence that the plaintiffs' broker, Mr. Khakee, was informed at the time the sub-contract was being negotiated that the defendants were subject to a time clause, but the plaintiffs were not told the actual date that was fixed for completion or the terms of the clause which provided for liquidated damages for delay in completion. In fact the original date fixed by the contract for completion was a date about the end of August 24 or 28, but it was extended to December 31, 1955, and the defendants had to pay Shs. 5,000/- as liquidated damages at the rate of Shs. 1,000/- per week or part of a week after December 31, 1955, until completion. The only reason that the defendants' contract with the owner was not completed by December 31, 1955, was the failure of the plaintiff to supply and fix the tiles in a proper manner by that date.

The history of the plaintiff's sub-contract with the defendants is as follows:

The defendants were approached by Mr. Khakee early in August, 1955, and on or about August 9, 1955, the plaintiff submitted a written estimate which is in evidence as exhibit AAA. The defendants retained the estimate and submitted it to the architect for approval, and after making an alteration as to the particular tiles to be used, and the prices of them, the defendants signed the estimate and returned it to the plaintiff. The estimate stated on its face that the tiles were to be laid by the plaintiff over existing concrete sub-floor in accordance with certain details, of which the following detail is material:

> "The floors . . . to be covered with a screed of sand and cement . . . . The screed to be made up of three parts of clean sharp sand to one part of Portland cement and steel trowelled after the initial set has taken place to a

smooth plane surface . . . and the screeding must be perfectly dry before the tiles are laid."

The offer was stated to be subject to the materials being available when required

and the last paragraph appearing on the face of the document contained the following words:

> "Please read conditions on the reverse side hereof which are incorporated with this offer."

The conditions on the back included the following:

> "Delivery or completion dates. – Whilst we will make every endeavour to effect delivery or completion of the work, as the case may be, by the date specified, we cannot accept responsibility or liability for failure to do so nor can we hold ourselves responsible for any consequential damage arising from this or any other cause."
>
> "Revision. – In the event of supplies being restricted or affected by war, flood, strike, lockout, accident, advances in railway rates, or increase in cost of labour, transport, and materials or through any other causes beyond our control, we shall be at liberty to revise the quotation. We can in no case be responsible for delay arising directly or indirectly from causes beyond our control (including war, fire, flood, strike, lockout or other labour disturbances) and such delay shall not entitle the customer to rescind the contract or to claim damages."
>
> "Terms of payment. – Unless otherwise agreed by us in writing all accounts, whether for materials supplied or for work done, are due on the last day of the month which immediately follows the month of delivery or completion of the work whether the work is to be done to the satisfaction of third parties or otherwise, but we reserve the right to demand payment at any time."

It was claimed on behalf of the defendants that these conditions were never brought specifically or sufficiently to their notice to be binding on the defendants. I am satisfied that apart from the sentence referring to conditions on the back of the estimate, these conditions were not specifically mentioned to the defendants, but in my opinion the sentence on the face of the estimate was sufficient to indicate that the plaintiff intended to contract on the basis of the conditions stated on the back of the estimate. Mr. Patel is not illiterate. The estimate was left with him for consideration and he referred the matter to the architect before he employed the plaintiff as a sub-contractor. I believe that he addressed his mind chiefly to the type of tiles to be used, and to the prices to be charged, but if he did not take the trouble to read and consider the other terms of the offer, then that was his fault and not any fault on the part of the plaintiff who had sufficiently intimated the terms of his offer so as to incorporate the conditions on the back as applying to that offer to the extent that the terms of those conditions were applicable in the circumstances which might arise.

The action of the defendants in altering the specification of the type numbers of the tiles to be used and the consequential alteration of the prices to be charged, and in signing the estimate so altered, and returning it to the plaintiffs was, in my opinion, an acceptance or an offer to accept the estimate so altered, and therefore subject to the conditions on the back, and that offer was accepted by the plaintiff. I consider that the conditions on the back of the estimate formed part of the sub-contract, but the extent of their application depends on the particular circumstances and will have to be considered in relation to the circumstances of the case.

In my opinion the condition which is entitled "Revision" does not apply. The first sentence of this condition has no application to the facts, and the second sentence could only apply to the facts of this case if it were shown that the causes of the delay were beyond the plaintiff's control, but in fact, the plaintiff was able to complete his contract effectively and substantially. I do not regard the fact that even after the plaintiff finally left the work, some few tiles were not satisfactorily fixed and were loose as material in this connection to show non-completion of the contract. There is no doubt but that he plaintiffs could have done the work properly, and the reason that the work was not done promptly was not due to causes beyond the plaintiff's control, but was due to the fact that for a very long time the

plaintiff did not correctly appreciate what was necessary to effect a satisfactory result or take effective measures to that end. Ultimately it was found that a satisfactory result could not be achieved

by laying the tiles on mastic which was applied directly to the screed and that it was necessary to lay a layer of bitumenised felt between the screed and the mastic. The plaintiff's failure to do that in the first instance was an error of appreciation, and was not due to a cause beyond its control.

In my opinion, the condition headed "Delivery or completion dates" does not apply to the facts of this case either because there never was a specific date fixed for completion in this case as far as the plaintiff was concerned, and therefore, the condition could not apply to excuse the plaintiff from completion by a fixed date which was never fixed. The condition is not inconsistent with it being a term of the subcontract that the plaintiff would complete the work within a reasonable time or even as soon as reasonably possible. In my opinion, the plaintiff did subsequently undertake to do the work as quickly as possible, and I think that this undertaking was binding on the plaintiff in the circumstances, but I shall deal with that later in the judgment, and I only say at this stage that the plaintiff knew from the very beginning that time was important to the defendants, and that the defendants were subject to a time clause although the date for completion was never intimated to plaintiff. Furthermore, the correspondence shows that the defendants always asked for and continued to ask for early performance by the plaintiff.

It is admitted that in the ordinary way once the men and materials were on the site, and the screed was ready, the work of this contract could be done in a week at the outside, but in fact although the plaintiff appears to have commenced his first attempt to lay the tiles before the end of August, 1955, the work was not completed in a manner that was at all satisfactory until February, 1956.

According to the plaintiff's witnesses, the ordinary way to lay these tiles is to apply a coat of mastic to a dry concrete screed and when the mastic is tacky, to apply the tiles to the mastic. Then heat is applied to the tiles which become flexible under the influence of heat, and when the tiles cool they should be fimly bonded to the screed by the mastic. If the tiles are over-heated they blister, and the job is not satisfactory. The screed must be a good one, level and very smoothly finished, but a good job should result if the screed is well finished even if the screed is a four-to-one screed instead of a three-to-one screed which is what was specified in the estimate.

At first the defendants laid a four-to-one screed which was in accordance with the specifications of their contract with the owner. It must have appeared to have been a satisfactory screed because the plaintiff's workmen started to lay the tiles on it without making any objection or raising any doubt as to the quality of the screed before they started to work on it. This attempt proved unsatisfactory and was abandoned early in September, 1955, and on September 7, 1955, the plaintiffs wrote to the defendants and alleged that the failure was due to certain defaults on the part of the defendants, but not suggesting that the screed was unsatisfactory. The architect and the defendants refuted the allegations which in fact were not persisted in by the plaintiff at the trial. Correspondence and negotiations between the parties and the architect ensued, in the course of which the defendants by letter dated September 11 asked the plaintiff to

> "start and complete this job at your earliest . . . as the time is running out, and if you fail to do so within a fortnight, we shall be forced to take further steps to complete this job, holding you responsible for all the consequences."

On September 26 the defendants wrote asking for a definite reply as to whether the plaintiffs would restart laying the tiles or not, and on September 28 plaintiff replied asking that the floors be rescreeded. After further correspondence, the plaintiffs wrote that they were making every effort to get the job at Nanyuki going, and that they would send their men up on October 25 with instructions to proceed with

the work at all speed, but nothing effective was in fact done, and further negotiations followed with the result that on November 2, 1955, the defendants wrote to the plaintiffs saying, *inter alia*,

> "We are prepared to meet you in one way, and that is we may lay the floor screed once again according to your specification, and we shall make a sample of such screed in our office here in Nairobi (as suggested by the architects) for

> your approval, and if this is approved by you we shall lay the screed as per sample and shall inform you when the same is ready. Nobody of us shall be entitled for any claim either loss of time and materials, etc. incurred by both of us so far."

On November 3, 1955, the plaintiffs replied accepting the offer. Before these two letters each party was making claims against the other. The effect of these two letters was clearly to make a new agreement as to the performance of the contract in terms that previous claims by the parties for loss of time and materials should be abandoned. Nothing was specifically said as regards a date for completion, but I am satisfied that this agreement envisaged that the plaintiffs would do the work as soon as possible when the new screed was ready, and that fact had been notified to the plaintiffs. I think this follows from the terms of this agreement coupled with the fact that the defendants had been pressing for early completion as from September, and the plaintiffs had stated in October that they were making every effort to get the job going. The sample screed was approved on November, 1955, and the plaintiffs then stated that if the screed was up to sample, they could see no further difficulty in completing the work, and the fact that the new screed was laid and ready for approval was notified to the plaintiffs coupled with a request to start and finish as early as possible by letter dated November 28. At this time the defendants could reasonably suppose that the sub-contract would be completed before December 31, which was the date after which they became liable, under their contract with the owner, for liquidated charges for delay in completion. The sub-contract should have taken only a week to complete and there was a month at least left to run. No doubt the plaintiffs also expected to complete their sub-contract at an early date, and they made and completed another attempt to lay the tiles in December, but the work was unsatisfactory. The defects in it were detailed in a letter from the architect dated December 31, 1955. Few of the tiles were laid flat, many were broken and blistered, lines were not straight, some of the tiles were too small and the shades of some grey tiles were not consistent. I accept it that these defects are true and it shows that apart from the fact that some tiles were broken, others blistered and possibly also the fact that some were not laid flat which may have been due to the difficulty of fixing them, there were other defects showing negligent workmanship on the part of the plaintiff. This letter intimated that the defendants were thenceforward liable to the owner in damages at £50 a week, and that the owner intended to enforce them. The letter asked the plaintiffs to put the floor in order as soon as possible and the plaintiffs undertook to do so as soon as they had received a supply of mastic which had been consigned to them by rail on December 30. A further attempt at laying the tiles was made in January, 1956, but was unsuccessful, and finally the work was done in February, 1956.

The difficulty in completing the work was that the screed was subject to actual dampness which was not easily apparent, and it was necessary to interpose a layer of bitumenised felt between the screed and the mastic, but the plaintiffs did not realise that this was so until the end of January or early in February, 1956. Plaintiffs' case was that they had taken all steps which they thought appropriate from time to time and that they had persevered until the job was reasonably well done. In the circumstances they submitted that they had never bound themselves or been bound to complete before any fixed date, and that they had done all that could reasonably have been expected of them to lay the tiling and that the causes of the delay were beyond their control.

Although I can sympathise with the basis of these contentions and I realise that the execution of this sub-contract must have been far more expensive in time and materials than was ever contemplated when the sub-contract was made, I am satisfied that the contentions are unsound.

The true position in my opinion is that the plaintiff contracted to supply and fix the tiles on a screed which conformed to specification. At the first attempt the screed did not conform to the specification, but

the plaintiff by starting to work on it without query or comment accepted that screed as satisfactory, which indeed it would have been if the proper steps had been taken. Later the screed was replaced with another

which completely satisfied the plaintiffs' stated requirements, but the plaintiffs, although they knew that time was important and had said that they were making every effort to get the job going, took over two months to do a job that should not have taken more than a week, and this, despite the fact that they had assured the defendants that they could see no further difficulty in completing the work. This assurance was undoubtedly relied on by the defendants who thus had every reason to believe that the work would be completed promptly, and that they would not become liable to damages for delayed completion. In my opinion the original sub-contract was for completion within a reasonable time after the premises were ready, and I am further of opinion that this was altered on November 3, 1955, to the effect that the contract would be completed as soon as reasonably possible after the new screed had been laid in compliance with plaintiffs' requirements. I find that the work was not done within a reasonable time or as soon as reasonably possible after the new screed had been laid to plaintiffs' requirements and that the attempts at performance up to December 31, 1955, were negligently performed as well as unsuitable for the purpose. Whatever may have been the position in August, 1955, when the sub-contract was made, there can be no doubt but that the plaintiffs later agreed to lay the tiles on the approved screed and said to the defendants that they could see no reason for further difficulty once the screed was up to sample. After this latter agreement plaintiffs well knew that time was important to the defendants who had repeatedly written to that effect. The defendants were thereby induced not to make other arrangements for the flooring in question. I am quite satisfied that the plaintiffs must be held to have failed in their obligation to the defendants to complete the work in a reasonable time in the circumstances of this case, and the cause was not beyond the plaintiffs' control. The case of *Hydraulic Engineering Co. v. McHaffie* (1), (1878), 4 Q.B.D. 670, established that damages for delay can be awarded even when no fixed date for completion was specified where the defendant had contracted to perform his obligation as soon as possible and had failed to do so.

The defendants have suffered damages in the sum of Shs. 5,000/-, but this amount is not necessarily recoverable from the plaintiffs since it arose under a contract to which the plaintiff was not a party, and the terms of which were not disclosed to the plaintiffs either in August, 1955, when the sub-contract was made or in November, 1955, when there was a further agreement to lay the tiles on an approved screed when that was ready.

In the result, the plaintiffs are liable in damages but not necessarily in the sum of Shs. 5,000/-. *Elbinger Actien-Gesellschafft v. Armstrong* (2) (1874), L.R. 9 Q.B. 473. It is clear, however, that the plaintiff knew that the defendants were subject to a time clause and that in the ordinary course of contracts in the building trade there would be a clause providing for liquidated damages in the defendants' contract with the owner. They knew that the defendants were concerned over the loss of time. As from December 31, 1955, they knew the details of the damages for which the defendant could be made liable to the owner, but in my opinion that does not affect the matter because the liability depends on what was in mutual contemplation at the time when the contract was made and when the later compromise was agreed to whereby the plaintiffs undertook to relay the tiles on an approved screed.

The difficulty in deciding what should be the reasonable damages to award to the defendants against the plaintiffs, is that there is no evidence of that except the fact that the defendants have had to pay Shs. 5,000/- to the owner because of the plaintiffs' default, and the fact that the architect suggested to the plaintiffs that if they would agree to pay £140 he would try to induce the building owner to accept it. If that offer had been accepted by plaintiffs, and if the building owner had also accepted it, presumably no further damages would have been claimed by the owner against the defendants. But the plaintiffs refused to entertain that offer, and it is by no means clear that the owner would have accepted it. The owner, in

fact, claimed Shs. 5,000/- from defendants and had refused to agree to another suggestion previously put by the architect.

There is no evidence that the sum of Shs. 1,000/- a week was excessive or unreasonable

liquidated damages for delay. It was agreed to by the defendants in its contract with the owner. The plaintiffs must have known that their delay was most likely to prejudice the defendants' position in relation to the owner. It was obvious that defendants could not deliver the building to the owner until this work was done, and it was the only work that remained to be done on December 31, 1955. The defendants' damages are not limited to the value of the work that the plaintiff contracted to do. They may include all the damage that directly resulted from the plaintiff's failure to complete within a reasonable time, and which was mutually contemplated by the parties to the sub-contract when it was made. This, in my mind, clearly envisaged liability to the building owner for delayed completion. I cannot, on the evidence, find that Shs. 5,000/- was unreasonable, and it was undoubtedly the loss suffered by defendants by reason of plaintiffs' delay. In my opinion, the defendants are entitled to about Shs. 5,000/- for damages for failure to complete within a reasonable time, and a further sum for putting right latent defects, if that amount could be properly established; but this question of latent defects had been treated as comparatively trivial. The only evidence as to the cost of it was an estimate of approximately Shs. 500/- by Mr. Patel. The cost has not been properly proved, and I think that justice will be sufficiently done if I make no separate award as to it, and assess the total damages at Shs. 5,000/- including the cost of putting right latent defects.

I give judgment on their counterclaim for the defendants in the sum of Shs. 5,000/- damages against the plaintiffs with costs thereon.

It has not been disputed that subject to the counterclaim, the plaintiffs are entitled to be paid Shs. 5,580/90 on the claim. I give judgment for the plaintiffs on the claim for Shs. 5,580/90 with costs calculated on Shs. 580/90 only on the lower scale.

The amounts of the judgment on the claim and counterclaim will be set off in the usual way.

Order accordingly.

For the plaintiff:
JA Couldrey
Kaplan & Stratton, Nairobi

For the defendants:
I Lean
Shapley, Barret, Allin & Co, Nairobi

Machiby Mahambi and others v Sheikh Mohamed Haidri
[1957] 1 EA 778 (HCZ)

Division:	HM High Court for Zanzibar at Zanzibar
Date of judgment:	17 October 1957
Case Number:	16/1957
Before:	Windham CJ

Sourced by: LawAfrica

[1] Practice – Suit against Government or public officer – Notice in writing before commencement of action not given – Effect of – Civil Procedure Code, s. 60 (*Z.*).

[2] Practice – Proceedings against police officer – Assault while and after arresting – Notice in writing before commencement of proceedings – Police Decree, 1949, *s.* 42 (1) (*Z.*).

Editor's Summary

The respondent sued the appellants for damages for assault. The respondent alleged that the appellants as police officers struck and kicked the respondent whilst and after arresting him on a charge of being drunk and disorderly. The appellants raised the preliminary objection that the action was not maintainable as no notice had been given in writing as required by s. 60 of the Civil Procedure Decree (Cap. 4). It was common ground that there was no compliance with this section, but the respondent contended that whether or not it was legally necessary, there was a compliance with s. 42 (1) of the Police Decree, 1949, which requires notice in writing to be given to the police officer concerned and to the officer in charge of police in the place where the act complained of was committed. The trial magistrate overruled the objection and held that since s. 42 (1) of the Police Decree was enacted subsequent to s. 60 of the Civil Procedure Decree, and since as touching police officers the two sections covered the same field, s. 42 (1) must be deemed to override and replace s. 60 in actions against police officers concerned. He also held that in any event s. 60 could not apply to the present case as it was confined to "any act purporting to be done by such public officer in his official capacity" and the appellants' conduct could not be deemed to do so.

Held–

(i) the two sections do not, as regards acts committed by police officers, cover the same field at all; s. 42 (1) is largely concerned with the internal administration and discipline of the police force, but in view of s. 26 of the same Decree, the court would not go so far as to say that an arrest by a police officer was not something done or purporting to have been done under the provisions of the Police Decree for the purpose of s. 42 (1);

(ii) compliance with s. 42 (1) does not dispense with the need to comply also with s. 60 of the Civil Procedure Decree since the requirements of the two sections are not sufficiently similar to justify the court in inferring an implied repeal of the latter by the former in suits against police officers; therefore, the action was not maintainable;

(iii) since everything the police constables did was ex facie in connection with their arrest and keeping under arrest a man found committing a crime for which they had right to arrest him, it was clear that they were so acting as police constables.

William Allen and Another v. Bai Shri Dariaba (1897), 21 Bom. 754 and *Koti Reddi v. P. Subbiah and Others* (1918), 41 Mad. 792 applied; *Narayan Hari Tarkhande v Yeshwant Raoji Naik and Another* (1928), A.I.R. Bom. 352 considered.

Per curiam – " . . . with whatever ferocity they may have assaulted the respondent, they were clearly . . . doing so in their official capacity as policemen effecting or endeavouring to effect the arrest of the respondent for being drunk and disorderly, and thereafter keeping him effectively under arrest."

Appeal allowed with costs.

Cases referred to:

(1) *Allen* (*William*) *and Another v. Bai Shri Dariaba* (1897), 21 Bom. 754.

(2) *Koti Reddi v. P. Subbiah and Others* (1918), 41 Mad. 792.

(3) *Narayan Hari Tarkhande v. Yeshwant Raoji Naik and Others* (1928), A.I.R. Bom. 352.

Judgment

Windham CJ: This is an appeal by the three defendants in a suit in the first class magistrate's court, against a ruling by the learned magistrate overruling their submission in limine that the action was not maintainable by reason of an admitted non-compliance with s. 60 of the Civil Procedure Decree.

The appellants are police officers, and the respondent sued them for damages for assault, in that they struck and kicked him while and after arresting him on a charge of being drunk and disorderly.

There are two provisions of the law prohibiting the institution of certain suits against police officers or against public officers (into which category police officers fall) save upon certain conditions. One of them is s. 60 of the Civil Procedure Decree (Cap: 4), which reads as follows:

> "60. No suit shall be instituted against the Zanzibar Government, or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been delivered to, or left at the office of, the chief secretary to the Zanzibar Government or the District Commissioner of the district, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims: and the plaint shall contain a statement that such notice has been so delivered or left."

The other provision, enacted later, is s. 42 (1) of the Police Decree, 1949, which reads as follows:

> "42 (1). No action shall be commenced or prosecution instituted against any police officer in respect of anything done or purporting to have been done by him under the provisions of this Decree, unless notice in writing of such action or prosecution, and particulars thereof, shall have been given to such police officer and to the officer in charge of police in the place where the act complained of was committed at least one month before the commencement of such action or the institution of such prosecution."

It is common ground that before the institution of this suit there was no compliance with s. 60 of the Civil Procedure Decree, and that, whether or not it was legally necessary there was a compliance with s. 42 (1) of the Police Decree, 1949. Upon counsel for the appellants submitting that there ought also to have been a notice under s. 60 in order to render the suit maintainable, the learned magistrate ruled that this was not necessary, on two different grounds. First, he ruled that since s. 42 (1) of the Police Decree, 1949, was enacted subsequently to s. 60 of the Civil Procedure Decree, which in fact it was, and since as touching police officers the two sections covered the same field, s. 42 (1) must be deemed to override and replace s. 60 so far as actions against police officers are concerned. Secondly, he held that in any event s. 60 would not apply to the present case since it is confined to suits instituted

> "in respect of any act purporting to be done by such public officer in his official capacity,"

while these acts of kicking and slapping and striking on the part of police officers could not (he held) be deemed to have been committed by the appellants while acting or purporting to act in their official capacity. I will examine each of these conclusions.

With regard to the proposition that a compliance with s. 42 (1) of the Police Decree, 1949, dispensed with the necessity of complying with s. 60 of the Civil Procedure Decree, a careful examination of the wording of the two sections makes it clear, to my mind, that they do not, as regards acts committed by police officers, cover the same field at all, but that s. 42 (1) of the Police Decree is largely concerned, as

indeed

the whole of that Decree is largely concerned, with the internal administration and discipline of the police force, and that the powers of arrest specifically conferred upon a police officer by this Decree are only in respect of disciplinary offences committed by other members of the force. In particular, the only power of arrest directly conferred by the Police Decree at all is the power conferred by s. 47 upon a police officer not below the rank of assistant inspector to arrest police officers subordinate to him for disciplinary offences. It is to s. 21 of the Criminal Procedure Decree (Cap. 8), and not to anything in the Police Decree, that we must turn in order to find the general provision empowering police officers to arrest members of the public without a warrant for offences such as the appellants were alleged in the plaint to have been arresting the respondent for when they assaulted him, namely the offence of being drunk and disorderly. However, since those powers of arrest are imported into the Police Decree, 1949, by the provisions of s. 26 of the latter Decree, which sets out the general powers and duties of police officers, I would not go so far as to say that an arrest by a police officer was not something "done or purporting to have been done under the provisions of this Decree" for the purpose of s. 42 (1). But, be that as it may, I am of the considered opinion that compliance with that section does not dispense with the necessity of complying also with s. 60 of the Civil Procedure Decree, since the requirements of the two sections are not sufficiently similar to justify the court in inferring an implied repeal of the latter by the former in so far as concerns suits against police officers. There is no reason to suppose that, by requiring in s. 42 (1) that notice of the impending suit should be given to the police officer concerned and to his superior officer, the legislature was intending to dispense with the existing and quite different requirement of s. 60 that a similar notice should be given, in the case of all government officials, to the chief secretary or to the local district commissioner.

I turn now to the second question, namely whether s. 60 of the Civil Procedure Decree itself applies to the institution of the present suit, having regard to the nature of the assaults alleged to have been committed by the appellants upon the respondent while effecting his arrest; in short whether those acts could be held to have been committed by them in their official capacity as police officers. For this purpose it is the allegations of fact as set out in the plaint which must be looked to. And these allegations are that the appellants

> "assaulted the plaintiff both at the time of arrest and inside Mfenesini police station. The plaintiff was being arrested by the defendants on a charge of being drunk and disorderly."

The particulars of assault are that

> "the plaintiff was repeatedly kicked by the defendants and slapped on the face and on the back of the neck. The plaintiff was boxed on the right eye by the defendants;"

as a result of which "the plaintiff fell unconscious for some time." Further consequences of the assault were pleaded in support of the claim for damages.

Now the test, in such cases, of whether the public officer concerned can be said to have been acting in his official capacity is not the nature or severity of the acts done by him, except in so far as these factors may in themselves serve as an index of whether he was in good faith acting in his official capacity at the time. But if he was so acting in good faith (albeit in bad temper) it does not matter that his acts were in the circumstances unjustifiable, or even that they were malicious or illegal. The position is stated very clearly in *William Allen and Another v. Bai Shri Dariabe* (1) (1897), 21 Bom. 754, where the provision under consideration was s. 32 of the Bombay Civil Courts Act, 1869, which provided that

> "No subordinate judge or court of small causes shall receive or register a suit in which the Government or any officer of Government in his official capacity is a party."

There the acts under consideration were those of a certain “mamlatdar” and collector whose official duties were concerned with the safeguarding of the estates of deceased

persons, and who to that end had entered into the deceased's house and taken possession of his property and locked up some of his rooms. The deceased's widow having sued them in respect of these acts, the court of appeal, in deciding (just as in the present case) whether these had been done by the defendants "in their official capacity," made the following very pertinent observations in their judgment, at p. 772:

> "It has been argued before us that the acts of the defendants were wholly illegal and unjustified by any Act or Regulation, and that, therefore, they cannot be official acts. This argument, however, begs the whole question. An official act is not necessarily a legal act; it may be a most illegal one. The legislature has not, as we have pointed out, in the section under discussion given any immunity or protection: all it has done is to provide a particular forum for the trial of suits against Government officers for acts done by them in their official capacity. The question then turns not on whether the acts were legal or illegal, right or wrong, justifiable or unjustifiable, but on whether the acts were or were not official acts: acts, that is to say, done by the officer acting and purporting to act in an official capacity. In the present case there can, we think be no possible doubt that the defendants were acting officially."

Observations to a similar effect were made in the judgments of the Court of Appeal in *Koti Reddi v. P. Subbiah and Others* (2) (1918), 41 Mad: 792, in construing the words "any act purporting to be done by such public officer in his official capacity" in s. 80 of the Indian Civil Procedure Code, which is substantially reproduced in s. 60 of the Zanzibar Civil Procedure Decree.

Applying these tests to the alleged actions of the appellants in the present case, it seems to me quite clear that, with whatever ferocity they may have assaulted the respondent, they were clearly, and indeed admittedly on the face of the plaint, doing so in their official capacity as policemen effecting or endeavouring to effect the arrest of the respondent for being drunk and disorderly, and thereafter keeping him effectively under arrest. It may be that in doing so they used more force than was necessary and perhaps acted maliciously, though even this would probably be denied by them since, if a glance at their statements of defence be permitted, it will be seen that they plead in the alternative that the respondent was carrying and brandishing a knife at the time. But that point is, as I have said, immaterial, the only material question being whether they genuinely did what they did in their capacity as police constables. Since everything they did was, on the face of the plaint, in connection with their arresting, and keeping under arrest, a man found committing a crime for which they had a right to arrest him, it seems clear, nor indeed is it denied in the plaint, that they were so acting as police constables.

One case has been cited for the respondent, *Narayan Hari Tarkhande v. Yeshwant Raoji Naik and Another* (3) (1928), A.I.R. Bom. 352, in which an act of assault by a police constable upon an individual, after having officially questioned him concerning his connection with a crime under investigation and elicited no response, was held on the facts not to have been committed "under colour or in excess of" his official duty. But that decision, in which the same principles were applied as I have enunciated, was based on the wholly justifiable conclusion that the beating by the police of a reluctant witness in order to induce him to give them certain information was more than a mere abuse or excess of their official powers and duties, since it lay right outside the scope of their official duty to take such illegal measures, so that their acts could not be argued to have been performed "under the colour of duty imposed or authority conferred" upon them. But the facts alleged in the present case are quite different, and are concerned with nothing more than an assault, excessive perhaps in degree, committed by police officers while arresting and endeavouring to keep under arrest a person whom they had a right to arrest for the commission of a cognizable crime. In respect of such an assault the judgment of Mirza, J., in the very case now under consideration contains a passage, at p. 364, which so far from supporting the respondent's contention strongly fortifies me in the conclusion at which I have arrived. The passage

reads as follows:

> "A police officer who commits an assault or battery on a person he arrests for a cognizable offence, can no doubt in certain violent cases, where the accused cannot be reasonably apprehended without resorting to those means, be said to be acting within the scope of his duty or under colour of his duty or authority. An assault in the technical sense is implied in every arrest. Where there may appear to be no justification for the police officer in effecting an arrest to commit a battery, he would still appear to be acting either in excess of his duty or authority or under colour of such duty or authority."

For these reasons I must hold that the learned trial magistrate erred in overruling the appellants' objection, raised at the outset of the hearing, that s. 60 of the Civil Procedure Decree applied and that by reason of the respondent's admitted non-compliance with it the action was not maintainable. The appeal is allowed with costs, the learned magistrate's ruling is set aside, and I hold that by reason of that non-compliance the suit was wrongly instituted and is not maintainable and must be dismissed with costs.

Appeal allowed with costs.

For the appellant:
AA Lakha
Balsara & Lakha, Zanzibar

For the respondent:
OM Sameja
Mukri & Sameja, Zanzibar

Ravi Bint Mohamed and others v Abdoo Shaher Ahmed
[1957] 1 EA 782 (SCA)

Division:	HM Supreme Court of Aden at Aden
Date of judgment:	29 March 1957
Case Number:	505/1956
Before:	Campbell CJ
Sourced by:	LawAfrica

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[1] Landlord and tenant – Monthly tenancy – Written agreement purporting to sub-lease premises for three years – Premises later sold to so-called sub-lessee – Notice to quit served on head tenant by sub-lessee after purchase – Whether head tenant entitled to tenancy by estoppel and possession of the premises.

Editor's Summary

The plaintiffs, tenants of a coffee house, sub-let it together with shop furniture and other articles to the defendant, sub-tenant under a registered deed for a term of three years commencing July 1, 1955. The

defendant executed the sub-lease on October 9. 1955. In December, 1955, the defendant purchased the premises at a public auction and upon execution of the conveyance in that month became owner. The defendant remained in possession as sub-tenant of the plaintiffs. The rent paid by the defendant was Shs. 50/- per month with an additional Shs. 310/- for hire of furniture and other articles, and this rent and the hire charges was paid until March, 1956, when the defendant ceased to make any further payments. In August, 1956, the plaintiffs sued for possession, rent, hire charges, and damages, and the defendant then gave the plaintiffs notice to quit expiring on September 30, 1956. The plaintiffs contended that the defendant was estopped from disputing their title as the plaintiffs had let the defendant into possession, and that the defendant, having taken a lease for a term of years, when the plaintiffs had a monthly tenancy, could not by his act destroy the plaintiffs' title, even though he had become the owner and, moreover, that he was bound by the lease; and having failed to pay the rent the plaintiffs were entitled to recover possession from the defendant as "statutory tenants." The defendant claimed that the plaintiffs were not in a position to maintain a claim for possession.

Held–

(i) since the plaintiffs had only a monthly tenancy terminable by a valid notice to quit, the claim for possession could not be maintained.

(ii) on the expiry of the notice to quit, the plaintiffs would be entitled to a "statutory tenancy" or the rights of a statutory tenant, if they were in possession; but possession being with the defendant, the plaintiffs had no right to recover possession as "statutory tenants."

(iii) the defendant was not estopped from pleading and proving that his lessor's title had been determined; the estoppel was confined to preventing the lessee from disputing that the lessor did not have title at the time of giving the lease.

(iv) the plaintiffs' sub-lease to the defendant for a period of three years was invalid as it purported to create an estate larger than the lessor's interest.

(v) the plaintiffs were, however, entitled to rent and hire charges after the filing of the suit as their contractual tenancy was not then determined.

Order accordingly.

Cases referred to:

(1) *Langford v. Selmes* (1857), 69 E.R. 1089; 30 Digest (Repl.) 509, *1486.*

(2) *Milmo v. Carreras*, [1946] 1 All E.R. 288; [1946] K.B. 306.

Judgment

Campbell CJ: The facts of this case, though not complicated, are somewhat curious. The first plaintiff is a widow and the mother of the other plaintiffs who are minors. It appears that her husband, who died about thirteen years ago, had a monthly tenancy of certain premises used as a coffee shop and belonging to Messrs. Cowasjee Dinshaw & Bros. The plaintiff subsequently let the premises to the defendant and he has been her tenant for a number of years. Two agreements granting him a tenancy have been produced dated October, 1950, the day of the month not being filled in, and October 9, 1955, respectively. It is only the last agreement with which we are now concerned. This purports to give a sub-lease, though it is really an assignment, of the premises to the defendant till June 30, 1958. The curious feature of the document is that a period of this length has been given when the plaintiff herself had only a monthly tenancy from Messrs. Cowasjee Dinshaw & Bros. It is also curious to observe that she was professionally advised and the document professionally drafted. One can only suppose that she concealed the facts of the matter from her legal adviser.

The rent for the premises is set out to be Shs. 50/- per month. An additional Shs. 310/- is agreed to be payable for

> "the hire of the furniture, goodwill and licence of the coffee shop as well as the new licence to sell the drink."

On December 16, 1955, the defendant bought the premises from Messrs. Cowasjee Dinshaw & Bros. and thus became both her landlord and her tenant or assignee. It appears that for some months he paid the rent and hire charges to the plaintiffs and in return, as her landlord, received from her for some time Shs. 65/15 as rent, this being the amount she had previously paid to Messrs. Cowasjee Dinshaw & Bros.

The defendant then appears to have come to the conclusion that there was no longer any need for him to go on paying, and he ceased to pay anything as from March, 1956.

On August 2, 1956, the plaintiffs accordingly filed this suit claiming possession of the premises and the sum of Shs. 360/- for the months of March to June, 1956. They claim possession on the grounds that the defendant, besides refusing to pay rent, has broken an express covenant of the lease which was not to sub-let. These allegations the defendant does not now deny.

The defendant gave notice to quit to the plaintiffs expiring on September 30, 1956.

The first question to be resolved is the extent of the validity of the “lease” dated October 9, 1955.

Mr. Nunn, on behalf of the plaintiffs, bases his argument on a statement contained in 20 Halsbury's Laws (2nd Edn.) at p. 8 and which reads:

> "It is not essential to the relation of landlord and tenant that the landlord should be entitled to create the tenancy; and if he has purported to do so, and has delivered possession to the tenant, the latter is estopped from disputing his title."

He therefore claims that the plaintiffs have a tenancy by estoppel which must endure till June 30, 1958.

But in 13 Halsbury's Laws (2nd Edn.) at p. 466 it is stated:

> "When, however, the grantor or lessor has some interest in the land, but purports to grant or to lease a larger interest than he has, the grantee or the lessee does not hold by estoppel, for an interest passed, and his tenure is of that interest, whatever it may be; and a tenant is not estopped at a date subsequent to the creation of the lease from proving that the lessor's title has determined, nor a grantee that the grantor's interest has ceased, in order to establish a title under the Statute of Limitations. But this doctrine only applies to the durability and not to the quantity of the estate, and where a grantor or lessor was properly entitled only to part of the premises demised, but not to the whole, then as no interest passed out of part of the demise the grantor or lessor had a good title by estoppel in respect of that part."

It is only the title at the time of the demise which cannot be impugned; the title both before and after that time may be disputed as long as no allegation is made that no interest passed out of the lessor. As is said in Foa's General Law of Landlord And Tenant (7th Edn.) at p. 461:

> ". . . the person accepting a lease, though estopped from saying that it passes no estate at all, is not estopped from saying that it does not pass as great an estate as it purports to convey, i.e. so great an estate in point of duration for he is always estopped from saying that it is not so great in point of quantity. It is always, for instance, permissible to prove that the landlord has parted with the reversion since the demise, or that he was only a termor and that his term has expired."

In *Langford v. Selmes* (1), an old case but reported in 30 Digest (Repl.) 509, *1486*, it was held that the doctrine of estoppel between landlord and tenant is founded upon the principle that a lessee, having accepted a lease, may not plead to the action of his lessor nil habuit in tenementis. But the lessee may plead to such an action that the lessor had an interest at the date of the lease, but that such interest had determined before the alleged cause of action arose. Therefore, if a termor affect to grant a lease for a term exceeding his own term in duration, and to reserve an annual rent, that would operate as an assignment of his term, and there would be no estoppel between him and the person to whom he made such assignment; and accordingly, it would be doubtful whether the assignor would have any remedies for recovering the rent.

Milmo v. Carreras (2), [1946] K.B. 306 is also in point. Here the plaintiff was tenant of a flat under a lease for a term of seven years expiring on November 28, 1944. By an agreement in writing of October 25, 1943, he agreed to sublet the flat to the defendant for one year from November 1, 1943, and thereafter quarterly until either party should give three months' notice. The agreement contained the usual undertaking to deliver up at the determination of the term. The so-called sub-term, by reason of the quarterly extension, would necessarily extend beyond November 28, 1944, when the head lease expired. On April 27, 1945, the plaintiff served on the defendant what purported to be a notice to quit on August 1, 1945. The defendant having refused to give up possession, the plaintiff in those proceedings sought an order for possession. It was held that where a lessee by a document in the form of a sub-lease divests himself of everything he has got (which he must do if he is transferring to his sub-lessee an estate as great as or purporting to be greater than his own), the relationship of landlord and tenant cannot exist between

him and the so-called sub-lessee. By the agreement of October 25, 1943, the plaintiff had become a stranger

to the land. He thereby had transferred to the defendant the whole of the term existing under the head lease and he retained no reversion. Accordingly, he had no right to have possession delivered up to him.

Applying the decisions in these cases to the present facts I am satisfied that the plaintiffs will have no right to collect rent after the notice to quit served on them became effective or to have possession delivered up to them. I cannot see that the fact that the suit premises here are protected premises assists them. On the expiry of the notice to quit the plaintiffs became merely statutory tenants holding over and, having gone out of possession, have no right of re-entry.

With regard to the balance of their claim this is for Shs. 310/- per month in respect of the hire charges of the furniture and fittings of the coffee shop. I see no reason why they should not be permitted to collect these. The defendant is under a contractual obligation to pay for these for the period agreed. If his possession of the premises was terminated by their total destruction that might be another matter. But he claims that this possession should not be terminated and I have held that it has not been terminated. I am not concerned with whether or not the hire charges are excessive, though from a perusal of the schedule of the “lease” it seems probable that they are. For the defendant knew what he was doing and there is no evidence of fraud or other good reason to enable him to escape from his contractual liability.

In the result a decree will issue awarding the plaintiffs the sum of Shs. 1,240/- for hire charges and Shs. 200/- for rent. It may be remarked that some rent at the rate of Shs. 65/15 which I have been told he has not been paid but which he has not claimed in this suit, is owed to him. This he will have to claim in another suit. The claim for possession is dismissed.

There is a claim for general damages concerning which no evidence was led or argument put forward. It is accordingly dismissed. Each party having succeeded on one of the two main issues there will be no order as to costs.

Order accordingly.

For the plaintiffs:
EW Nunn
E Westly Nunn, Aden

For the defendant:
PK Sanghani and *G Taraporwalla*
G Taroporwalla, Aden

Suleman Mohamed Bhimji v R
[1957] 1 EA 786 (HCT)

Division:	HM High Court for Tanganyika at Dar-Es-Salaam
Date of judgment:	17 December, 1957
Case Number:	366/1957
Before:	Abernethy J

Sourced by: LawAfrica

[1] Customs – False declaration contrary to s. 149 (*b*) *of the East African Customs Management Act,* 1952 *– Whether charges on the bill of exchange* "*incidental to the making of contract of sale*" *– Whether* "*c.i.f.*" *includes charges incidental to the making of contract of sale – East African Customs Management Act,* 1952, *s.* 107 (1) (*a*) *and s.* 149 (*b*).

Editor's Summary

The appellant had arranged to import, in two consignments of equal number, 192 radios manufactured in Belgium. This indent was confirmed by a confirming house-Bidgood Larsson Ltd. in the United Kingdom. An invoice from the suppliers for £672 was supplied by the appellant to his clearing and forwarding agent and according to the figure in the invoice the c.i.f. value per set was Shs. 140/-. At this value the sets were free of import duty by the provisions of the Customs Tariff Ordinance. An import free entry form prescribed for use when the goods to be imported are not dutiable was then presented by the appellant's agent to the customs authorities and on the strength of the figures in the invoice the c.i.f. value of the imports in the form was shown as Shs. 13,440/- or £672 or Shs. 140/- per set. In the meantime a bill of exchange drawn by Bidgood Larsson Ltd. on the appellant bearing Shs. 7/- bill stamps was accepted by the appellant. The effect of the charge of Shs. 7/- for bill stamps the prosecution said was to raise the value of the imports for customs purposes to a figure above Shs. 140/- per set, namely to, Shs. 140/07 per set which rendered the sets dutiable at a rate ad valorem of 22 per cent., and accordingly the appellant caused to be made a false declaration contrary to s. 149 (*b*) of the Act. The appellants were convicted and fined. On the appeal it was argued on behalf of the appellant that the charge of Shs. 7/- was not incidental to the making of the contract within the provisions of s. 107 (1) (*a*) of the Act.

Held–

(i) the charge of Shs. 7/- on the bill of exchange was not incidental to the making of the contract within the provisions of the s. 107 (1) (*a*) of the Act;

(ii) whatever the East African Customs Management Act states has no effect on the ordinary meaning of the letters c.i.f., and charges which are not incidental to the cost i.e. the price paid for the goods, insurance and freight are not covered by c.i.f.;

(iii) the appellant did not give false c.i.f. value for the goods when he entered the figure Shs. 13,440/- as the c.i.f. value on the customs form.

Appeal allowed. Conviction and sentence set aside.

No cases referred to in judgment

Judgment

Abernethy J: The appellant in this case was found guilty of causing to be made a false declaration, contrary to s. 149 (*b*) of the East African Customs Management Act, 1952, and was fined Shs. 3,000/-. Particulars of the charge read as follows:

"The person charged on or about the month of January, 1957, at Dar-es-Salaam caused to be made a false

declaration in respect of ninety six ‘Norvak’ radios by giving to Messrs. Jashbhai P. Patel & Co., licensed Customs agents, a Novak invoice dated December 28, 1956, referring to O. No. Novak/2 showing the c.i.f. value to be £672 thereby informing them of the fact knowing that such fact was false and thereby causing the Messrs. Jashbhai P. Patel & Co. to make a false declaration in a matter relating to Customs on Import Free Entry No. 837 of

January, 1957, to wit that the c.i.f. value was £672. This is an offence contrary to s. 149 (*b*) of the East African Customs Management Act, 1952."

The facts of the case as summarised by the learned trial magistrate are as follows:

"Towards the end of 1956 accused arranged to import in two consignments of equal number, 192 radios made by a Belgiam firm. His indent upon the suppliers was confirmed by the house of Bidgood Larsson Ltd., in the United Kingdom and the licensed Customs agents Jashbhai P. Patel were to represent him for Customs purposes at Dar-es-Salaam.

"To that end accused forwarded to Patel's following a telephone call by him to the principal of that firm, a document which is now exhibit 2. The document is an invoice addressed to accused by the suppliers and is in the sum of £672. In the telephone call accused instructed Mr. Patel to clear the goods and I have no hesitation in inferring that the document in question was passed to Patel for that reason. The document was handed by accused to one Bhaloo for taking to Patel and this charge was duly carried out by Bhaloo.

On the strength of the document Patel's set about arranging the clearance of the goods. They observed, no doubt, had they not known it earlier, that the c.i.f. value per set according to the figures in exhibit 2 was Shs. 140/-. At that value-if that were the value for Customs purposes-the sets were free of import duty by virtue of Item 153 (*a*) of the Customs Tariff Ordinance (No. 39 of 1954 as amended by No. 35/55). Under the authority of Regulation 39 (1) (B) of the East African Customs Regulations, 1954, therefore, Patel's submitted to the Customs a form C. 16, an Import Free Entry Form, prescribed for use when the goods to be imported are not dutiable. On this form, on the strength of exhibit 2, the c.i.f. value of the imports was shown as Shs. 13,440/- or £672 or Shs. 140/- per set. This form as submitted is in evidence as exhibit 1.

"The form, referred to in evidence as an I.F.E. or Import Free Entry was first submitted on January 7, 1957, (P.W. 1). It was rejected by the customs in order that an indent, that is to say the order on the manufacturer by the importer, should be produced. This was done and the form re-submitted on January 23. It was then accepted. A few days later the vessel arrived and the customs stopped clearance and ordered the examination of a sample in order that the value might be calculated.

"In the meantime a bill of exchange (exhibit 6) drawn by the confirming house Bidgood Larsson on accused had arrived at the Standard Bank of South Africa. There is some dispute as to when this was presented to accused for acceptance the first time, but on his own evidence it was not later than January 8 or the day after the first lodgment of exhibit 1 with the customs authorities. There were impressed on the bill, as one would expect, U.K. bill stamps which amounted to Shs. 7/-. Accused accepted the bill subject to the arrival of the ship and unconditionally accepted it on January 30.

"The effect of the charge of Shs. 7/- for bill stamps was the prosecution say to raise the value of the import for customs purposes to a figure above Shs. 140/- per set, namely, to Shs. 140/073 per set. This would render the sets dutiable under Item 153 (*b*) of the Tariff Ordinance at a rate ad valorem of 22 per cent., the duty then payable being Shs. 2,959/- on that consignment."

Section 107 (1) (*a*) of the East African Customs Management Act provide that:

"Where any imported goods are liable to duty ad valorem, then the value of such goods for the purpose of assessing the duty thereon shall be taken to be the price which, in the opinion of the commissioner, they would fetch on a sale in the open market in the territories at the time and place of importation; and for the purpose of computing such price it shall be assumed:

(*a*) that such goods are to be delivered to the buyer at the port of place of importation, freight, insurance, commission, and all other costs, charges and expenses, incidental to the making of the contract of sale and the delivery of the goods at that port or place (except any customs duties and

> landing charges payable in the territories and any buying commission, at a rate not exceeding five per centum of the total value, which the commissioner is satisfied has been paid to an agent) having been paid by the seller."

and it has been submitted by learned counsel for the appellant that the charge of Shs. 7/- was not incidental to the making of the contract of sale. With that submission I must agree. The Shs. 7/- charge was on a second contract entered into between the firm of Bidgood Larsson Limited and the appellant concluded after the making of the contract for the sale of the goods between Novak Radio Corporation and the appellant.

The appellant's second ground of appeal is an even stronger one, and one which learned counsel for the Crown found it difficult to resist.

In filling up the Import Free Entry form the appellant gave the c.i.f. value of the goods as Shs. 13,440/-, the c.i.f. value given in the exporters' invoice. There is no doubt in my mind that c.i.f. covers cost, insurance and freight only. All that the appellant was required to declare in the form was the c.i.f. value, which he did. Whatever the East African Customs Management Act says has no effect on the ordinary meaning of the letters "C.I.F.," and charges which are incidental to the cost, that is, the price paid for the goods, insurance and freight, are not covered by c.i.f.

The appellant therefore did not give a false c.i.f. value for the goods when he entered the figure Shs. 13,440/- as the c.i.f. value on the Customs form.

I must therefore allow this appeal and set aside the conviction and sentence.

Appeal allowed. Conviction and sentence set aside.

For the appellant:
BH Rahim
BH Rahim, Dar-es-Salaam

For the respondent:
JG Samuels (Crown Counsel, Tanganyika)
The Attorney-General, Tanganyika

Suleiman Fakir-Mohamed v Ambalal Joitram Hindoo
[1957] 1 EA 789 (HCZ)

Division:	HM High Court for Zanzibar at Pemba
Date of judgment:	12 December 1957
Case Number:	2/1957
Before:	Windham CJ
Sourced by:	LawAfrica

[1] Rent restriction – Monthly tenancy – Demolition of premises imminent – Premises vacated by tenant – No notice to quit served on tenant – Premises demolished and re-built – Application to Rent Restriction Board for tenancy in the reconstructed premises – Rent Restriction Decree, 1953, *s.* 19 (1) (i), *s.* 7 (1) (*l*) (i) *and s.* 7 (1) (*j*) *and s.* 8 (1) (*Z.*).

Editor's Summary

The appellant was the landlord of a building under construction. Upon the site occupied by the new building there stood, until some time in 1954, an older building, of which the respondent rented a portion, namely a flat on a monthly tenancy. The respondent left the premises before they were demolished. In August, 1957, the respondent applied to the Rent Restriction Board under s. 19 (1) (i) of the Rent Restriction Decree, 1953, asking the board to allocate to him a "tenancy in the reconstructed premises." The board subsequently made an order ordering the appellant "to assign and deliver possession of one of the ground blocks to the applicant." The board also found that the respondent had left the old premises not voluntarily and because he wished to do so, but because they were about to be demolished. On this finding of fact the board held that the relationship of landlord and tenant between the parties continued to exist until the respondent's application. No notice to quit was served on the respondent when he left the premises. On appeal the argument was largely whether the board had power under the latter part of s. 7 (1) (*l*) (i) and s. 8 (1) of the Decree to make the order which it made.

Held–

(i) the board erred in holding that the relationship of landlord and tenant continued to exist until the respondent's application to the board.

(ii) the respondent having left the premises in 1954, followed by their actual demolition, effectually put an end to his monthly tenancy, just as any notice to quit would have done.

(iii) no relationship of landlord and tenant can subsist unless there exists the subject matter, either land or premises or both, to which it can attach itself. This relationship cannot exist in vacuo.

(iv) since none of the provisions of the Rent Restriction Decree, 1953, entitled the board to make the order, that order was ultra vires the Rent Restriction Board.

Simper v. Coombs, [1948] 1 All E.R. 306, distinguished.

Appeal allowed. Order of the Rent Restriction Board set aside.

Cases referred to in judgment:

(1) *Simper v. Coombs*, [1948] 1 All E.R. 306.

Judgment

Windham CJ: The appellant is the landlord of a building in Wete, Pemba, in the course of being newly constructed. Upon the site occupied by this new building there stood, until some time in 1954, an older building, of which the respondent rented a portion, namely one flat, as business premises as a month-to-month tenant at a rent of Shs. 100/- per month. He paid rent up to March, 1954. He then left the premises, shortly before their demolition. I will consider presently his reason for leaving them. Whatever that reason was, the appellant did not give him notice to quit. More than three years later, on August 12,

1957, the respondent made a formal written application to the Rent Restriction Board under s. 19 (1) (i) of the Rent Restriction Decree, 1953, asking the board to allocate to him a

> "tenancy in the reconstructed premises and to fix a date for the completion of the reconstruction."

Upon this application, and after hearing the evidence of the respondent only, the board on October 2, 1957, made its order, from which the appellant now appeals, in which it ordered the appellant

> "to assign and deliver possession of one of the ground blocks to the applicant, as soon as it is ready and certified habitable by the Health Authorities."

The board in its order, before granting this relief, made a finding of fact that the respondent (applicant) had left the old premises not voluntarily and because he wished to do so, but because they were about to be demolished (as in fact they shortly were demolished) on the grounds of their being in a ruinous and dangerous condition. The appellant has attacked this finding of fact. It is true that the respondent, who alone gave evidence, did not state in specific words the reason why he left his flat. But he did say that – "I was in that house for fifteen months before it was demolished," and he continued – "The house was demolished in 1954; last receipt was in March, 1954." Nor was any question put to him in cross-examination to suggest that the imminence of the demolition was not the cause of his leaving the premises; indeed he was not cross-examined at all. In the face of this, and in the face also of the statement in the respondent's original written application to the Board that–

> "the applicant was evicted from the old premises that once stood in the place of the present one because that [sic] premises were in a dangerous state from health point of view,"

it can only reasonably be taken as having been conceded by the appellant before the board that the respondent left the premises because the premises were about to be demolished and not, as the appellant now seeks to urge, voluntarily for some other reason. The board's finding of fact on this point was therefore justified.

On the ground of this finding of fact the board went on to hold that the relationship of landlord and tenant between the parties continued to exist until the respondent's application to them in August, 1957, and indeed until the delivery of their order in October, 1957, a period of some three and a half years after the respondent left the premises. Now it is conceded that the respondent, who had been a contractual tenant on a month-to-month basis, never received any formal notice to quit from the appellant; although the reason for this is not stated it may well have been that the respondent had in fact quitted the premises before it would have become necessary to serve such a notice upon him. And it may be that it was the absence of any notice to quit that moved the board to hold that the respondent still remained the appellant's tenant. But, be that as it may, the board in my view erred in so holding. For, whatever the respondent's reason may have been for quitting the premises, and even if as the board found he was virtually forced to do so, his leaving them after making a final payment of monthly rent in March, 1954, followed by their actual demolition, effectually put an end to his month-to-month tenancy, just as finally as any notice to quit would have done. For no relationship of landlord and tenant can subsist unless there exists a subject-matter, either land or premises or both, to which it can attach itself. The relationship cannot exist in vacuo. In the present case there was no question of the respondent's remaining a tenant of land on which the demolished building had stood, for he had been the tenant merely of one flat in that building. It is instructive in this connection to refer to the judgment in *Simper v. Coombs* (1), [1948] 1 All E.R. 306. In that case it was held that upon the demolition by an enemy bomb of a house, of the whole of which (including the land on which it stood) the appellant was a contractual tenant upon a weekly tenancy, the appellant remained the respondent's tenant because he had never served a notice to quit on her, either before or after the destruction of the house, and that as such tenant she was entitled to possession of the substantially similar house which was eventually erected on the bombed site. But the

basis of this decision, as is quite clear from the judgment, was that the land upon which the house had stood was still there, and that she had been, and accordingly

still remained, the tenant of that land, the continued existence of which kept the whole tenancy alive. The following passages from the judgment clarify the position:

> "The tenant now brings this action claiming that her weekly tenancy has never been determined and that she is still the tenant of the premises. The position at common law is plain. She had a contractual tenancy, and that tenancy has never been determined by due notice to quit. It therefore continues in existence. The destruction of the house by a bomb did not determine the tenancy. It is well settled that the destruction of a house does not by itself determine the tenancy *of the land on which it stands* . . . The fact that a new house has been erected on the site does not make any alteration to the legal position . . . That house is substantially the same as the old one. *It is annexed to and part of the land which was let under the tenancy*, and therefore it is now included in the tenancy which has never been determined."

In the above passages I have underlined the references to the land which was in that case included in the lease, since it was this fact which was patently the basis of the decision and which clearly distinguishes it from the present case, where a flat only was let, the destruction of which left nothing to which any tenancy could attach itself and thus determined the tenancy. Whether in the present case the respondent acquired any right of action against the appellant for damages suffered by him as a result of the termination of his lease by the demolition of its subject-matter is another question, and one which does not fall to be determined in the present proceedings.

The Rent Restriction Board could not therefore make the order which they did on the basis of any relationship of landlord and tenant having subsisted, their finding on that point being wrong. What power if any, then, did they have to make the order upon the appellant to "assign and deliver possession of one of the ground blocks" in the new building to the respondent? The board's powers are confined to those conferred upon it by the instrument of its creation, the Rent Restriction Decree, 1953. It is now rightly conceded by the respondent, through his counsel, that the provision of that Decree under which he purported originally to apply to the board, namely para. (i) of s. 19 (1), was inapplicable, since that paragraph operates only where it is the landlord who has applied to the board, namely for an ejectment order, and it enables the board in such an order to require the landlord to grant to the tenant a new tenancy in the reconstructed premises. Here, there was no question of an ejectment order, since the respondent had already gone out. It might perhaps have been better policy for him to have refused to vacate his flat and so compelled the appellant to apply for such an order under s. 19 (1) (i). But this he did not do. It is further to be noted that when he left his flat the respondent did not enter into any agreement with the appellant about continuing or renewing his tenancy in any part of the new premises when constructed. For he states in evidence–

> "I had no promise or agreement with the owner to go back into the house again if it were constructed. The landlord did not promise anything. I knew that he was going to construct another house."

The provision of the Rent Restriction Decree, 1953, under which the board itself purported to act in making its order was para. (*j*) of s. 7 (1). This paragraph empowers the board to

> "approve lettings, sub-lettings or assignments of premises and any prospective tenants, sub-tenants or assignees."

Now if this paragraph had been worded in some such manner as follows:

> "To order a landlord to let, sub-let or assign premises to any specified tenant, sub-tenant or assignee,"

then it would no doubt have empowered the board to make the order which it purported to make, though a provision in such terms would constitute a startling interference with freedom of contract. But para. (*j*) merely speaks of the board "approving" leases, etc. The recognised meaning of "approve" in such a

context is

to confirm either some action which has been taken or decided upon by one or more persons or some agreement which has been or is about to be entered into between two or more persons. A "letting," in the ordinary meaning of the term, is a lease or agreement, and its approval by the board presupposes that both parties have entered into it or propose to enter into it. For the board to force upon one party against his will a lease to another party is something very different from the board's merely "approving" a lease. Accordingly the board's order in the present case was not in my view covered by any power conferred upon it by s. 7 (1) (*j*).

It is next urged for the respondent, that the board had the necessary power under the latter part of para. (1) (i) of s. 7 (1). Para. (1) (i) empowers the board to

> ". . . allocate to any suitable tenant at such rent as the board may fix any house or portion thereof which without good cause has been left unoccupied for a period exceeding one month and, if any house is in an unfinished condition, to cause such house to be finished in all respects and rendered fit for habitation."

A careful reading of this paragraph is hardly needed to make it clear that nothing in it can have any application to the order made by the board in the present case.

Finally it is contended for the respondent that the board had power to make the order under s. 8 (1) of the Decree, which empowers the board to

> "investigate any complaint relating to the tenancy of premises made to it by a tenant or a landlord of such premises."

But even assuming that the respondent's application to the board in this case could be held to be a "complaint" such as is envisaged by this section, which I am satisfied that it could not, the section would not apply since it was not a complaint by a tenant; for as we have seen, the respondent when he made the application had long since ceased to be a tenant.

Since none of the provisions of the Decree which I have considered covers the board's order, and since upon a careful perusal of the Decree I am unable to discover any other provision which might be held to cover it, the order was ultra vires, the board's powers being statutory only. This appeal must therefore be allowed with costs and the board's order set aside. The board having made no order for costs, there will be no order for costs below.

Appeal allowed. Order of the Rent Restriction Board set aside.

For the appellant:
JC Patel
Patel & Patel, Zanzibar

For the respondent:
RV Joshi
RV Joshi, Zanzibar

S F Hassan v The Commissioner of Income Tax

[1957] 1 EA 793 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	17 October 1957
Case Number:	63/1956
Before:	Sir Newnham Worley P, Sir Ronald Sinclair V-P and Briggs JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – MacDuff, J

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[1] Income tax – Assessment – Interest in partnership – Whether salary paid to a partner deductible expense in ascertaining profit and loss of partnership business – What proportion of loss in partnership deductible from gross income of an individual – East African Income Tax (*Management*) *Act,* 1952, *s.* I, *s.* 14 (1) (i), *s.* 15 (*b*) *and s.* 58 (*a*).

Editor's Summary

The appellant was in practice as an advocate and this constituted the major source of his income. He was also interested in partnership with his brother in a safari firm in which his activities were of a minor nature. The partnership agreement provided that his brother should receive a salary of £900 per annum and the profits were to be divided as to two thirds to the appellant and one third to the brother. In 1951, the partnership incurred a loss of £427 or £428 before charging the brother's salary, or £1,328 if the salary were taken into account. The appellant claimed to deduct from his gross income under s. 14 (1) (i) of the East African Income Tax (Management) Act, 1952, the sum of £886, being the two thirds of £1,328. The Commissioner allowed the deduction of £427 only and this was upheld by a majority by the committee, which the Supreme Court confirmed. It was argued on further appeal that the appellant's brother's salary should be a deductible expense in ascertaining the appellants profit or loss from the partnership business.

Held–

(i) in order to ascertain the income of a partner from a partnership, the income of the partnership as such must first be ascertained.

(ii) payments by the partnership by way of salary, interest or drawings to a partner are not deductible expenses of the partnership.

(iii) a partner's loss or profit cannot exceed the loss or profit of the partnership as such and, accordingly, the appellant's loss was £427.

Appeal dismissed.

Cases referred to in judgment:

(1) *Cross v. Commissioner of Income Tax,* Kenya Supreme Court (Mombasa) Civil Appeal No. 19 of 1955 (unreported)

October 17. The following judgments were read by direction of the court:

Judgment

Briggs JA: This is an appeal from a judgment and decree of the Supreme Court of Kenya refusing to reduce the assessment of the appellant for income tax for the year 1951.

The major source of the appellant's income was his professional practice as an advocate. In addition he was in partnership with his brother, Mr. S. I. Hassan, in a firm called "African Hunting Safaris," whose name sufficiently described its business. Mr. S. I. Hassan was fully employed in the firm and the permits and licences on which the business depended were his. The appellant's activities in the firm, though apparently he was not a mere sleeping partner, were clearly minor. The partnership agreement provided for the payment to Mr. S. I. Hassan of a "salary" of £900. per annum, and from the actual conduct of the partners it appears that this was payable whether or not profits were made. Subject to the payment of the salary, profits were to be divided as to two-thirds to the appellant and one-third to Mr. S. I. Hassan. In 1951 the partnership incurred a loss of £427 or £428 before charging the salary, or

£1,328 if the salary were to be taken into account. The appellant claimed to deduct from his gross income, under the provision now contained in s. 14 (1) (i) of the East African Income Tax (Management) Act, 1952, the sum of £886, being two-thirds of £1,328. The Commissioner allowed a deduction of £427 only. The committee by a majority upheld him and the learned judge confirmed their decision.

The appellant concedes that in England the salary could not be deducted before arriving at the profits of the firm, and that in consequence the deduction which he claims could not be made; but he contends that the scheme of the local Act differs materially from the English one, and that the deduction must here be allowed. He bases this on the general proposition that in England the income of a partnership is assessable as such, whereas in East Africa assessments are only raised against individuals, not against partnerships. He submits that the result of this distinction is that when considering the income of any person received from a partnership business one must consider his interest, as it were, in isolation; that any expenditure which from his point of view is "wholly and exclusively incurred . . . in the production of the income" must therefore be an allowable expense in ascertaining his income from that source (s. 14 (1)); that in this case only his brother's expert knowledge, permits and licences, and work in the field made it possible for the business to be carried on at all; therefore from the appellant's point of view the brother's salary must be a deductible expense in ascertaining the appellant's profit or loss from the firm's business.

The argument is attractive, but it omits one essential factor. Section 8 of the Act charges for tax

> "subject to the provisions of this Act . . . income . . . in respect of . . . gains or profits from any trade, business, profession, or vocation."

The words "trade, business, profession, or vocation" are not expressly restricted to those carried on by the taxpayer alone, and are wide enough in their natural sense to include those carried on by him in partnership with others. Section 58 provides that

> "Where a trade, business, profession, or vocation is carried on by two or more persons jointly"

certain special provisions shall apply. It is clear that the words "trade, business, profession, or vocation" refer back directly to the same words in s. 8. So the income of any taxpayer in respect of profits from any partnership business in which he is a partner is to be determined in accordance with s. 58. The material words are in para. (*a*) and are as follows:

> "the income of any partner from the partnership shall be deemed to be the share to which he was entitled during the year of income in the income of the partnership (such income being ascertained in accordance with the provisions of this Act) and shall be included in the return of income to be made by such partner . . ."

In order to ascertain the income of the partner for the purposes of s. 8, one must first ascertain the income of the partnership as such. The provisions of the Act applicable for this purpose are primarily those of s. 14 and s. 15, which govern in ordinary cases the deduction of expenses of conducting a business. If s. 14 is applied to the partnership as such it is apparent that salaries, payments of interest, drawings, and any other payments made out of the profits to any partner are not expenses of the partnership which might be deductible, but mere distributions of profits of the partnership. Section 15 (*b*) is also expressly in point to forbid the deduction of a salary paid to a partner, where the income to be ascertained is that of the partnership. I am therefore clearly of opinion that the "income" of the partnership was in this case a loss of £427, since under s. 2 losses must be "computed in like manner as profits."

Before considering how the loss fell to be shared between the partners, I would point out that the words "shall be deemed to be" in s. 58 (*a*) give notice that the amount charged as income by the

combined effects of s. 8 and s. 58 may well be quite different from what in common parlance might be called “the partner’s income from the partnership.” In this case I think it is quite different. In that sense I think the

appellant did incur a loss of £886, though, in view of the capital position I would not say that his brother made a profit of £900 minus £443. With that warning I turn to the question,

> "What was the share to which the appellant was entitled of the partnership's loss of £427?"

To answer this one looks to the terms of the partnership agreement and, since it provided that in each year Mr. S. I. Hassan was in the absence of larger profits to be at least £900 better off than the appellant, it is obvious that the whole loss of £427 fell on the appellant. It was for this reason that he was correctly allowed to deduct the whole of the £427 and not merely two-thirds of it.

Against these views the appellant could only raise a submission that s. 58 is merely procedural and that it must be read subject to the general policy of the Act regarding individual assessments. I cannot agree that s. 58 is procedural. It is a material part of the Act for ascertaining the amount of certain types of "income" through profit or loss of a partnership business. It is collateral to, but no inconsistent with, the general policy of individual assessments. But perhaps its most important effect is one to which I have not yet referred. The provisions of a partnership agreement may well have the result that in a particular year when the partnership as such precisely balances its accounts, making neither profit nor loss, one partner makes a profit and the other a loss in the commercial sense. Were it not for s. 58 (*a*), the first partner would be chargeable to tax and the other entitled to a deduction. As it is, that is not possible. The word "share" must be given its true sense. The most which any partner can in any event be chargeable for, or be entitled to deduct, is the whole of the profit or loss of the partnership as such. If that is not the position, he can only be chargeable for, or entitled to deduct, an aliquot part of that profit or loss. I think s. 58 cannot be either disregarded or cut down.

In my opinion this appeal should be dismissed with costs. I conclude with two matters in the nature of foot-notes.

Mr. Newbold for the respondent was content to argue the appeal on the lines which I have accepted, but pointed out that a question might have been raised whether Mr. S. I. Hassan's "salary" was a revenue payment at all. In another case it might be argued that some or all of it was a capital payment. Mr. Newbold also referred to a judgment of the Supreme Court of Kenya in *Cross v. Commissioner of Income Tax* (1), Mombasa Civil Appeal No. 19 of 1955, (unreported), which was relied on in this case in the Supreme Court. It contains the following passage:

> "To take an example of the present partnership making a profit of £1,000 after paying Mrs. North's salary of £460. According to Mr. Newbold, and with this I agree, the profits of the partnership as such would be £1,460. If I understood him correctly this would be assessed, according to present practice in the sum of £730 against each partner. If that is so I think it is wrong in that it ignores the meaning of the words 'share to which he was entitled' in s. 58 of the Act. If the English practice is followed the shares of income of the partnership to which the partners would be entitled would be £500 to Mr. Cross and £960 to Mrs. North and it is in those proportions in England that they would bear the total tax assessed against the partnership."

Mr. Newbold informed us that he had been misunderstood. In fact the practice in this country is as it is in England, and as the learned judge thought it ought to be here, and Mr. Newbold certainly did not intend to say that it was otherwise.

Sir Newnham Worley P: I also agree. The appeal is dismissed with costs.

Sir Ronald Sinclair V-P: I agree.

Appeal dismissed.

For the appellant:
DN Khanna
DN & RN Khanna, Nairobi

For the respondent:
CD Newbold QC and *JC Hooton* (Legal Secretary and Deputy Legal Secretary, East Africa High Commission)
The Legal Secretary, East Africa High Commission

Suleman Kara Osman v Walji Mulji Dattani and another Trading as Walji Mulji Dattani & Bros

[1957] 1 EA 796 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	27 September 1957
Case Number:	41/1957
Before:	Sir Newnham Worley P, Briggs Ag V-P and Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Uganda – Keatinge, J

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[1] Rent Restriction – Premises designed as shop in front and living quarters behind – Whether premises exempted from Rent Restriction Ordinance (*Cap.* 115) (*U.*) *– Meaning of* "*living quarters*" *– Government Notice No.* 10 *of* 1957 *para.* 3 (*a*) (*U.*).

Editor's Summary

The suit premises, consisting of a portion of a building, the front part of which was designed to be used as a shop and the rear as a residence, were let in 1941, and from 1942 to 1945 the first respondent and his family had lived in the premises. Since the beginning of 1946 no one had lived in the premises and the rear portion of the building, like the front, had been used for business purposes. The appellant as landlord sued the respondents, who previously held the premises under contractual tenancy and now claimed to be statutory tenants for possession. Government Notice No. 120 of 1954 (now replaced by para. 3 (*a*) of Government Notice No. 12 of 1957) exempted from the provisions of the Rent Restriction Ordinance

> "premises . . . which do not include any living quarters and are not included in one tenancy agreement or lease with any living quarters."

The High Court dismissed the suit holding that the premises included living quarters and that, therefore, the premises had not been decontrolled. On appeal the appellant contended that "living quarters" means quarters that were being lived in at the relevant date, which would be January 1, 1946, when Government Notice No. 120 of 1954 took effect; that the lapse of ten years during which the rooms in question had

been used exclusively for business purposes made it impossible properly to call them living quarters now; and that user must in the long run determine whether premises are living quarters or not.

Held–

(i) the expression "living quarters" means "quarters for living in" rather than "quarters being lived in";

(ii) the appellant had to prove that the alleged living quarters could not lawfully be used as such, and this he was unable to do; the "purpose of letting" must be considered for this limited and, as it were, negative purpose when deciding whether premises are living quarters or not, but it is only a factor to be considered among others in arriving at a positive answer.

Observations of Keatinge, J., in *K. K. Shah v. Modern Sweet Mart Ltd.,* Uganda High Court Civil Case No. 400 of 1956 (unreported) dissented from;

(iii) the policy of the Rent Restriction Ordinance is not only to protect the sitting tenant, but also those who may become sitting tenants in future, and the respondents fall in this class.

Decision of Keatinge, J., ([1957] E.A. 398 (U.)) affirmed.

Cases referred to:

(1) *Harnam Singh v. Jamal Pirbhai*, [1951] A.C. 688.

(2) *K. K. Shah v. Modern Sweet Mart Ltd*., Uganda High Court Civil Case No. 400 of 1956 (unreported).

(3) *Noor Mohamed v. Shree Vishrakurma*, [1957] E.A. 364 (U.).

(4) *Williams v. Perry* [1924] 1 K.B. 936.

(5) *Wolfe v. Hogan*, [1949], 1 All E.R. 570.

September 27. The following judgments were read:

Judgment

Briggs JA: This is an appeal from a decree of the High Court of Uganda. The appellant as landlord sued the respondents for possession of certain premises previously held under contractual tenancy. Their defence was that the premises were controlled and that they were statutory tenants. The only issue was whether the premises were still controlled or had been decontrolled by reason of the provisions of Government Notice No. 120 of 1954 (now replaced by para. 3 (*a*) of Government Notice No. 10 of 1957). The effect of these is to exempt from the provisions of the Rent Restriction Ordinance (Cap. 115)

> "premises . . . which do not include any living quarters and are not included in one tenancy agreement or lease with any living quarters."

The claim was dismissed with costs and the plaintiff appeals.

Most of the facts are not now in dispute. The appellant's father in 1941 let the premises to the first respondent on a two year tenancy which expired on December 31, 1943. They were described as "one shop premises . . ." and there were no restrictions as to user. Subletting and structural alterations were subject to landlord's consent. On January 6, 1944, the first respondent, who had then held over for some days, took the second respondent, who is his brother, into partnership. The landlord accepted the partnership as tenants and they have been in occupation ever since. The appellant succeeded his father as landlord in 1953. The premises are of a type common throughout East Africa. The building is long and narrow. The front part, which abuts on a street, was designed to be used as a shop, and the back part was designed for residential purposes. A wall separates it from the shop and it consists of a living room, a kitchen, a bathroom and a store or servant's room. These premises and several others like them form a single block. The front portion has at all material times been used as a shop. There was some dispute as to user of the back portion. The High Court's finding, which is not now seriously attacked, is that from the inception of the tenancy at the beginning of 1942 until the end of 1945 the first respondent and his family lived there. It is common ground that since the beginning of 1946 no one has lived there. The back portion, like the front, has been used for purposes of the partnership business. No structural alterations have been made. It is not, I think, disputed that, if the partners or one of them now wished once again to use the back portion as his own residence, there could be no objection to this in law, and there would be no obstacle in fact, except that the stock in trade now stored there would have to be moved out and some shelves put up for storage space might as a matter of convenience have to be moved. The first respondent says this could be done in ten to fifteen days.

On these basic facts the learned trial judge found that the premises as a whole included living quarters – the back portion – and accordingly, since it was not disputed that the whole premises were held under a single tenancy, that the premises had not been decontrolled. The main argument for the appellant, indeed, I think, the only argument, though it was presented in many aspects, was that, although up to the end of 1945 and perhaps for some time after it might properly have been said that the premises included living quarters, the lapse of ten years during which the rooms in question had been used exclusively for business purposes made it impossible properly to call them living quarters now. In its narrower form, the argument is that "living quarters" means quarters that were being lived in at the relevant date, which would be January 1, 1946, when G.N. 120/54 took effect: in its wider form, that user must in the long run determine whether premises are living quarters or not.

I should hesitate long before enunciating a set of principles by which it might be determined whether premises are or are not living quarters in the relevant sense. And, however clearly such principles might be laid down, the question itself would remain, in my opinion, one of fact. I must nevertheless express some general views in criticism of the appellant's submissions. So far as I am aware, the phrase "living quarters" is, in reference to Rent Restriction legislation, novel. It is not defined and

is not used in any special relation to other words now well-known, such as “dwelling house.” It has no status as a term of art and should *prima facie* bear its simple grammatical meaning. I understand the words “living quarters” to mean “quarters for living in,” rather than “quarters being lived in.” In other words, I think “living” is primarily descriptive of the nature of the “quarters” and the purpose for which they were designed. It does not, I think, refer in the first place to their user at a specific time. It may do so, but I think that meaning is secondary.

Some attempt was made to reply on the fact that the back portion, although admittedly designed for living quarters, was equally adapted for business purposes, since the bathroom contained no bathroom fittings, but only a tap, and the kitchen no cooking range, but only a chimney. No doubt these are factors which can properly be considered, but they commonly apply to premises of this kind and certainly would not preclude a finding that these premises were designed for use as living quarters. At the inception of the tenancy and for some years thereafter they were used for that purpose, as were hundreds of similar buildings in Kampala. I think that on these facts it was an inescapable conclusion that the shop premises as a whole in 1945 “included living quarters.” But I would add a proviso. It is at least possible, though it is not necessary to decide the point, that if premises are let on terms forbidding residential user they cannot in law be held to include living quarters, although part of them may have been designed and well adapted for that purpose. If this is correct, “living quarters” has the extended meaning of “premises which may lawfully be used as living quarters.” But nothing of that sort arises here. It is true that the appellant contended in the court below that these premises were “let for business purposes.” If the question here were whether the letting was predominantly for business or for domestic purposes, so as to determine the character of the premises as a whole as (business) “premises” or “dwelling-house” (see *Harnam Singh v. Jamal Pirbhai* (1) [1951] A.C. 688) he might have succeeded on this point; but I think that question does not arise in this case. The appellant would have had to prove here that the alleged living quarters could not lawfully be used as such, and this he was unable to do. I think the “purpose of the letting” must be considered for this limited and, as it were, negative purpose when deciding whether premises are living quarters or not, but it is only a factor to be considered among others in arriving at a positive answer. If it be found that the landlord and tenant both intended that the tenant should live in the alleged “living quarters,” that will be some evidence that they were living quarters in fact at that time, but it is not conclusive. To this extent I must with respect dissent from the views expressed by the learned judge both in his judgment under appeal and in a previous judgment in the case of *K. K. Shah v. Modern Sweet Mart Ltd*. (2), Uganda High Court Civil Case No. 400 of 1956 ((unreported). Lewis, J., in *Noor Mohamed v. Shree Vishrakrma* (3), [1957] E.A. 364 (*U*.)) appears at first sight to have considered that if the “purpose of the letting” was shown to be non-residential this would preclude a finding that the premises “included living quarters;” but I think on fuller consideration of his judgment it appears that he is considering only possible prohibitions on user, and holds by implication that if there is no prohibition the question is open and one must look to other factors. I think with respect that this is the correct approach to this particular aspect of the problem.

The learned trial judge relied on *Williams v. Perry* (4), [1924] 1 K.B. 936, as showing the importance of the “purpose of the letting,” but I think the case is not helpful in this reference. It does, however, demonstrate that in England premises may change their character as dwelling houses or business premises, and that this may happen without structural alteration. In *Wolfe v. Hogan*, (5), [1949] 1 All E.R. 570, it was submitted that, in the absence of a restrictive covenant, de facto user decided the question whether premises were “let as a separate dwelling” and therefore subject to the Act, but this was rejected, the court holding that one must have regard to the user contemplated by the parties at the time

of the letting and that change of status could not be effected by mere change of user unless the landlord had consented to, or at least acquiesced in, the change. These cases clearly turn on the words “let as a

separate dwelling." They are no authority for importing such words into the meaning of "living quarters," with which alone we are here concerned.

It remains for decision whether, if the shop-premises "included living quarters" in 1945, the back portion later changed its character and ceased to be living quarters by reason of long non-occupation. I think it is clear that other reasons could produce such a change. Structural alterations could do so, and I think dilapidation rendering the premises unfit for human occupation might have the same effect. So might any supervening legal prohibition on user as living quarters; but such factors do not arise here. Either respondent might, as I have said, resume residence at any time. In the circumstances I think non-user for residence was at most a factor to be taken into account with others as leading, but not compelling, the court towards the conclusion that these premises were no longer living quarters. In view of the past history of the premises and the subsisting rights of the respondents, I think it was a factor of comparatively little weight and was rightly treated as inconclusive.

The appellant argued that the whole policy of the Ordinance is to protect only the sitting tenant. I think this is only partially true. Protection is extended to those who may become sitting tenants in future, and the respondents are within that class. These premises are of a common type and if it had been intended to decontrol them in all cases where the living quarters were not actually occupied it would have been easy to find apt words for the purpose.

It is perhaps worth noting that in the original plaint the appellant described the premises as a "shop and residence." This was later amended to read "shop premises," but it is not without significance as an admission made at a time when he was contending that in law the rooms in question had never been, or alternatively had ceased to be, a residence.

I think that the learned trial judge's conclusion was correct and that this appeal should be dismissed with costs.

Sir Newnham Worley P: I agree. The appeal is dismissed with costs.

Forbes JA: I also agree.

Appeal dismissed.

For the appellant:
AI James
Baerlein & James, Kampala

For the respondents:
RA Caldwell
PJ Wilkinson, Kampala

Kibiego Arap Kipkiai and others v R
[1957] 1 EA 800 (SCK)

Division: HM Supreme Court of Kenya at Nairobi

Date of judgment: 29 April 1957

Case Number: 74, 75, 76, 77/1957

Before: Rudd Ag CJ and Pelly Murphy J

Sourced by: LawAfrica

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[1] Criminal law – Native intoxicating liquor – Whether offence triable summarily – Whether possession on farm of materials for making liquor an offence – Native Intoxicating Liquor Ordinance, s. 22 (1) (*K.*) *– Criminal Procedure Code s.* 27 (3) *and s.* 197 (*K.*).

Editor's Summary

A magistrate at Thomson's Falls in Criminal Case No. 26 of 1957 (of that court) convicted four Africans each of whom filed an appeal to the Supreme Court. These appeals Nos. 74–77 of 1957 were consolidated and heard together and the appellate court allowed one appeal for reasons given below, reduced the sentences in two others, and reserved judgment in the remaining appeal for consideration of the question whether a charge of an offence against s. 22 (1) of the Native Intoxicating Liquor Ordinance is triable summarily pursuant to s. 197 of the Criminal Procedure Code.

Held–

(i) since an offence against s. 22 (1) of the Ordinance is punishable with imprisonment for a term not exceeding six months or a fine not exceeding Shs. 1,000/- "or both," the offence is triable summarily under s. 197 (2) of the Criminal Procedure Code and the words "or both" do not have the effect of authorising imprisonment exceeding six months or a fine exceeding Shs. 1,000/-.

(ii) the appeal which the court had allowed was allowed because the charge did not disclose any offence known to the law; possession of materials for manufacturing native intoxicating liquor on a farm is not an offence and s. 22 (1) does not apply to such materials.

Appeals Nos. 74–76 dismissed but sentences reduced. Conviction and sentence relative to Appeal No. 77 quashed.

No cases referred to in judgment

Judgment

Rudd Ag CJ: read the following judgment of the court: These appeals were consolidated and heard together on April 15, 1957, when the sentences in appeals Nos. 74 and 75 of 1957 were reduced to a fine of Shs. 30/- in each case and appeal No. 77 of 1957 was allowed, the conviction and sentence in that case being set aside, and the appellant ordered to be acquitted. The court reserved judgment in appeal No. 76 of 1957 and stated that it would give its reasons for allowing appeal No. 77 of 1957 at a later date for the future guidance of the magistrate. The only reason that judgment was reserved in appeal No. 76 was for consideration of the question as to whether a charge of an offence against s. 22 (1) of the Native Intoxicating Liquor Ordinance was triable summarily in accordance with the procedure prescribed by s. 197 of the Criminal Procedure Code. That question depends upon whether an offence against s. 22 (1) of the Native Intoxicating Liquor Ordinance is an offence punishable with imprisonment for a term not exceeding six months or a fine not exceeding Shs. 1,000/- within the meaning of s. 197 (2) of the

Criminal Procedure Code. The offence is in fact made punishable with imprisonment for a term not exceeding six months or a fine not exceeding one thousand shillings or both.

In our opinion the offence comes within the terms of s. 197 (2) of the Criminal Procedure Code. If the offence were punishable with a term of imprisonment not exceeding six months and no other punishments were specified, then s. 27 (3) of the Penal Code would apply to authorise a sentence of a fine instead of or in addition to imprisonment. The words “or both” in the penalty do not have the effect of authorising a sentence of a period of imprisonment exceeding six months or a fine exceeding one thousand shillings. Appeal No. 76 therefore fails so far as it is an appeal

against conviction, but we think that the sentence should be reduced for the same reasons that the sentences were reduced in appeals 74 and 75, namely that there was no enquiry as to whether or not the appellants could afford to pay a fine of Shs. 200/- which was, in any case, excessive in our opinion in all the circumstances of the case for a first offence. Furthermore we had before us on appeal evidence which, if it had been before the trial magistrate, would have probably caused him to impose a much smaller fine. The sentence is reduced to a fine of Shs. 30/- only.

The reason that appeal No. 77 of 1957 was allowed was that the charge did not disclose any offence known to the law. Possession of materials for manufacturing native intoxicating liquor on a farm is not an offence. Section 22 (1) does not apply to materials for manufacturing native intoxicating liquor. Accordingly the conviction and sentence in appeal No. 77 of 1957, were quashed and the fine, if paid, must be refunded.

Appeals Nos. 74–76 *dismissed but sentences reduced. Conviction and sentences relative to appeal No.* 77 *quashed.*

For the appellants:
DF Shaylor
Buckley, Hollister & Co, Nairobi

For the respondent:
KC Brookes (Crown Counsel, Kenya)
The Attorney-General, Kenya

Hamed Bin Suleiman EL Busaidi v Salim Bin Ahmed EL Busaidi
[1957] 1 EA 801 (SCZ)

Division:	His Highness the Sultan’s Court for Zanzibar at Zanzibar
Date of judgment:	30 September 1957
Case Number:	26/1957
Before:	Windham CJ
Sourced by:	LawAfrica

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[1] Mohamedan law – Will – Testator instructing draft will to be drawn and dying before approving it – Whether draft will valid – Succession Decree (*Cap.* 13), *s.* 2 (*Z.*).

Editor’s Summary

The plaintiff applied for a grant of letters of administration of the estate of his half-brother, an Arab Muslim of the Ibathi sect. He was, save for the deceased’s widow, the nearest relative. The defendant,

whose father was the deceased's first cousin, opposed the grant and sought to propound a will said to have been made by the deceased about a week before his death under which the defendant, in addition to being a beneficiary, was named as executor. The defendant produced in evidence a document which he claimed to be an unsigned draft will of the deceased which was written down in accordance with oral instructions given by the deceased of which the terms were approved by the deceased before his death. One Rashid, a licensed public letter writer, gave evidence for the defendant that the deceased, when they once met, said to him "I want to make a will, can you write me out one?" Rashid agreed, took down notes of the proposed will and promised to "bring a draft will in a day or two." The draft will, it was said in evidence, was duly produced to the deceased and that the deceased called Rashid back in two or three days and said "Go and prepare a document in the terms of this one" and handed back the draft will to him. In the meantime, the deceased died. A number of other witnesses also gave evidence, some corroborating details of the story of Rashid, others testifying merely as to what he had told them. One witness, while corroborating most of Rashid's story, said: "Rashid definitely said he had not shown deceased the draft before deceased died." This evidence was denied by Rashid. The questions before the court, therefore, were,

firstly, whether the document alleged to be the deceased's will was drafted upon his (deceased's) instructions at all or whether, as it was contended for the plaintiff, it was a complete fabrication compiled after his death; secondly, whether this document, if genuine, was ever seen and approved by the deceased; and thirdly, whether, if the document were genuine, it could be said to be a valid will of the deceased in accordance with the Mohammedan law of wills and the relevant legal decisions interpreting that law.

Held–

(i) the court was unable to accept Rashid's uncorroborated statement that he showed the draft will to the deceased and that the latter approved it;

(ii) since it had not been satisfactorily proved that the deceased ever approved the draft, nor indeed even saw it, and since, according to Rashid's own evidence the deceased desired to see if the draft correctly gave effect to his oral instruction, it could not possibly be held that it necessarily represented his final testamentary intentions or that, had he lived, he might not have altered it.

Chunna Kunwar v. Rasili Kunwar (1949), A.I.R. All. 655 applied.

Administrator-General, Zanzibar v. Nassor bin Fazil bin Nassor and Others, [1957] E.A. 159 (Z.) considered.

Order accordingly.

Cases referred to:

(1) *Administrator-General, Zanzibar v. Nassor bin Fazil bin Nassor and Others*, [1957] E.A. 159(Z.).

(2) *Chunna Kunwar v. Rasili Kunwar* (1949), A.I.R. All. 655.

Judgment

Windham CJ: The plaintiff seeks a grant of letters of administration of the estate of his half-brother, Seyyid Seif bin Suleiman el Busaidi, an Arab Muslim of the Ibathi sect and a man of wealth and substance, who died in Zanzibar on December 17, 1956, the plaintiff being, save for the deceased's widow, his nearest relative. The defendant, whose father was the deceased's first cousin, opposes the grant and seeks to propound a will said to have been made by the deceased about a week before his death under which he, the defendant, in addition to being a beneficiary to the extent of one-third of the residue of the estate, is named as executor. In support of this claim the defendant has produced in evidence, as exhibit (1), a document which he claims to be an unsigned draft will of the deceased which was written down in accordance with oral instructions given by the deceased and whose terms the deceased approved before his death. Two questions of fact and one of law fall to be decided. The first question of fact is whether the document exhibit (1) was drafted upon the deceased's instructions at all or whether, as is contended for the plaintiff, it is a complete fabrication compiled after his death. The second question of fact, which will arise only if the document is not held to be such a complete fabrication, is whether the deceased ever saw and approved it before dying. The question of law, which will likewise arise only if the document is not found to be such a fabrication, is whether it can be held to be a valid will of the deceased in accordance with the Mahommedan law of wills and the relevant legal decisions interpreting that law.

The story of how the document exhibit (1) came into existence is based, so far as direct evidence is concerned, entirely on that of the witness Rashid bin Hamed, a licensed public letter writer. Briefly, his story is that, about fifteen days before his death, the deceased, through an intermediary, sent for him to ask him to try and arrange a marriage between himself (the deceased) and a certain lady, and that during their conversation, which took place in an unfrequented lane near the goldsmith's shop on whose baraza the deceased had been sitting when they met, the deceased said to him: "I want to make a will; can you write me out one?" Rashid agreed, and took out a small piece of paper and asked the deceased to tell him what he wanted written. Rashid's evidence continues as follows:

> "So he told me, and I took it down on the small piece of paper, and later I copied it out on to this document exhibit (1) in the form of a will. I said – 'Now I am going to draft out a will and show it to you.' He agreed. I have not got those notes that I took down. I tore the paper up after I had drafted exhibit (1). So we parted. I said 'I will bring you the will in a day or two.' I then prepared the will, from the notes that I had taken down. I prepared it at my house. I then took it to deceased, about two days after I had last seen him. I took it to him at the goldsmith's. I said – 'Here is the draft will,' and showed him exhibit (1). He said 'Read it to me.' So I read it to him from beginning to end. He said – 'Very well, I shall keep it with me and you can come back in two or three days.' This exhibit (1) was merely a draft of the will, and I wanted to write the will itself. Deceased then said – 'When you come again I will give you this draft.' He said – 'Come back in two or three days.' Deceased told me – 'come back in two or three days, first so as I can give you back this paper and secondly so that you can bring me an answer about this lady.' He said – 'I want to keep this draft will and look at it for two or three days.' He didn't say why. So I went away. After two or three days I returned to the goldsmith's shop. Deceased was there and told me – 'About that woman, it's all off.' Then he took out this document exhibit (1) from his pocket and said – 'Go and prepare a document in the terms of this one.' He handed exhibit (1) to me. That is all he said to me. I went away with exhibit (1). But I did not write out any will from it, because I did not have time, and also I heard he had died. When I left him, that last occasion, we arranged that I should come back to him, bringing the will. No definite time was arranged when I should come back to him. It was about a week after I last saw him that I heard he had died. I attended his funeral."

In cross-examination Rashid added more specifically, regarding the approval of the draft exhibit (1) by the deceased:

> "Deceased could have signed it as the will itself if he had wanted to. It was confirmed by him, and he said – 'Its contents are correct, go and write them out.' It only needed the date and my name added."

In re-examination, however, he observed – "I write fair copies of wills in ink. Exhibit (1) is in pencil," – as infact it is.

Such is the story of Rashid regarding the connection between the deceased and the draft unsigned will (if such it be) exhibit (1). It is not in dispute, and has been established by the evidence of his widow, that the deceased's final illness lasted for just a week, and that for the last four days of his life he was incapable of speech. As I have stated earlier, two questions of fact arise, first, whether exhibit (1) was drafted on the deceased's instructions at all, and secondly whether, if it was so drafted, it was ever seen or approved by him.

With regard to the first question, a number of other witnesses have given relevant evidence, and they may be divided into two groups. First, those whose testimony is corroboratory of Rashid's in the true sense, that is to say evidence deriving from a source other than Rashid himself and tending to suggest that his story is true. Secondly, those who testify merely as to what Rashid told them, and whose evidence is therefore not corroboratory but merely goes to show the consistency of Rashid's story, be it a true or a false one. I may sat at once that neither was Rashid's story so inherently probable nor did he himself shine so convincingly as a witness of truth that I would accept his evidence without its being corroborated in the true sense by some reliable witness. And the only two witnesses who afforded independent corroboration of it were Omar Salum Baashwaan and Abdulrahim Mohamed Jidawi.

Omar Salum was a public letter writer. His evidence, if it is o be accepted, affords corroboration of Rashid's not only as regards the draft will exhibit (1) having been drafted on the deceased's instructions but also as regards its having been seen and approved by the deceased after Rashid had written it out, for Omar's story, in brief, is that about a fortnight before the deceased died he (Omar), while passing the deceased's house, was called in by him, and that the deceased, after some conversation

upon other topics, told him that he had made a will in which he had named the defendant as his executor and as heir to one-third of his property and proceeded to retail to him two or three other of the testamentary provisions which are in fact contained in the draft will exhibit (1), reading out from a document that he took out of a drawer in his desk and laid in front of him, a document which he said was the will and which looked very like exhibit (1), and asking him not to disclose to anybody else its existence or contents.

Having carefully considered the evidence of Omar Salum I find myself unable to accept it. Even if he had in the past, as he stated in evidence, written letters for the deceased, he had not done so for some two years and did not claim to be one of his close friends; and it is too great a strain upon credulity to believe that the deceased would have volunteered to communicate to him, and to him alone, the existence and contents of his will, vowing him to secrecy. There were other unsatisfactory features and unconvincing statements in Omar's evidence, and his demeanour (even after making allowances for the fact that he was somewhat deaf) was not impressive. I reject his story that the alleged interview between the deceased and himself ever took place.

The other witness to give evidence corroborating in the true sense Rashid's story of how the document exhibit (1) came to be drafted, though not in this case his assertion that the deceased saw and approved it after it had been written out, was Abdulrahim Mohamed Jidawi, a retired Government servant of over thirty years standing who was at one time a third class magistrate and acting registrar of this court. This witness, who was a long-standing friend of the deceased and used to meet him almost daily, testified that about fifteen or sixteen days before his death the deceased asked him who were the people who wrote wills in court, whereupon the witness gave him the names of two people, of whom one was a certain Mohamed Ahmed and the other was Rashid. About eight or ten days later, the witness states, the deceased told him – "I got Rashid instead of Mohamed Ahmed, and he will do the will for me." That was all the deceased said. The witness Abdulrahim Mohamed Jidawi impressed me as a man of integrity, and he has a long and distinguished record in the Government service. I accept his evidence as true. It constitutes very strong corroboration of Rashid's story, up to the point when he drew up the draft will exhibit (1) from notes taken down upon the deceased's oral instructions at his interview with the latter. Further, through slighter, corroboration of Rashid's story up to that point is afforded by the evidence of Mohamed Ali Salum. His evidence, which I am likewise prepared to accept, corroborates the story of Rashid's meeting with the deceased, not directly as regards the matter of the will, it is true, but as regards the negotiations for the marriage of the deceased which, according to Rashid, were the occasion of that meeting – negotiations which according to both of them soon fell through. Finally, evidence showing the consistency of Rashid's story of how exhibit (1) came to be written, though not in the proper sense corroborating it, was afforded by the defendant himself, and the witnesses Seif Humoud and Sheikh Abdulla bin Suleiman, to all of whom Rashid told that story, not indeed immediately after the deceased's death, but some few days later. I will consider the evidence of Sheikh Abdulla bin Suleiman again presently, in connection with Rashid's statement that the draft will was seen and approved by the deceased. But for the moment I am concerned with the question whether it was drafted before the deceased's death upon his oral instructions, as alleged by Rashid, or whether on the other hand it was a complete fabrication drafted after the death. On this question of fact I would not, as I have said, have accepted Rashid's evidence had it been unsupported; but corroborated as it is by the evidence of Abdulrahim Mohamed Jidawi and (in a more indirect fashion) of Mohamed Ali Salum, I am prepared to accept it, and to find as a fact that exhibit (1) was drafted upon the deceased's oral instructions to Rashid to draw him up a will containing such dispositions as he specified. I make this finding of fact after

carefully considering not only the credibility of the witnesses but also all the arguments adduced concerning the probability of the deceased desiring to make a will in such terms and in such circumstances and the significance of Rashid's not having disclosed the existence of the draft will to anybody immediately after the deceased's death.

I turn now to the further and legally vital question of fact, namely whether Rashid is to be believed on the remainder of his story, in which he states that after he drew up the draft will he took it to the deceased and that the latter kept it for two or three days and then returned it to him (Rashid) saying that he confirmed it and that Rashid should prepare a will in the same terms. Of this part of Rashid's story there is no corroboration, since I have rejected the evidence of Omar Salum. As regards evidence showing the consistency of Rashid's story on this point, both the defendant and Said Humoud have stated that Rashid told them, independently, that he had handed the draft will to the deceased, who had kept it and then handed it back to Rashid saying that it was in order and asking him to prepare a fair copy for his signature. But the evidence of Sheikh Abdulla bin Suleiman, who was called by the plaintiff, throws a very different light on the matter, and I may say at once that of all the witnesses in this case there is none on whose evidence I place greater or more unhesitating reliance than on that of this old and venerated citizen of Zanzibar, who has been President of the Arab Association for more than twenty years. He knew both the deceased and Rashid well. He testifies that Rashid came to him after the deceased's death and told him about the draft will and sought his advice whether or not to show it to His Highness the Sultan, knowing that both he (Sheikh Abdulla) and the deceased were friends of His Highness. The crucial passages in Sheikh Abdulla's evidence were the following. First he said–

> "After deceased's death, Rashid and I met. He told me – 'Seif bin Suleiman during his lifetime told me he wanted to make a will, and said to me – "You make out a will in the way it is generally done; make a draft and show it to me." But I did not show him the draft, and he died . . .' "

Later in his examination in chief he repeated – "Rashid definitely said he had not shown deceased the draft before deceased died." And in cross-examination, when the point was specifically put to him, he said–

> "He did not say that deceased had died without signing the fair copy of the will; he said that deceased had not seen the draft."

This conversation between Sheikh Abdulla and Rashid was put to Rashid in the witness box. Rashid admitted that they had met and spoken about the draft will about a week after the deceased's death, but when the point was put to him he said he had told Sheikh Abdulla that the deceased had kept the draft and asked him to make a fair copy of it, and denied that he had told Sheikh Abdulla that the deceased died without having approved the draft. Sheikh Abdulla also stated in evidence that he and Rashid had met about a fortnight before the hearing of this case, when it became clear that each intended to stick to his version of what Rashid had told him at that first meeting of theirs after the deceased's death, and that he advised Rashid to "tell the truth."

In the light of Sheikh Abdulla's evidence, which I believe without hesitation, I find myself unable to accept Rashid's uncorroborated statement that he showed the draft will to the deceased and that the latter approved it. Indeed, quite apart from the question of the credibility of witnesses, it seems to me inherently unlikely that a professional writer of legal documents such as Rashid, knowing that all he had to do to complete this important piece of work for his old and wealthy client was to "fair" the draft will, which on his own admission would take at the most three-quarters of an hour, and bring it to him for execution, would have left this formality undone for at least a week (since the deceased's last illness lasted for a week) only to be reminded of it by hearing of his death. What I suspect the truth of the matter to be is that the defendant and Rashid together, on discovering that so little more than the truth about the draft will need be stated by Rashid in order to give it a chance of being admitted as a valid will under whose provisions the defendant stood to gain so much, decided that Rashid should add to his otherwise

substantially true story that one vital falsehood, namely that the deceased had seen and approved the draft will; and no doubt they conspired to procure the witness Omar Salum to give false evidence in corroboration. Be that as it may, there have been only six witnesses in this long case whose evidence

I could implicitly and unhesitatingly trust, namely Abdulrahim Mohamed Jidawi. Sheikh Abdulla bin Suleiman, the deceased's widow, the deceased's clerk, Seyyid Soud bin Ahmed, and the Ibathi Kadhi Sheikh Mohamed bin Salum; and of these only the first two named gave evidence directly relevant to the truth or untruth of Rashid's story firstly of how exhibit (1) came to be drafted and secondly of its approval by the deceased. Largely by reason of Abdulrahim's evidence I have accepted Rashid's story on the first point, while mainly on the evidence of Sheikh Abdulla bin Suleiman coupled with lack of corroboration. I have rejected the remainder of it.

Having made these findings of fact, I turn to the law. Under s. 2 of the Succession Decree (Cap. 13) a "will" is defined as

> "the legal declaration of the intentions of the testator with respect to his property, which he desires to be carried into effect after his death."

Now it is common ground that a Mohamedan will is not invalid merely because it is oral, or merely because, if written, it is not signed. And it is also common ground that what the defendant seeks to propound as the deceased's will in the present case is the draft exhibit (1) and is not, and could not in the circumstances be, the oral instructions given by the deceased to Rashid, since the deceased expressed the clear intention that his will should be no mere oral declaration but a written instrument. It is unnecessary in this connection to do more than quote the following passage from the recent judgment of my brother Law, J., in the not dissimilar case of *Administrator-General, Zanzibar v. Nassor bin Fazil bin Nassor and Others* (1), [1957] E.A. 159 which in my respectful opinion correctly sets out the law:

> "A Mohamedan will may be either written or oral (*Re Esaji Alibhai*, 1 Z.L.R. 612). In this case the court is not concerned with an oral will. When the deceased gave her instructions to Mohamed Ahmed, she was not then making an oral will but declaring her intention as to the contents of a will which was to be reduced to writing. A declaration of intention to make a written will cannot be regarded as an oral will, because it cannot be inferred that there was an intention that the oral declaration itself should operate as a testamentary disposition. (*Venkat Rao v. Namdeo*, 58 I.A. 362). These instructions were in fact reduced to written by Mohamed Ahmed, and the written document was approved by the deceased as her will when Seyyid Soud read it over to her. The fact that it was unsigned and has remained unsigned is immaterial and does not affect the validity of the will (*Aulla Bibi v. Allauddin* (1906) 28 All. 715). In *Esaji*'s case (*supra*) a draft unsigned will was not admitted to probate because although it represented the testator's wishes, he had declared his intention of obtaining his son's approval to it before signing it, but he died before his son's approval could be obtained. The court held that in those circumstances the draft was no more than a tentative will, as it was subject to approval of a son who did not approve. Had the son had an opportunity to approve but not approved, the draft might have been altered to meet his wishes. In *Aulla Bibi's* case (*supra*) the testator gave a Vakil instructions to draft his will, but died before he could sign it. The unsigned draft was admitted to probate, the court being satisfied that it represented the testator's final testamentary intentions."

Now a number of cases have been cited to me, mainly Indian decisions, in which unsigned drafts of wills of Muslims, or even unsigned letters of instruction to a lawyer, have been held to constitute valid wills. But in every case the decision has been based on the fact that the document or documents have been shown to represent the final testamentary intention of the deceased, and that he had not reserved to himself the opportunity of altering it, or of checking it with a view to perhaps altering it. In short the deceased's "animus testandi" must go with the document sought to be propounded. In the present case, if the deceased had indeed approved the draft, exhibit (1) it might well have been held, in the light of these principles, to constitute a valid will in spite of its not having been "faired" and signed, subject always to the consideration of the further question whether the deceased intended it to be "attested

before a kadhi," with which question it is, in the event, not necessary to deal. But since I have found that it has not been satisfactorily proved that the deceased ever approved the draft, or indeed ever even saw it, and since according to Rashid's own evidence the deceased desired to see it with the object of approving it if it correctly gave effect to his oral instructions, it cannot possibly be held that it necessarily represented his final testamentary intentions or that, had he lived, he might not have altered it. The legal position is stated very clearly in the judgment of Seth, J., in the Indian case of *Chunna Kunwar v. Rasili Kunwar* (2)(1949), A.I.R. All. 655, a decision which reviewed most of the earlier decisions and which concerned the validity of a Hindu will made in 1914 when the Hindu law regarding the execution of wills was the same as the Muslim law (vide para. 12 of the judgment, at p. 658). The following passage from para. 15 of the judgment is very much in point:

> "Even where a testator might have desired to execute a more formal document later, his intentions already declared whether orally (where an oral will is permissible) or in a less formal document, may be treated as his will, but only if it is proved that the testator intended the oral declaration or the writing to be enforced after his death in the absence of a more formal document, intended to be executed in future. We consider that a mere draft, which the testator never intended to be treated as his will in the absence of a more formal document, cannot be admitted to probate, merely because the court feels satisfied that if the testator had lived, he would have executed a will in the terms of the draft that he had prepared or got prepared. We are thus unable to concur in the view that every draft of a will can be treated to be a will where no formalities are required for its validity."

For these reasons I hold that the draft will, exhibit (1), does not constitute a valid will of the deceased and cannot therefore be admitted to probate. The counterclaim is therefore dismissed with costs. The plaintiff's claim will be allowed with costs and letters of administration of the deceased's estate will be granted to the plaintiff as prayed.

Order accordingly.

For the plaintiff:
TJ Inamdar QC, SJ Inamdar and *RL Patel*
RL Patel, Zanzibar

For the defendant:
KS Talati
Wiggins & Stephens, Zanzibar

Kuria Wagachira v R
[1957] 1 EA 808 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	6 November 1957
Case Number:	340/1957
Before:	Sir Kenneth O'Connor CJ and Rudd J
Sourced by:	LawAfrica

[1] Arrest – Search – Police constable's power – Suspicion of possession or conveying anything stolen or unlawfully obtained – Criminal Procedure Code, s. 25 (*K.*).

[2] Criminal law – Forgery – Alteration without authority – Document purporting to be what in fact it was not – Evidence that forgery committed within jurisdiction vital – Criminal Procedure Code, s. 343 (*K.*).

Editor's Summary

The appellant who was pushing a trade bicycle in the street was stopped by a police constable who was a member of cycle squad and on checking the number found that it had been altered. It was alleged that the appellant said that the bicycle was his and produced a cash receipt in his name in ink for a bicycle and on which was printed the name of The Cycle Mart & Exchange. It was also alleged that the appellant later said that the cycle belonged to his brother who was in detention. The police constable took the appellant to The Cycle Mart & Exchange who confirmed that the cash sale receipt had been completely altered and that it was originally made out in pencil for a "Ding-Dong" bell. On the way to the police station the appellant gave the police constable Shs. 10/- and asked him to release him. The police constable took the money and handed it to a police inspector at the police station. The appellant was accordingly charged, convicted and sentenced to a total of twenty-one months on four counts, viz. (1) conveying suspected stolen property, (2) forgery of a cash sale receipt, (3) uttering a false document, and (4) official corruption. He appealed against his conviction on all four counts and contended that the police constable had no reasonable grounds for suspecting that the bicycle was stolen or unlawfully obtained and the constable was therefore not acting under s. 25 of the Criminal Procedure Code the relevant portion of which reads as follows:

> "25 (1) Any police officer, or other person authorized in writing in that behalf by the Commissioner of Police, may stop, search and detain–
>
> . . . . . .
>
> (*c*) Any person who may be reasonably suspected of having in his possession or conveying in any manner anything stolen or unlawfully obtained."

The appellant further contended that in order that s. 25 may apply it is necessary that the police officer should not only stop, but must also search and detain the person suspected and that reasonable grounds for suspicion must exist at the time that the person is stopped. The other ground of appeal were that the appellant gave a satisfactory explanation supported by documentary evidence of his possession of the bicycle; that there was no evidence before the trial magistrate that the receipt was either made or altered without authority; that there was no evidence before the magistrate that the receipt was forged by the appellant in Kenya within the jurisdiction of the court of trial and that there was no evidence that it was forged on May 30, 1957, as charged, or that the appellant uttered it in Kenya knowing it to be false.

Held–

(i) the police constable had grounds for suspicion of a large number of the persons who used cycles and there was nothing to show that he stopped people indiscriminately;

(ii) it is not necessary for the police officer to go through every stage of stopping, searching and detaining, and s. 25 applies even if the grounds for reasonable suspicion have not appeared until after the person has stopped, or been stopped, for some other reason; *Willey v. Peace*, [1950] 2 All

E.R. 724 applied.

(iii) the appellant's explanation as to his possession of the bicycle was unsatisfactory;

(iv) there was evidence on which the magistrate could find that the document had

been altered without authority, (contrary to s. 343 (*b*) of the Penal Code) but in addition to this, it was also a false document in that the appellant made a document purporting to be what in fact it was not (contrary to s. 343 (*a*) ibid);

(v) the evidence of forgery of this document in Kenya by the appellant fell just short of the standard of proof required in a criminal prosecution. *Des Raj Sharma v. R.*, (1953), 20 E.A.C.A. 310 followed;

(vi) there was ample evidence that the appellant uttered the receipt in Kenya knowing it to be a false document.

Appeal on counts 1, 3 and 4 dismissed. Appeal on count 2 allowed and conviction and sentence on this count quashed.

Cases referred to:

(1) *Willey v. Peace*, [1950] 2 All E.R. 724.

(2) *Des Raj Sharma v. R.* (1953), 20 E.A.C.A. 310.

Judgment

Sir Kenneth O'Connor CJ: read the following judgment of the court: The appellant was convicted on August 22, 1957, by the resident magistrate in Nairobi on four counts that is to say:

Count 1. Conveying suspected stolen property (a bicycle) contrary to s. 318 Penal Code;

Count 2. Forgery of a cash sale receipt purporting to be a receipt for a bicycle contrary to s. 345 Penal Code;

Count 3. Uttering a false document (i.e. the cash sale receipt) contrary to s. 349 Penal Code; and

Count 4. Official corruption contrary to s. 3(2) of the Prevention of Corruption Ordinance, 1956, in that he corruptly gave Shs. 10/- to the police constable who had arrested him to induce the police constable to release him.

The appellant was sentenced to imprisonment for periods totalling twenty-one months. He now appeals against his convictions on all four counts.

We take the following statement of the facts from the judgment of the learned magistrate:

"P. 2, P.C. Stephen, was a member of the cycle squad of Kingsway Police Station.

"On the afternoon of May 30, 1957, he was on duty in Victoria Street, checking cycles. He saw accused pushing the cycle Ex. 3, a trade type cycle, and stopped him and checked the number. He considered that the number had been altered.

"He asked accused whose the cycle was. Accused said it was his, and produced the cash sale memo Ex. 1 in his own name.

"P. 2 saw that Ex. 1 was not in order. Accused then said the cycle belonged to his brother – who was in detention.

"Ex. 1 is printed in the name of The Cycle Mart & Exchange. P. 2 took accused to The Cycle Mart & Exchange, to P. 1. Mr. R.H. Patel.

"P. 1 has stated that Ex. 1 has been completely altered from the duplicate Ex. 2. P. 3. Mr. K. H. Patel states that he wrote out Ex. 1 and Ex. 2 in pencil. It was the memorandum of a sale of a "Ding-Dong" bell for Shs. 2/50 on June 4, 1956.

“The original pencil writing of P. 3 is visible on Ex. 1 under the ink writing.

“Ex. 1. is now made out in ink purporting to be a sale of a cycle to the accused on June 4, 1952.

“P. 2 then took accused to Kingsway Police Station. On the way, in Stewart Street, opposite to the Jeevanjee gardens, accused gave P. 2 Shs. 10/- and asked P. 2 to release him, otherwise accused would get into trouble.

“P. 2 took the money on to the police station and handed over the Shs. 10/- to P. 4 Inspector Dean.

“Inspector Dean is in charge of the cycle section at Kingsway Police Station. He also considered that the number on Ex. 3 had been altered.

> "The number was irregular and he concluded it had been altered from having seen hundreds of cycles with altered numbers. The Ex. 3 was sent to C.I.D. H.Q. for examination by Inspector McHenry. This inspector has left the country and his evidence is not available. In fairness to the accused, the prosecutor read out the report. This report was to the effect that no other number appeared as a result of the acid etching test. No alteration of any nature was discernible.
>
> "There is now no number at all on the cycle Ex. 3. Presumably the test applied removed the number. Defence.
>
> "Accused states that the cycle was left by his brother when he was detained. He took the cycle, and the receipt, from his brother's house. The cycle remained in his possession until 1956, when he could legally use a cycle.
>
> "He had two receipts for licences for his brother for 1953 and 1954.
>
> "His brother knew that he could use the cycle. He denies that he bribed P. 2."

Mr. Swaraj Singh for the appellant takes as his first point that prosecution witness No. 2, P. C. Stephen, was not acting under s. 25 of the Criminal Procedure Code when he stopped the appellant because here was, at that stage, no reasonable ground for suspecting that the bicycle which the appellant was pushing was stolen or unlawfully obtained: if s. 25 of the Criminal Procedure Code did not apply, there could be no conviction under s. 318 Penal Code.

This argument was put to the learned resident magistrate in the court below. He did not agree, as a finding of fact, that P.C. Stephen had no reasonable grounds for suspecting that the bicycle was stolen or unlawfully obtained. The learned magistrate found as a fact that P.C. Stephen had such grounds. There was evidence on which the learned magistrate could reasonably so find. Mr. Swaraj Singh attacks the magistrate's finding of fact on this matter because, he says, the learned magistrate attributed to the police constable a piece of knowledge which was in the mind of the inspector in charge of the cycle section at Kingsway that five thousand cycles were stolen in Nairobi in 1956. Even if P.C. Stephen did not know the number of cycles stolen in 1956, he did know that there was a special "cycle squad" of which he was a member and he had himself in seven months found about ten cycles with altered numbers. He must have known that cycle thefts were prevalent in Nairobi.

We agree with the learned magistrate that P.C. Stephen had grounds for suspicion of a large number of the persons who used cycles and that there is nothing to show that he stopped people indiscriminately. The cycle which the appellant was conveying was a trade cycle. We think that there was evidence on which the learned magistrate could reasonably find that P.C. Stephen had grounds for reasonably suspecting that the appellant had in his possession a bicycle stolen or unlawfully obtained when he stopped him.

In view of this it is unnecessary for us to consider Mr. Swaraj Singh's contention that in order that s. 25 may apply it is necessary that the police officer should not only stop, or not only search or not only detain a person suspected of having in his possession or conveying property stolen or unlawfully obtained; but that he must do all three, and that reasonable grounds for suspicion must exist at the time that the person is stopped: it will not satisfy s. 25 if, for instance, the person has himself come to a stop and the police officer then notices that he is conveying what the officer reasonably suspects to be stolen property. We have examined the authorities quoted by Mr. Swaraj Singh in support of this proposition and we think that they fall far short of establishing it. For instance in *Willey v. Peace* (1), [1950] 2 All E.R. 724 it was held that the police had acted in accordance with s. 66 of the Metropolitan Police Act, 1839 (which corresponds to s. 25 (*c*) Criminal Procedure Code) notwithstanding that the detective constable had not stopped Willey when he reasonably suspected him of conveying stolen property and

ordered his search and detention. Willey was then in the police station to which he had gone voluntarily with another police officer. We are by no means convinced that it is necessary for the police officer to go through every stage of stopping, searching and detaining, or that it is not possible

to operate s. 25 if the grounds for reasonable suspicion have not appeared until after the person has stopped, or been stopped, for some other reason.

We think that ground 1 (*a*) of the Petition of Appeal fails.

Ground 1 (*b*) alleges that the appellant gave a satisfactory explanation supported by documentary evidence of his possession. As to this we need only say that we are in entire agreement with the learned magistrate in finding the appellant's explanation (supported by a bogus receipt) unsatisfactory.

Ground 2 (*a*) of the grounds of appeal alleges that there was no evidence before the learned magistrate that the receipt was either made or altered without authority, as required by s. 343 of the Penal Code.

This ground assumes that it was necessary for the prosecution to bring their case under s. 343 (*b*). We are far from saying that there was not evidence on which the magistrate could find that the document had been altered without authority within s. 343 (*b*). But, in our view, there was evidence which brought the case also within s. 343 (*a*). We think that the appellant's contention on this point also fails.

Ground 2 (*b*) is to the effect that there was no evidence before the learned magistrate that Ex. 1 was forged by the appellant in Kenya within the jurisdiction of the trial court and there was no evidence that it was forged on May 30 as charged. Mr. Swaraj Singh argued that there should be unequivocal evidence that the appellant forged the document and that he forged it in Kenya. He relied on *Des Raj Sharma v. R.* (2) (1953), 20 E.A.C.A. 310. The effect of that case is that proof of the commission of the offence within the jurisdiction of the court is essential to the prosecution case and, if not capable of exact proof, evidence should be laid from which the necessary inference can be drawn. In our view, the evidence in this case of forgery of this document in Kenya by the appellant fell just short of the standard of proof required in a criminal prosecution.

As to grounds 2 (*c*) and (*d*), the magistrate dealt with these adequately and we agree with him.

As to ground 3, we think that the learned magistrate was right in finding the document was a false document and there was ample evidence that the appellant uttered it in Kenya knowing it to be a false document.

Ground 4 was abandoned at the trial.

There was evidence to support the learned magistrate's finding on the official corruption count.

The appeal against conviction and sentence on counts 1, 3 and 4 is dismissed. The appeal on count 2 is allowed and the conviction and sentence on that count only are quashed.

Appeal on counts 1, 3 *and* 4 *dismissed. Appeal on count* 2 *allowed and conviction and sentence on this count quashed.*

For the appellant:
Swaraj Singh
Swaraj Singh, Nairobi

For the respondent:
GP Nazareth (Crown Counsel, Kenya)
The Attorney-General, Kenya

Charles Alfred Sutton v R
[1957] 1 EA 812 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgement:	3 June 1957
Case Number:	109/1957
Before:	Rudd Ag CJ and Forbes J
Sourced by:	LawAfrica

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[1] Street traffic – Driving while under the influence of drink – Conflict of medical evidence – Accused suffering from ear trouble – Traffic Ordinance (*No.* 39 *of* 1953), *s.* 43 (1) (*K.*)

[2] Evidence – Conflict of evidence – Duty of court critically to examine evidence.

Editor's Summary

The appellant was convicted under s. 43 (1) of the Traffic Ordinance of driving a motor vehicle whilst under the influence of drink to such an extent as to be incapable of having proper control of the vehicle at 6.05 p.m. on October 26, 1956. He appealed against conviction and at the hearing of the appeal the arguments largely centred upon the evidence given by medical experts, and on the question of correct inferences to be drawn from conflicting evidence. The facts of the case appear in full in the judgment.

Held–

(i) it is the duty of a court critically to examine all the evidence before it, whether it is evidence given by an expert or any other witness.

(ii) the magistrate misdirected himself in that he attached too much weight to the bald statement of the pathologist that the blood content of alcohol would have been .16 per cent. at 6.15 p.m. on the evening in question, and in presuming, without any evidence, that the appellant's resistance to the effects of drink was low.

(iii) where another factor has been established which is capable of causing the degree of incapacity then the alcoholic content of the blood may not be a determining factor.

(iv) where evidence of a blood test is adduced the evidence should show that the sample of blood taken for test was in proper custody and untampered with between the time it was taken and the time of testing.

(v) the court was not satisfied that if the evidence had been subjected to more critical examination and if there had been no misdirection, the appellant would necessarily have been convicted.

Per curiam – ". . . there may be cases in which a person is under the influence of drink to some degree and yet is not incapable of exercising proper control. Such a person cannot be convicted under s. 43, but if he can be proved to have driven recklessly or dangerously or carelessly he should be charged under s.

45 or s. 47 of the Traffic Ordinance and, on conviction, substantial punishment would be justified because persons in that condition may actually constitute a greater danger to the public than a person who can be classified as being actually drunk.

Appeal allowed.

Cases referred to in judgment:

(1) *R. v. Hawkes*, 22 Cr. App. R. 172.

Judgment

Rudd Ag CJ: read the following judgment of the court: The appellant appeals from a conviction under s. 43, sub-s. (1) of the Traffic Ordinance of driving a motor vehicle whilst under the influence of drink to such an extent as to be incapable of having proper control of the vehicle at 6.05 p.m. on October 26, 1956.

At the time stated in the charge, an inspector of police observed the appellant and his wife and another man holding on to each other and walking very unsteadily to a motor car which was parked in Stewart Street, Nairobi. He formed the opinion that

all three were drunk. He saw them get into the car which the appellant drove away towards Government Road. The police officer said that the car was driven away

> "rather fast for the traffic on the road and rather erratically, not straight, sort of zig-zag"

moving slightly from side to side, and that in leaving the place where it was parked the car was reversed out into the carriage-way at an unduly high speed and caused another vehicle to brake suddenly to avoid a collision. The inspector next saw the car flush parked near Torrs Hotel and the appellant's wife leaving the hotel and getting into the car which was then driven off by the appellant. In leaving the position in which it was flush parked the car reversed into a stationary taxi but there was no evidence that this collision was a forceful one or that damage was caused to the car or to the taxi, and both vehicles drove away. The car driven by the appellant proceeded into and along Government Road and into Swamp Road where it was stopped by the inspector and the appellant was arrested. The inspector considered that it had been driven too fast and that it was weaving in and out of traffic in an improper manner in Swamp Road and Government Road. The inspector further stated that at the time of his arrest the appellant's speech was slurred and that, in fact, he was hardly able to speak; but this evidence does not seem to be very consistent with the evidence of the police pathologist who recorded that the appellant's speech was normal at 7.15 p.m. on the same evening.

The appellant denied that he was incapable of having proper control of a motor car. He admitted that he had had a large bottle of lager beer with his lunch at 1.30 p.m. and that he had consumed three similar bottles of beer later in the afternoon; but he said that he had a history of ear trouble which had resulted in sporadic attacks for some years previously and that when such an attack occurred he became dizzy when he got up after sitting down for some time, particularly if he had been sitting in a confined space and then went out into the open. On such occasions his wife frequently had to support him. He claimed that he was suffering from such an attack on the afternoon in question and that his wife had to assist him to walk to the car because of the severity of the attack of ear trouble.

His wife said that she had joined the appellant and his friend late in the afternoon for tea and that she had not taken any alcohol on that afternoon. She confirmed that the appellant was liable to sporadic attacks of ear trouble and that on such occasions she used to support him when he was walking. She said that the appellant had complained to her that his ear was troubling him that afternoon when she met him for tea.

The appellant was clinically examined by the police pathologist at 7.15 p.m. on the evening in question and a sample of his blood was taken for submission to the Government Analyst's Department for test as to the alcohol content. The police pathologist recorded the result of his clinical examination in a report which was put in evidence as exhibit 1. It records that the appellant's general demeanour, character of speech, state of clothing, conjunctiva and character of breathing were all normal. His pupils were dilated, his pulse was 120 and there was a slight smell of alcohol from his breath. Under "General Co-ordination" the report stated:

(1) Walks along a straight line, no stagger.

(2) Finger-nose test slightly impaired.

(3) Tremor of hands noticed.

Under the heading "Further notes by medical officer" the pathologist recorded

> "presence of a degree of inco-ordination noted. May be due to alcohol or may be due to disturbance of sense of balance caused by ear disease. Have recommended examination by Government medical officer to

establish this point."

Ultimately the police pathologist certified in his report that the appellant was under the influence of drink or a drug to such an extent as to be incapable of having proper control of a vehicle.

On the recommendation of the pathologist the appellant went to Doctor Forrester,

a Government medical officer, who first saw the appellant at 8.30 p.m. on October 26, when the appellant complained of dizziness and noises in his left ear. Doctor Forrester noted that the appellant was then slightly unsteady on his feet but that he appeared to be otherwise in full possession of his faculties. On the following morning the appellant reported again to Doctor Forrester who found that he was still dizzy and that his left ear was full of wax and debris which, on removal, disclosed a large perforation of the ear drum. After consultation with a specialist the appellant subsequently had an operation for mastoidectomy, and the appellant said that since the operation his giddiness had not returned.

There was evidence that the sample of blood taken from the appellant on October 26 was received by a technologist at the Government laboratory on October 26 and that a test showed .1495 per cent. alcohol with a margin for error of .01 per cent. either way. There was no evidence as to the person who had had custody and control of the sample between October 26 and October 30, nor of the means used to transmit it from the pathologist to the technician at the laboratory.

In Doctor Forrester's opinion the dilation of the pupil of the eye, the pulse rate of 120 and the tremor of the hands, observed in the appellant by the pathologist on October 26, could be caused by nervous tension as a result of his arrest and examination at the instance of the police. We are of opinion that even if these symptoms could be attributed as being due, in some degree, to drink they are insufficient, of themselves, to establish incapacity of proper control of a vehicle. Doctor Forrester further testified that dizziness and inco-ordination in the finger-nose test could, without doubt, result from the ear trouble, and having considered the report of the pathologist he was of opinion that it did not justify a finding that the appellant's efficiency was impaired by drink or drugs and he said that if he had known that the blood content was .15 per cent. it would not cause him to alter that opinion.

The police pathologist stated in evidence that in his opinion .15 per cent. of alcohol in the blood was a high level and he adhered to his view that the appellant was under the influence of drink to such an extent as to be incapable of having proper control of the car at the time of his examination. He further stated that one hour previous to that examination the percentage of alcohol in the blood would have been .16 per cent. but he gave no indication of the basis for that opinion. Such a bald conclusion should not be given in evidence without stating the reasons which give rise to it. It is the duty of a court critically to examine all the evidence before it, whether it is evidence given by an expert witness or by another witness. We think it clear that the fact that a person's blood alcohol was at .15 per cent. at a particular time cannot, of itself alone, indicate what was the blood alcohol percentage one hour earlier, for that would depend upon whether the tide of alcohol in the blood was rising or stationary or falling at the time of the examination, and it would depend on the amount of alcohol consumed, the time and rate of consumption and the rate of absorption which might be affected by many factors such as the amount and nature of food in the stomach. None of these matters are apparent from the pathologist's report or the rest of his evidence. While it would probably have been possible to say that a certain amount of absorbed alcohol would have been combusted during the previous hour, nevertheless, it does not necessarily follow from that that the percentage of alcohol in the blood would have been higher previously for that would depend upon the state of the balance between absorption and combustion; but the magistrate accepted this statement by the pathologist without subjecting it to critical examination and he referred to it at least four times in his judgment as a matter of undoubted fact and obviously he attached considerable weight to it against the appellant. In our opinion he was not justified in doing that.

The police pathologist agreed that disease of the ear could cause inco-ordination and erratic driving of a motor car irrespective of the question of drink. The only feature noted in his report made at the time of

his examination of the appellant which definitely tended to show incapacity for control was the presence of a degree of in coordination, but he noted at the time that this might be due to ear trouble. He did not himself examine the condition of the appellant's ear and so he is not in a position to

say that the degree of inco-ordination noted could not have been due to ear disease instead of the effect of drink. On the other hand, Doctor Forrester, who did examine the appellant's ear, was of the opinion that it could undoubtedly account for the inco-ordination that was observed by the pathologist and recorded in the report, Exhibit 1.

We have noted that the only instance of inco-ordination recorded in that report was in respect of the finger-nose test and that it was recorded as a slight impairment.

We should refer to one other item of evidence given by the pathologist to the effect that even if the lack of inco-ordination could be attributed partly to the effect of ear disease it would have been aggravated by the effect of drink, and although Doctor Forrester was not prepared to agree that that would necessarily be so we think that the magistrate might have been entitled to convict on that ground if there had been no misdirection in the judgment. But in our opinion there were misdirections. We think that the magistrate attached too much weight to the bare statement of the pathologist that the blood alcohol content would have been .16 per cent. at 6.15 p.m. on the evening in question and we think that the magistrate was not justified in saying, as he did, that it was reasonable to assume that the appellant had low resistance to the effects of drink because the appellant told the court that he did not drink every day. In point of fact the appellant said that although he did not drink every day he was accustomed to alcohol and had worked in a brewery. In our opinion there was no evidence to justify any presumption as to the extent of the appellant's tolerance to the effect of alcohol.

Although in all cases of this nature evidence of the alcohol content of the blood is highly important, and we hope that whenever possible evidence will be adduced as to it as a matter of course, we think that it is possible to attach too much weight to it. It is well known that individuals vary as regards their tolerance of alcohol and consequently the determining test as to whether a person was capable or incapable of exercising proper control must always depend upon clinical examination rather than upon the blood alcohol count. The value of the test is that where incapacity has been established it can show either that it is not due to alcohol or that there is a high degree of probability that it is due to drink and not to other latent causes. Thus where incapacity is established and the blood alcohol content is established at a percentage which is capable of inducing incapacity and there is no evidence of any other factor capable of causing incapacity it can safely be assumed that the incapacity was due to alcohol; but where there has been established the existence of another factor which is capable of causing the degree of incapacity that was noticed then the alcohol content to the blood may not be a determining factor.

We would refer to Medical Jurisprudence by Gordon Turner and Price (3rd Edn.) at p. 792 where the learned author says:

> "Although the majority of persons with blood alcohol levels in excess of 0.15 per cent. can be considered unfit to drive motor cars, there would appear to be a few persons with such high tolerance that they may appear relatively sober when their blood alcohol concentration reaches 0.2 per cent. Newman and Fletcher state that if the level of 0.15 per cent. is accepted as definite evidence of being under the influence of alcohol, then there is a serious danger that some persons may be punished for "drinking" and not for "drunken driving". . . South African law requires that before a person can be convicted of a crime it must be proved beyond any reasonable doubt that he is guilty of the crime. Blood tests by themselves, unless extreme values are taken, only prove probabilities and a person cannot be convicted by such tests alone. Blood alcohol estimations may however, afford very valuable additional evidence in the diagnosis of acute alcoholic intoxication, especially in cases where there is some doubt clinically."

Where evidence of such a blood test is adduced the evidence should show that the sample of blood taken

for test was in proper custody and untampered with between the time it was taken and the time of testing.

Before leaving the case we would advert to the fact that a person is not necessarily guilty of an offence under s. 43 of the Traffic Ordinance merely by reason of the fact that he was under the influence of drink when driving a motor car. He must be under the influence of drink to such an extent as to be incapable of exercising proper control of the car, *R. v. Hawkes* (1), 22 Cr. App. R. 172. We are not to be taken to suggest that a person cannot be convicted unless he is proved to be actually drunk, but there may be cases in which a person is under the influence of drink to some degree and yet is not incapable of exercising proper control. Such a person cannot be convicted under s. 43, but if he can be proved to have driven recklessly or dangerously or carelessly he should be charged under s. 45 or s. 47 of the Traffic Ordinance and, on conviction, substantial punishment would be justified because persons in that condition may actually constitute a greater danger to the public than a person who can be classified as being actually drunk.

We desire to point out that there is nothing to prevent a charge of reckless driving or of careless driving being preferred with a charge under s. 43 provided that the provisions of s. 48 of the Traffic Ordinance have been complied with.

In the instant appeal, we are not satisfied that if the evidence had been subjected to more critical examination and if there had been no misdirection, the appellant would necessarily have been convicted, and we allow the appeal.

Appeal allowed.

For the appellant:
KB Keith
Kaplan & Stratton, Nairobi

For the respondent:
C Brookes (Crown Counsel, Kenya)
The Attorney-General, Kenya

Taws Limited v The Commissioner of Customs and Excise
[1957] 1 EA 816 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgement:	6 November 1957
Case Number:	83/1956
Before:	Sir Newnham Worley P, Sir Ronald Sinclair V-P and Briggs JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Forbes, J

[1] Customs – Importation of machines – Parts manufactured in U.S.A. and assembled in Holland – Which is country of origin – Whether machines constitute prohibited imports – East African Customs Management Act, s. 161 *and s.* 167 (*b*).

Editor's Summary

The Customs at Mombasa had seized fifteen calculating machines which had been imported into Kenya by the appellants, on the ground that they were of United States origin. The appellants sued in the magistrate's court for the recovery of the goods under s. 161 of the East African Customs Management Act alleging that they were of Dutch origin. It was common ground that all the parts comprising the machines were manufactured by a single company in the United States and that the parts were assembled in Holland. The magistrate found that the place of origin of the machines was the United States and dismissed the suit with costs. In arriving at his conclusion the magistrate based himself largely on the fact that the machines bore a maker's plate reading "Made in U.S.A." There was no other evidence of origin before the court. The appellants appealed to the Supreme Court and made application to admit further evidence which was intended only to prove that the plates showing that the machines were made in the United States had been affixed in error and were normally to be used on machines assembled in the United States. The Supreme Court, too, dismissed the appeal whereupon the appellants preferred this appeal. The Court of Appeal affirming the decision of the Supreme Court.

Held–

(i) if the machine is identifiable as a unit, although it is in parts when it is imported in the country of assembly, it originated in the country which produced the parts;

(ii) under s. 167 (*b*) of the East African Customs Management Act, 1952, the onus of proving the place of origin of any goods seized under the Act is on the person claiming the goods, and the appellant had failed to discharge the onus.

Appeal dismissed.

Cases referred to in judgment:

(1) *Aristoc Ltd. v. Rysta Ltd.*, [1945] 1 All E.R. 34; [1945] A.C. 68.

Judgment

Briggs JA: read the following judgment of the court: This was an appeal from an appellate judgment and decree of the Supreme Court of Kenya. We dismissed the appeal with costs, and now give our reasons.

The appellants are importers and in October, 1955, imported into Kenya fifteen calculating machines. These were seized by the Customs at Mombasa as being prohibited imports on the ground that they were of United States origin. The appellants sued in the magistrate's court for the recovery of the goods under s. 161 of the East African Customs Management Act, alleging that they were Dutch origin. The suit was dismissed with costs. The learned magistrate found that the place of origin of the goods was the United States, and based him largely on the fact that they bore a maker's plate reading "Made in U.S.A." It was common ground that all the parts comprising the machines were manufactured by a single company in the United States and that the parts were assembled in Holland. Before the court of trial there was no other evidence of origin.

On first appeal an application to admit further evidence was made and allowed. That further evidence was intended only to prove that the plates showing the goods to have been made in the United States had been affixed in error, and was normally to be used only on machines assembled in the United States. The learned judge was inclined to accept this and considered that in view of the admitted facts the plates had little significance. His grounds of judgment were in essence as follows:

> "There is no definition in the relevant legislation of the term "origin" in relation to goods, nor was any authority on the subject cited to me. It appears to me that the question whether or not a machine "originates" in the country in which it is assembled is largely a question of degree. If the machine is identifiable as a unit, although it is in parts, when it is imported into the country of assembly, I should certainly be of the opinion that it originated in the country which produced the parts. If, on the other hand, the parts on importation into the country of assembly could not be identified to comprise a particular machine, or machines, I should be inclined to the view that the country of assembly was the country of origin."
>
> . . . . . .
>
> "On the view I have taken of the matter, the agreed facts before the court are equivocal. They are as consistent with the machines being imported into Holland as identifiable units, as otherwise. Under s. 167 (*b*) of the East African Customs Management Act, 1952, the onus of proving the place origin of any goods seized under the Act is on the person claiming the goods. In my opinion the facts put before the court by the

> appellant do not establish the country of origin of the goods, and the appellant has therefore failed to discharge the onus laid upon him by the Act."

The question of a possible retrial was discussed. This may well have been because of the insufficient and unsatisfactory state of the evidence offered by the appellants. However, counsel for the appellants said categorically that he did not want a retrial.

There were certain indications in the evidence adduced in the Supreme Court which suggested that the appellants might have been unable to improve their position if further details of the facts had been given. The export office manager of the United States manufacturers speaks in a letter to the appellants of "the machines in question" having been "shipped as parts to Holland for assembly there." Another officer of the manufacturers writes that "the principal work on the calculator is done . . . in Holland." The first appeal was dismissed with costs.

Mr. Salter for the appellants attempted before us the difficult task of contending that in the case of any imported goods the place of origin could only be in law the place where the last item of work necessary to complete the articles in their final character was done. He appreciated that, if he was to show that the test applied by the learned judge was wrong, he must in logic argue that, if a machine, for example a typewriter, comprising hundreds of parts still required to have the last one fixed in position, it had not yet acquired its character as a typewriter, and the place where the last part was affixed would be the place of origin. He attempted to support this argument by referring to a special provision of the law regarding imported motor vehicles. A special licence is required if they are "of North American origin assembled and/or part manufactured outside North America." But the existence of this special provision as regards one type of goods did not appear to us to be a good reason for applying any unusual or special meaning to the words "originating in" a particular country. We thought the simplest test of origin would ordinarily be to pose the question,

> "Where did these goods first acquire the character of a calculator, or typewriter, or as the case may be?"

It is not suggested for a moment that the question would always be easy to answer. It emphasises what the learned judge said below, that these are largely questions of degree: in other words each case must depend on its own facts. The subsequent sentences which we have quoted from the learned judge's judgment are merely, as it seems to us, a special application of the general principle. If the parts intended to form one calculator are shipped as an identifiable whole, it seems to us that the whole has already acquired the character of a calculator, though an unassembled and so an incomplete one. We think there is nothing in what we have said which in any way conflicts with the dicta of Lord Wright in *Aristoc Ltd. v. Rysta Ltd*. (1), [1945] A.C. 68 at p. 101, and it should in any event be remembered that the issue in that case was "origin" in the sense of identity of the manufacturer, not place of manufacture.

We were accordingly of opinion that the decision of the Supreme Court was entirely correct. Since it was possible that the goods seized might have been proved to have originated in Holland if certain further evidence had been adduced, we enquired whether the Crown would be prepared to consent to a retrial on terms. That consent was not forthcoming and we considered that without it would probably be beyond our jurisdiction, and would in any event be improper in the circumstances, to make such an order.

Appeal dismissed.

For the appellant:
CW Salter QC and *AW Tagart*
Shapley, Barret, Allin & Co, Nairobi

For the respondent:
JC Hooton (Deputy Legal Secretary, East Africa High Commission)
The Legal Secretary, East Africa High Commission

E L Doutre v Sanitary Stores Ltd
[1957] 1 EA 819 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	27 September 1957
Case Number:	57/1957
Before:	Sir Newnham Worley P, Briggs Ag V-P and Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Uganda – Sheridan, J

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[1] Building contract – Architect – Employed to draw plans and supervise construction – Extent of authority to bind principal.

Editor's Summary

The appellant employed N., a contractor, to build a house for him, and N. in turn employed the respondent as a sub-contractor to carry out the plumbing work. The appellant also engaged Dr. E. May and Partners, architects, for the purpose of making the plans and supervising the construction of the house. Before completion of the house, N. abandoned the contract and another contractor was employed to finish the job. At the time N. abandoned the work, the respondent had completed ninety-five per cent. of the work. Following some negotiations between the respondent, the appellant and one Boosted, a partner in the firm Dr. E. May and Partners, the respondent completed the plumbing work. The point at issue was whether Boosted acting on behalf of the appellant, purported to enter into an agreement with the respondent for payment by the appellant of the whole of the cost of the plumbing in consideration of the respondent's completing the work, and, if so, whether in so doing Boosted was acting within the actual or ostensible scope of his authority. At the trial Boosted had said in evidence

> "I confirmed with Mr. Ram (managing director of respondent company) that in my opinion the defendant would pay for the works."

The appellant, who had already made considerable interim payments to N., denied that he had agreed to pay the respondent more than the cost of completing the plumbing work.

Held–

(i) the ordinary and natural meaning of the words used by Boosted was no more than an expression of opinion and did not constitute an agreement purporting to bind the appellant;

(ii) in the absence of any finding that special authority for the purpose had been conferred, or of evidence that Booster's ostensible authority as architect had been greatly enlarged, it could not be said that he had authority to bind his principal to pay for works which were the responsibility of the original head contractor.

Appeal allowed.

No cases referred to in judgment

Judgment

Forbes JA: read the following judgment of the court: This appeal from a decree of the High Court of Uganda came on for hearing on September 18, 1957. After hearing argument on both sides, we allowed the appeal with costs in this court and the court below, subject to a set off against costs of Shs. 500/- which it was conceded was payable in any event by the appellant to the respondent. We now give our reasons for allowing the appeal.

The appellant is a building-owner who employed a contractor by the name of Narshibhai to build a house for him on plot 20, Prince Charles Drive, Kampala. The appellant's architects for the purpose of making the plans and supervising the construction of the house were Dr. E. May and Partners. The respondent was a subcontractor who was employed by Narshibhai to carry out the plumbing in the appellant's house at a contract price of Shs. 9,500/-. It is common ground that as to this subcontract there was no privity of contract between the appellant and the respondent,

the respondent being only entitled to look to Narshibhai for payment for work under the sub-contract.

When the construction of the house was nearing completion, Narshibhai abandoned the contract, apparently owing to financial difficulties, and another contractor had to be procured to finish the job.

At the time when Narshibhai abandoned the contract, the respondent's work under the sub-contract was about ninety-five per cent. complete. Following some negotiations between the respondent, the appellant and Mr. B. W. Boosted, a partner in the firm of Dr. E. May and Partners, the Architect, the respondent remained on site and completed the plumbing work. It is not disputed that the whole of the plumbing work was properly done; and it was conceded by the appellant that he was liable to pay for plumbing done after Narshibhai had abandoned the contract. The sum payable in respect of this work was agreed at Shs. 500/- and this is the sum which, for convenience, we have allowed by way of a set-off against costs.

The respondent, who was the original plaintiff, claimed that when Narshibhai abandoned the contract, a new agreement was entered into between the appellant and themselves whereby the appellant undertook to pay for the whole of the plumbing work carried out by the respondent and that the consideration for this undertaking was the respondent's agreement to complete the work. The appellant, who had already made considerable interim payments to Narshibhai in respect of the contract, denied that he had agreed to pay more than the cost of completing the plumbing work.

Mr. Gurdas Ram, managing director of the respondent company, gave evidence that the appellant had personally given him an undertaking to pay for the whole of the plumbing. This evidence, however, does not appear to have been accepted by the learned trial judge, who based his decision upon certain negotiations between Mr. Boosted and Mr. Gurdas Ram. The learned judge accepted Mr. Booster's evidence regarding these negotiations; and the points at issue on this appeal were whether that evidence established that Mr. Boosted, acting on behalf of the appellant, purported to enter into an agreement with the respondent for payment by the appellant of the whole of the cost of the plumbing in consideration of the respondent's completing the work, and, if so, whether in so doing Mr. Boosted was acting within the actual or ostensible scope of his authority.

The learned trial judge found that Mr. Boosted did purport to bind his principal, the appellant, to pay to the respondent the whole of the cost of the plumbing work, and he continued:

> "On the legal issue I find that Mr. Boosted was acting within the apparent scope of his authority, if he had not an actual authorisation which I am inclined to believe he had, when he bound his principal the defendant to an agreement that he would pay the plaintiffs for all work done if they would complete the remaining work."

With respect, we are unable to agree with either finding.

As regards the question whether Mr. Boosted purported to bind the appellant to pay for the whole work the material evidence given by Mr. Boosted was as follows:

> "Mr. Ram rang me up and asked me what the state of affairs with his work was now that the contract with Narshibhai had been terminated. I ventured the opinion that I thought the money would be forthcoming from the owner. I telephoned the defendant and he replied that he was ready to pay for the sanitary work. I got the impression that he would pay plaintiffs for the work which they had done. I confirmed with Mr. Ram that in my opinion the defendant would pay for the works."

It was on this passage and in particular on the last sentence that the learned judge based his finding that Mr. Boosted bound his principal, the appellant, to pay for the whole of the work, though holding that Mr.

Booster’s impression may well have been mistaken and based on a misunderstanding. In our opinion, however, the learned judge has read into this passage a meaning which it is not capable of bearing. We are

unable to see how the words "I confirmed that *in my opinion* the defendant would pay for the works" can be construed as an undertaking given by Mr. Boosted on behalf of the appellant to pay for the works. On the ordinary and natural meaning of the words this amounts to no more than an expression of opinion on the part of the architect, and we are quite unable to construe it as constituting an agreement purporting to bind the appellant. We are satisfied that the expression used by Mr. Boosted accurately described what took place and was no more understatement intended to convey a firm undertaking, and we are fortified in this view by the letter which he wrote to the appellant on April 3, 1956, in which he says

> "I must point out that you are not obliged to make any payment to Sanitary Stores and, in the event of your making a payment it is ex-gratia and without prejudice in any way."

We are not shaken in this belief by the letter written some months later on July 17, 1956, by Mr. Boosted to Sanitary Stores in which he purported to confirm that their account would be paid direct by the building owner. Nor are we impressed by the explanation of the letter of April 3 given by Mr. Boosted; and in this connection we think that the learned trial judge misdirected himself in holding that Mr. Boosted was an "independent witness without any axe to grind" since it could happen that Mr. Boosted might be held liable to Sanitary Stores in an action for breach of warranty of authority.

Even if we could have agreed that Mr. Boosted purported to bind the appellant to pay for the plumbing work, we would have been unable to agree that in so doing he was acting within the apparent scope of his authority. The learned judge, be it noted, does not find that Mr. Boosted had express authority to make such an agreement. It is not very clear what the basis was for the finding that "Mr. Boosted was acting within the apparent scope of his authority," but as there does not seem to have been any evidence that the appellant by his conduct or otherwise held out Mr. Boosted as having such authority, we presume that the learned judge regarded the matter as falling within the general scope of an architect's authority. It is clear, however, that in the absence of special authorisation or extension of an architect's authority, his general authority in relation to a building contract is limited. The general standing and authority of an architect are stated in the following extracts from 3 Halsburys Laws (3rd Edn.) at pp. 526 and 527:

> "The objects for which an architect or engineer is employed comprise the preparation of drawings and plans for the buildings or works in contemplation, and also superintendence of their construction, and he generally is the agent of the building owner or employer in both these respects, but this depends on the terms of the contract . . . The authority of the architect as agent does not empower him without the knowledge or consent of his employer to make promises that conditions contained in it will be varied or waived . . . Where an architect is merely instructed to prepare plans, his employment is not that of an agent, and he therefore has no implied authority to obtain tenders . . . An authority to obtain tenders does not imply authority to enter into a contract with a builder or contractor . . ."

And in Hudson on Building Contracts (7th Edn.) at p. 477 in relation to the authority of an architect to employ sub-contractors:

> "Where the architect desires to employ specialists direct, he should obtain express authority from the building owner. Otherwise the building owner might defend any claim brought by the specialist on the ground that the architect had no authority in matters outside the contract, . . ."

It is true that the passages cited refer to the authority of the architect under the original contract, and that in this case there had been a failure of the contractor and it was necessary to obtain another contractor or contractors to get the work completed. We do not see, however, that this could in itself result in any extension of an architect's authority. It might conceivably, depending on the circumstances, be held that

an

architect in such a case had implied authority to engage a contractor to complete the work, or part of the work; though even this appears doubtful without a finding that the building owner had in some way held out the architect as having such authority. But in our opinion the authority of an architect cannot extend to commit the building owner to pay large sums of money for which he would not otherwise be liable without either express authorisation or clear evidence of ostensible authority to that end. The mere general authority of an architect is, in our view, clearly insufficient to enable an architect to bind his principal in the manner alleged in this case. In the absence of any finding that special authority for the purpose had been conferred, or of evidence that Mr. Booster's ostensible authority as architect had been greatly enlarged, we cannot accept that he had authority to bind his principal to pay for works which were the responsibility of the original head contractor.

There was no such finding or evidence, and we accordingly allowed the appeal.

Appeal allowed.

For the appellant:
PJ Wilkinson
PJ Wilkinson, Kampala

For the respondent:
ML Patel
Manubhai Patel & Sons, Kampala

R v Ajit Singh s/o Vir Singh
[1957] 1 EA 822 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	29 April 1957
Case Number:	179/1956
Before:	Rudd Ag CJ, Connell and Pelly Murphy JJ
Sourced by:	LawAfrica

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[1] Criminal law – Practice – Revisional jurisdiction of Supreme Court – Whether aggrieved party can call for revision when right of appeal not exercised – Criminal Procedure Code, s. 361 *and s.* 363 (*K.*).

Editor's Summary

The accused was tried for theft of timber contra s. 270 of the Penal Code and at the end of the prosecution's case the magistrate held that there was no case to answer. The accused was acquitted and he was awarded Shs. 500/- as compensation as the magistrate regarded "it frivolous in the extreme for

him to have been re-charged." About a month earlier the accused had been charged with an exactly similar charge but it was withdrawn under s. 87 (*a*) of the Criminal Procedure Code. The present case was brought before the Supreme Court by way of revision at the instance of the attorney-general to review the finding that the charge was frivolous and the consequent order for payment of compensation. Edmunds, J., before whom this case originally came adjourned it for consideration before a full bench. At the subsequent hearing counsel for the accused took the preliminary point that s. 363 (5) of the Criminal Procedure Code, which reads as under, precluded the court from exercising revisional jurisdiction because the matter was brought to the notice of this court by a party who had a right of appeal against the magistrate's decision by way of case stated:

> "s. 363 (5). Where an appeal lies from any finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed."

The Crown argued, firstly that on the facts this was not a frivolous or vexatious prosecution and that the question whether it was or was not, was one of fact, and that

an appeal by way of case stated did not lie; secondly, that if an appeal did originally lie, the time for preferring the appeal had expired when the Crown requested the court to exercise its powers of revision and that sub-s. (5) is not designed to exclude the power to entertain a revision in such circumstances.

Held–

(i) sub-s. (5) of s. 363 is not intended to preclude the Supreme Court from considering the correctness of a finding, sentence or order merely because the facts of the matter have been brought to its notice by a party who has or had a right of appeal, and is not intended to derogate from the wide powers conferred by s. 361 and s. 363 (1).

(ii) the Supreme Court can, in its discretion, act sui motu even where the matter has been brought to its notice by an aggrieved party who had a right of appeal; *Chhagan Raja v. Gordhan Gopal* (1936), 17 K.L.R. 69 distinguished.

(iii) there was nothing on the record to show that the prosecution was frivolous or vexatious.

Per curiam – " 'Frivolity' in our judgment involves other aspects than grounds upon which it can be concluded that there is no case to answer."

Order for payment of compensation set aside.

Cases referred to in judgment:

(1) *Chhagan Raja v Gordhan Gopal* (1936), 17 K.L.R. 69

Judgment

Rudd Ag CJ: read the following judgment of the court: This case comes before this court in the following circumstances. On August 10, 1956, the 2nd class magistrate, Dundori, tried a charge of theft of timber, contrary to s. 270 of the Penal Code, against one Ajit Singh, and at the close to the case for the prosecution, held that there was no case to answer, acquitted the accused and, on being then asked to give compensation under s. 173 of the Criminal Procedure Code, awarded Shs. 500/- to the accused stating his reasons as follows:

> "The accused was subject to exactly the same charge (Cr. C. No. 635/B/56) on June 30, 1956, with Mr. Carter prosecuting. This case was withdrawn under s. 87 (*a*) C.P.C. Within a fortnight accused is re-charged and I have found there is no case to answer.
>
> "The prosecutor in this second case is the officer in charge Dundori Police Station and it seems to me that he should have been very much more careful, in view of his limited experience, and should have obtained the advice of someone with more knowledge before charging the accused for a second time for the same offence on very slender evidence.
>
> "The accused has been put to a great deal of inconvenience and cost and I think it frivolous in the extreme for him to have been re-charged."

The prosecution was conducted by the officer in charge of the police station at Dundori, the complainant being Colonel Milburne, who claimed to be the owner of the timber alleged to have been stolen.

On October 9, 1956, a letter was addressed to the registrar of the Supreme Court by the attorney-general requesting that the court should call for and examine the record under the provisions of

s. 361 of the Criminal Procedure Code to review the finding that the charge was frivolous and the consequent order for payment of compensation. On February 6, 1957, Edmonds, J., considered the matter in the exercise of the revisional jurisdiction and heard Mr. Long who represented the accused before the magistrate. Mr. Long took the preliminary point that sub-s. (5) of s. 363 of the Criminal Procedure Code precluded the court from exercising revisional jurisdiction because, he contended, the matter was brought to the notice of this court by a party who had a right of appeal against the magistrate's decision by way of case stated; and he relied on *Chhagan Raja v. Gordhan Gopal* (1) (1936), 17 K.L.R. 69 in support of this contention. Counsel for the Crown argued that no appeal by way of case stated was open to him.

In these circumstances Edmonds, J., directed that the revision be adjourned for consideration by a full bench.

We have had the advantage of hearing the arguments of Mr. Long for the accused and of Mr. Brookes, Crown Counsel. Mr. Long again relied on the provisions of s. 363 (5) as precluding the exercise of the court's powers of revision for the reasons above set out. Mr. Brookes argued, first, that on the facts this was not a frivolous or vexatious prosecution and that the question whether it was or was not was one of fact and that an appeal by way of case stated did not lie. Secondly, that if an appeal did originally lie, the time for preferring the appeal had expired when the Crown requested the court to exercise its powers of revision and that sub-s. (5) is not designed to exclude the power to entertain a revision in such circumstances.

Sub-s. (5) of s. 363 is in the following terms:

> "(5) Where an appeal lies from any finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed."

The construction of this sub-section is not free from difficulty. The opening words appear to indicate that it is concerned with cases where a right of appeal presently exists; but the last three words seem to imply that if the right of appeal had existed and if the party aggrieved has not taken advantage of that right while it existed, then proceedings by way of revision shall not be entertained at his instance.

We do not propose to say which construction is correct; nor do we propose to say whether, in the instant case, an appeal by way of case stated did in fact ever lie.

We are of opinion that sub-s. (5) is not intended to preclude the Supreme Court from considering the correctness of a finding, sentence or order merely because the facts of the matter have been brought to its notice by a party who has or had a right of appeal. We do not think this sub-section is intended to derogate from the wide powers conferred by s. 361 and s. 363 (1). To hold that sub-s. (5) has that effect would mean that this court is powerless to disturb a finding, sentence or order which is manifestly incorrect – for instance in the case of a conviction where no offence known to the law has been proved – merely because the aggrieved party, who might well be an ignorant person, has not exercised a right of appeal but has asked for revision and thus brought the matter to the notice of the court. In our judgment the court can, in its discretion, act sui motu even where the matter has been brought to its notice by an aggrieved party who had a right of appeal. In our view *Chhagan Raja v. Gordhan Gopal* (1) (*supra*) merely decided that, on the facts of that particular case, the court should not make an order in revision. It emphasises that the exercise of jurisdiction in revision is discretionary.

In this case the decision was brought to the notice of the court by the Crown, and the court, in the exercise of its discretion, decided to call for and examine the record under the powers conferred by s. 361.

We find ourselves unable to agree with the learned magistrate that the prosecution was "frivolous." The complainant testified that he had permission (though only verbal) from the Forest Department to cut timber in the Forest Reserve below his plot. Mr. Potgieter, the forest officer, supports that testimony. It appears that in 1947. there was a concession granted to Bahati Saw Mills until it was worked out in 1953, but that mill was only allowed to fell "exotic thinnings." At some date not exactly specified in evidence there was a concession granted to Bonsers who were informed by Mr. Hales that they could take any timber formerly belonging to Bahati Forest Mills. According to Mr. Hales the complainant had no concession between 1923 until July 23, 1956.

We are really left then with two conflicting claims; Milburne testifies that he cut the timber in question in 1951 and 1952 on a verbal authority from Mr. Potgieter. Complainant was always present when the timber was cut up, measured and stamped. According to Mr. Potgieter

> "in 1950 Bonser had moved their S. Bahati Mill to . . . and had no more interest in the area."

Bonsers when they worked through a concession moved their timber immediately.

This witness however adds in cross-examination that

> "In 1952 there was a concession over the whole Bahati area in S. Bahati. No permission to P.W. 1 by L.C.B."
>
> "I did not apply on his behalf."

Much the same changing line is taken by Mr. Hales; in examination in chief he says:

> "I did not give the accused permission to remove any timber whatsoever from Milburne's."

In cross-examination he states:

> "I informed Walia of Bonsers that he could take any timber formerly belonging to Bahati Forest Mills."

The Forest Ranger, Njoguna stated:

> "Accused approached me re old timber left lying about by Bahati Saw Mills or C. Bonser."
>
> "I said be careful not to take other people's timber."

The magistrate gave reasons for concluding there was no case to answer. All he said in connection with the ground of "frivolity" was:

> "The accused has been put to a great deal of inconvenience and cost and I think it frivolous in the extreme for him to have been re-charged."
>
> "Frivolity" in our judgment involves other aspects than grounds upon which it can be concluded that there is no case to answer.

Frivolous is defined in the Oxford English Dictionary as

> "Paltry, trumpery; not worthy of serious attention; having no reasonable ground or purpose."

In our judgment there is nothing on the record to show that this prosecution was frivolous or vexatious and we therefore set aside the order for payment of compensation made by the magistrate.

Order for payment of compensation set aside.

For the appellant:
KC Brookes and *GP Nazareth* (Crown Counsel, Kenya)
The Attorney-General, Kenya

For the respondent:
Lawrence E Long
Lawrence E Long, Nakuru

Pal Singh and Hari Singh v EA Diesel Mart Limited

[1957] 1 EA 826 (CAN)

Division: Court of Appeal at Nairobi

Date of judgment: 1 June 1957

Case Number: 68/1956

Before:	Sir Newnham Worley P, Sir Ronald Sinclair V-P and Bacon JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Connell, J

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[1] Rent restriction – Consent order to grant future lease at restricted rent – Failure to grant at agreed rent – Validity of enforcement after expiration of Rent Restriction Ordinance – Validity of order to grant future lease – Increase of Rent (*Restriction*) *Ordinance,* 1949, (*K.*).

Editor's Summary

In 1952 the parties to this appeal submitted to a Rent Control Board's consent order under which the respondent company was to surrender possession of the appellant's shop for the purposes of demolition and erection of a new building in return for the grant of a new lease, at a rent indicated, of similar premises in the new building. On completion of the new building in late 1954 and after repeated requests by the respondent company the appellants offered a new lease at a rent in excess of that prescribed in the order. The respondent company refused to accept the offer, and filed a copy of the consent order in the resident magistrate's court on December 24, 1954, the date on which the Increase of Rent (Restriction) Ordinance, 1949 ceased to apply to business premises. In the following May on the respondent company's application, the magistrate approved the amended terms of a new lease and had it executed on behalf of the appellants by the court's nominee. The appellant's appeal to the Supreme Court was dismissed, and the present appeal was brought principally on the grounds that the magistrate had no jurisdiction in May, 1955, to deal with the respondent company's application for the execution of the lease, secondly that the Rent Control Board exceeded its jurisdiction in ordering in 1952 the grant of a three year lease which even had it been granted forthwith would have outlived the Ordinance as applicable to business premises, or alternatively that such a lease would have prematurely expired by operation of law on December 24, 1954, and thirdly that the particular form of order made was so uncertain as to be unenforceable by way of execution in a court of law.

Held–

(i) the filing of the order was the point from which the proceedings stemmed and the remedy by way of execution survived for the respondent company in the normal course as a corollary of its having obtained a lawful decree on December 24, 1954.

(ii) the board clearly had jurisdiction to make the consent order and as the appellants had applied for it and availed themselves of it, they could not thereafter complain of the provision for the grant of a new lease on the agreed terms.

(iii) the meaning of the order of the magistrate's court was sufficiently clear, and the amendments made to the lease were merely matters of form.

Appeal dismissed with costs. Order that the appellants do give immediate possession of the rebuilt shop to the respondent.

Cases referred to:

(1) *Steavenson v. Oliver* (1841), 8 M. & W. 234; 151 E.R. 1024.

(2) *Bawa Singh Melaram v. Patel and Others*, E.A.C.A. Civil Appeal No. 99 of 1955 (unreported).

(3) *Inder Singh Gill v. B.E.A. Timber Co*. (1956), 23 E.A.C.A. 202.

(4) *Abdul Rehman and Another v. R. H. Gudka*, [1957] E.A. 4 (C.A.).

(5) *Keshoram Poddar v. Nundo Lal Mallick* (1927), 54 I.A. 152.

(6) *Seshadri Aiyangar v. Narayana Nair* (1950), A.I.R. Mad. 106.

(7) *Alla Ditta Qureshi v. Ngara Provision Store and Others* (1956), 23 E.A.C.A. 1.

(8) *Kumaretta v. Sabapathy Chettiar* (1907), 30 Mad. 26.

(9) *Girish Chunder Lahiri v. Shoshi Shikhareswar Roy* (1900), 27 I.A. 110.

(10) *Edwards v. Jones* (1921), 124 L.T. 740.

(11) *Brilliant v. Michaels*, [1945] 1 All E.R. 121.

(12) *Bath's* (*Bishop*) *Case* (1605), 6 Co. Rep. 34b; 77 E.R. 303.

(13) *Re Lander & Bagley's Contract*, [1892] 3 Ch. 41.

June 1. The following judgments were read:

Judgment

Bacon JA: On October 15, 1952, the parties to this appeal being then before the Central Rent Control Board sitting in Nairobi, a consent order was made relating to certain business premises of which the appellants were the landlords and the respondent company was the tenant. The premises were then within the scope of the Increase of Rent (Restriction) Ordinance, 1949 (to which I shall refer as "the Ordinance"). More than five months were still to go by before the passing of Ordinance No. 8 of 1953 which amended the Ordinance in a material respect by removing business premises from its ambit in the following terms:

> "Provided that this Ordinance shall cease to apply to any business premises, wheresoever situate in the colony, with effect from December 25, 1954."

The consent order was made in proceedings for possession instituted by the appellants under para. (*k*) of sub-s. (1) of s. 16 of the Ordinance, which applies where the landlord requires possession to enable the reconstruction of the premises to be carried out,

> "in which case the Central Board . . . may include in any ejectment order for such purpose an order requiring the landlord to grant to the tenant a new tenancy of the reconstructed . . . premises or part thereof on such terms as may be reasonably equivalent to the old tenancy . . ."

The landlords desired to demolish and reconstruct the whole building of which the respondent company's premises formed part, namely one of the two shops on the ground floor. The material parts of the consent order were as follows:

> "BY CONSENT:
>
> "(1) Possession of premises in occupation of E.A. Diesel Mart Limited to be handed over to landlords when vacant possession of the remaining portion of the entire premises on the plot is available to the said landlords.
>
> "(2) Landlords to erect the proposed building within six months of the date of vacant possession being obtained.
>
> "(3) Landlords to grant the said tenants (respondents) and/or their associated concern or concerns in which Mr. B. T. Gathani and his family hold fifty-one per cent. or more of the share capital a lease of the rebuilt shop now in respondent's occupation for a term of three years at the same rental as at present, subject to all increases in rent as may be from time to time permissible under the Ordinance during the said term, with an option to the tenants of renewal for a further period of two years, at a rent twenty-five per cent. in excess of the rent being paid at the end of the said term of three years, if the rents are not then controlled."
>
> "(5) Formal lease to be signed by the parties at the tenants' expense, the tenants paying all legal expenses

and disbursements in connection therewith."

Paragraph (1) of the order contemplated same delay before possession should be given to the appellants by the respondent. In due course possession was so given at the end of July, 1953, but, before quitting the old premises, the respondent took the precaution of writing (on the 22nd of that month) to ask for an assurance that a new lease would be granted in compliance with the order of the board. That assurance was given by letter two days later, and the respondent company then moved out.

Demolition and re-building then took place. By a series of letters in July, August, September and October, 1954, when the new building was nearing completion the respondent's advocate time and time again requested the appellant's advocate to

prepare and to submit the draft lease. In this the respondent met with no success. Believing that the new building had been completed and partly occupied, the respondent's advocate wrote on November 1 demanding reinstatement in the reconstructed premises. There is some doubt as to the exact date on which it was in fact completed, but it was at about that time. Be that as it may, that letter at last enticed the cat out of the bag, for on the 27th of that month the appellants' advocate replied and for the first time suggested that the appellants expected from the respondent a higher rent than that which had been prescribed in the consent order. On December 7, 1954, the respondent refused that suggestion. Thereafter the conduct of the respondent's case was handed over to Mr. Nazareth who eventually appeared before us.

The critical date was now fast approaching – December 24, 1954, the last day on which the Ordinance "applied' to business premises free of the effect of the amending proviso enacted in 1953. We were informed at the hearing of this appeal that on that last day, December 24, 1954, a certified copy of the board's order was duly filed on behalf of the respondent in the appropriate resident magistrate's court. Indeed, both the magistrate who subsequently heard execution proceedings and the Supreme Court of Kenya on first appeal found that the order was so filed.

But I observe in passing that the letter (now in the magistrate's court file of Civil Case No. 7813 of 1954) from the advocate then representing the respondent to the resident magistrate, Nairobi whereby the former purported to submit the copy of the order and to request that it be filed bears the date December 29, 1954, is stamped as having been received on the following day and is annotated "certified copy of R.C.B. order not enclosed for filing," that note being signed and dated "January 8, 1955." The letter is followed by a carbon copy of that advocate's notice to the appellants of the filing, also dated December 29, 1954, in which it was stated that the order had been filed

> "by me on behalf of . . . E.A. Diesel Mart Ltd. to-day December 24, 1954, in Civil Case No. 7813/54."

Immediately thereafter in the file appears the certified copy of the order itself. The certificate was given by the secretary of the board on December 21, 1954. The document bears the stamp of the resident magistrate's court, civil side, dated December 25, 1954. Moreover, although the magistrate at one time found that the filing took place on December 24, 1954 (see p. 38 line 15 and p. 30, line 31 of the appeal record), at another time he found that it was done on the 30th (see p. 44, line 33). Since the three material documents contain patent inconsistencies, and since the magistrate was at one time or the other evidently mistaken, it seemed desirable to put an end to all doubts. Accordingly I have examined the magistrate's court register of civil cases and have thereby ascertained that the board's order was in fact duly entered therein on December 24, 1954, and that the civil case number 7813 of 1954 was then and there duly allotted to it. All the preceding and succeeding case-numbers are in their proper order in the register. There was, as I have indicated, no contest before us on this point. Indeed, on this second appeal, the finding of the Supreme Court that the order was duly filed on December 24, 1954, with evidence to support it, could not have been questioned. I am now satisfied that there was good reason in fact, as well as in law, for not questioning it.

Not only is the due filing of the order not now contested; it is also agreed that – again pursuant to sub-s. 33 (1) and also to r. 4 of the Increase of Rent (Restriction) (Enforcement of Determinations and Orders, etc.) Rules of Court, 1950 – the board was duly served with notice of the filing. Pursuant to r. 4 the appellants were also duly so served, as both courts below found. The appellants now admit that all those steps were proper and effective per se, for whatever they may be worth, which, as the appellants contend, amounts to nothing.

There was then a fruitless exchange of numerous further letters, including one of March 24, 1955, whereby Mr. Narareth tried to procure compliance with the order by submitting to the advocates who were by that time acting for the appellants a lease (already executed by the respondent) for execution by them. This last endeavour to

conclude the matter without further resort to the courts failed to elicit any co-operation and the respondent company was left to such remedies as it might have in law. That brings me to April 1955.

Sub-s. (1) of s. 33 of the Ordinance provides that, on an order of the board being filed and notice thereof being served on the board, "such. . . order may be enforced as a decree of the court." Accordingly on May 3, 1955, the respondent filed in the resident magistrate's court an application for execution of the consent order of October 15, 1952, asking *inter alia* that the appellants be directed to execute the lease which had been submitted to them, or, in default, that it be executed by or by a nominee of the court.

The application was opposed. The first appellant swore an affidavit in which *inter alia* he alleged that he had been advised that the application was misconceived in law, he denied that the appellants had at any time wilfully refused to obey or to comply with the order or that they had been or were unwilling to submit a lease for execution or to execute one which gave legal effect to the order, he contended that the lease submitted by the respondent did not give proper legal effect to the order, and he maintained that the respondent company had itself

> "refused to accept a lease in accordance with the said consent order despite repeated offers."

It was submitted by Mr. Nazareth that the affidavit was "misleading." In my opinion it would be a considerable understatement so to describe it. The correspondence throughout the entire material period was exhibited to the affidavit of the respondent company's managing director sworn on April 29, 1955, in support of the application for execution and included in the record of this appeal. The appellant's advocates, when preparing the record, did not include the correspondence itself, but I have read it. It by no means affords any reasonable or even arguable foundation for the factual matters to which the first appellant deposed. It is incontestably clear that, whatever may be the force of their argument on technical matters of law, the appellants were at all times after the completion of the rebuilding using their best endeavours to evade the order to which they had given their consent and to trump up an excuse for alleging, without the slightest justification, that the delay was the fault of the respondent. At no time did they show any bona fide willingness to grant a lease in conformity with the order, and at no time did the respondent refuse to accept such a lease. I should describe the first appellant's affidavit as a dishonest attempt to conceal his own and presumably his co-appellant's bad faith. The sole true cause of the respondent's failure to have the lease granted without the courts' assistance was, according to the correspondence, that the appellants were seeking to obtain from the respondent a great deal more rent than that to which they were entitled under the order. The fact that the premises had been rebuilt – and perhaps on a greater scale than the appellants had contemplated at the time of the order – placed no difficulty whatever in the way of identifying the new shop to which the respondent could claim that the order applied. The new shop was smaller, not larger, than the old one, but the respondent never demanded that less rent than that prescribed by the order should be paid. In short, there was nothing whatsoever to prevent the appellants from giving effect to the order, but they did not wish to do so.

The application of May 3, 1955, was supported by the affidavit to which I have referred. To it was also exhibited a copy of the lease which had been submitted to the appellants. With certain modifications either suggested or agreed to by the present respondent (to which I shall later refer) the lease was approved by the court. Acting under s. 98 of the Civil Procedure Code the court eventually ordered that the lease be executed by a nominee of the court itself. This was done. Incidentally the lease was registered on July 13, 1956.

The present appellants appealed to the Supreme Court of Kenya against the magistrate's order. Their appeal was dismissed in toto and they then brought this second appeal. Voluminous argument was submitted to both courts below. I think

it unnecessary to refer to it in any detail, for the whole matter was again very fully argued before us and will presently be dealt with accordingly.

Mr. Khanna who appeared for the appellants was fully conversant with the case, having appeared for them in both courts below. He left no stone unturned in his search for legal objections to the execution of the lease. I propose to deal with the whole matter under the three main headings under which it was seen to fall as the hearing proceeded. Mr. Khanna in effect founded his case on the following three propositions: first, that the magistrate's court had no jurisdiction to direct that the lease be executed on the respondent's application filed in that court on May 3, 1955; secondly, that in any event the board had exceeded its jurisdiction when on October 15, 1952, it ordered that the appellants should grant a lease for three years certain, which term, even if the lease had been granted forthwith, would, in the events which happened, have outlived the ordinance as originally applicable to business premises; alternatively, even if the board had jurisdiction to make the order which it made, a lease granted pursuant thereto would have prematurely expired by operation of law on December 24, 1954; thirdly, that in any event the particular form of order made on October 15, 1952 was so uncertain as to be unenforceable by way of execution in a court of law.

Mr. Khanna's first proposition was, in effect, that the provision in sub-s. (1) of s. 33 of the Ordinance that, on the requisite filing and notice of filing of the board's order, it "may be enforced as a decree of the court" does not mean that the order in the instant case thereupon became in the full sense a decree enforceable as such; what really happened, he submitted, was that it became, for the remaining hours of December 24, 1954, enforceable as though it were a decree, but that, as from the commencement of the following day its enforceability disappeared by reason of the proviso to sub-s. (2) of s. 1 of the Ordinance which at that moment took effect. For the purposes of enforcement, he submitted, the magistrate's court must be regarded as having been an ad hoc tribunal which in May, 1955, had ceased to exist, with the result that the respondent no longer had available the remedy of execution, whatever other remedy he may have had.

Mr. Nazareth countered by submitting that, although, so to speak, the roots of the execution proceedings may well have run still more deeply, at the least the filing of the order under s. 33 was the point from which those proceedings stemmed; that the Ordinance was thus (at the latest) "applied" to the relevant business premises for the purpose of execution when the order was filed and all the rest was mere working out; and that the combined effect of judicial decisions and the statutory provisions with which we are here concerned is that the remedy by way of execution survived for the respondent company in the normal course as a corollary of its having obtained a lawful decree on December 24, 1954.

In my opinion Mr. Nazareth's submission must be accepted. My reasons, including my understanding of the effect of the principal authorities which either or both counsel cited are as follows.

In the first place the Ordinance, in so far as it was formerly an enactment which applied to business premises in Kenya, should be regarded as having been a temporary enactment which expired, not an enactment which was repealed. The duration of its provisions, for the purpose of enforcing rights which may be alleged to have been acquired under it, is thus a matter of construction: per Baron Parke in *Steavenson v. Oliver* (1) (1841), 8 M. & W. 234 at p. 241.

I will next summarize three decisions of this court to which reference was frequently made at the hearing.

Bawa Singh Melaram v. Patel and Others (2), E.A.C.A. Civil Appeal No. 99 of 1955 (unreported) decided in March, 1956, was an appeal from the dismissal of a suit under s. 11 and s. 21 of the Ordinance brought by the appellant-tenant for the recovery of excess rent paid. The rent had been assessed by the board in May, 1954, the premises concerned being business premises. The suit had been filed in September of that year but the proceedings at first instance were not concluded until long after the proviso enacted in 1953 had taken effect. The Supreme Court dismissed the suit on the ground that the cause of action had died on December 24, 1954, and that

accordingly there was no longer any jurisdiction to consider the claim. On appeal the question was whether the cause of action, accrued before the expiry of the Ordinance as regards its application to business premises (which, for the sake of brevity, I shall hereafter call "the partial expiry of the Ordinance") but not then pursued to judgment, survived. After citing *Steavenson v. Oliver* (1), this court said:

> "It is therefore a pure question of construction, to be determined by consideration, of the statute itself, whether or not it was intended that subsisting rights and causes of action created by it should be expunged when it expired quad business premises, as I assume, for the sake of argument, it did."

It was held, allowing the appeal, that

> "on a true construction of the . . . Ordinance it was never intended to destroy subsisting civil rights in connection with business premises when they ceased to be controlled . . . accrued civil rights under it will survive and can be enforced."

For present purposes, I would say, that decision strongly indicated a trend in favour of the respondent here, but is not conclusive in that behalf. Two possibly arguable distinctions are noteworthy: first, whereas the suit was there commenced before the partial expiry of the Ordinance, here the application to the magistrate's court for execution was made after such expiry; secondly, in the particular case of recovery of excess rent the section concerned, namely s. 21, provides by sub-s. (3) thereof that any such sum

> "shall be recoverable at any time within two years from the date of the payment thereof"

which seems to me to be a possible pointer towards survival of that particular cause of action for the prescribed period in any event, subject, of course, to the implied condition that it had accrued in the case of any given premises before the expiry of the Ordinance in relation thereto. I say no more than that. At all events *Bawa Singh's* case (2) does not, in my view, afford a decision of the question now before us.

Inder Singh Gill v. B.E.A. Timber Co. (3) (1956), 23 E.A.C.A. 202 was a landlord's appeal. In proceedings which had been commenced by the tenant before the partial expiry of the Ordinance the board thereafter, while those proceedings were still pending, dismissed the tenant's claim for compensation under sub-s. (8) of s. 16 in respect of business premises on the ground that it no longer had jurisdiction to entertain it. The tenant successfully appealed to the Supreme Court. On the landlord's second appeal to this court the board's order was affirmed. In so deciding, this court expressly adhered to the general principle as stated in *Bawa Singh Melaram v. Patel and Others* (2), namely

> "that it is a pure question of construction whether the legislature intended that a claim of this kind" (viz. the claim for compensation) "should survive as one which could effectively be translated into a judgment-debt for money or intended that the claim should be expunged."

But, when it came to the application of that principle to the circumstances of that particular case (which were fundamentally different in several respects from those of the instant one), this court held that as from the partial expiry of the Ordinance the board was no longer empowered to make an order for the compensation of the tenant. Among other grounds for that view which were noted in the judgments were these: per Briggs, J.A., that any tenancy which might in that instance have been granted if the landlord had carried out his original intention to rebuild would at best have been a monthly one, the loss of which would only have given rise to nominal compensation; that there seemed to be no good reason for saying that justice required that the board's jurisdiction to assess the claim for compensation must have been intended to survive; and that, if the board had made an order for compensation as asked by the tenant, it

would in effect have been carrying out some of its old functions in respect of the business premises already decontrolled; and, per Worley, P., that

the real loss contemplated by sub-s. (8) of s. 16 is the loss of the protection afforded to a statutory tenancy, but, since that protection had as regards business premises been withdrawn as from the partial expiry of the Ordinance, the main reason for awarding compensation had practically disappeared; and that the board could not have made an award without exercising its former jurisdiction, since an order cannot be regarded as existing in vacuo, detached from any relationship to the premises affected by it.

It seems to me that *Inder Singh Gill's* case (3) was decided on subject -matter which was very different from that of the instant case. Its only relevance at this moment, I think, springs from the view which this court there affirmed that in every dispute as to the survival of rights or remedies under the Ordinance beyond the date of its partial expiry it is the construction of the Ordinance itself which must decide the issue.

The third decision of this court to which reference was made was *Abdul Rehman and Another v. R. H. Gudka* (4), [1957] E.A. 4. This was an appeal by landlords from the dismissal by the Supreme Court of Kenya of their suit for possession of business premises. As in the instant case, the premises had been rebuilt, for which purpose the board had in 1951 ordered possession to be given to the landlords on condition that, on completion of the re-building, a new lease (in that case, one for seven years) should be granted. The rent was to be assessed by the board. In December, 1952, the rebuilding was completed, and in February, 1953, the board assessed the rent. After the partial expiry of the Ordinance the landlords tried to get the tenant out or alternatively to obtain from him a higher rent. In August, 1955, they sued for possession, and thereafter the tenant filed the board's order of 1951 in the magistrate's court. It was held on appeal that the order had merely given to the tenant a right to have a lease granted to him and was in the mature of a decree for specific performance; that the tenant had a subsisting civil right, unaffected by the partial expiry of the Ordinance, but that his right was in persona only, since in Kenya a person who has an executory right to the grant of a lease has no legal or equitable interest in the land; and that, the rent having been assessed, there remained nothing more for the board to do and the tenant's right had crystallized with the result that, despite his failure to file the order until 1955, the order continued to be effective and enforceable in some way other than "as a decree of the court" pursuant to s. 33 of the Ordinance.

The obvious distinction between that case and the instant one is twofold: there the tenant had gone into possession of the re-built premises in 1952 whereas here the tenant has never been allowed to do so at all; and there the board's order was only filed after, whereas here it must be taken to have been filed before, the partial expiry of the Ordinance. It seems to me that the suggestions in the judgment of this court in *Abdul Rehman's* case (4) to the effect that it was quite possible that the tenant could not enforce his right by procuring the execution of the lease by proceedings in the magistrate's court, but that other means of enforcement were open to him, are of no assistance in the instant case where the date of filing the order was vitally different.

The remaining cases to which I think it necessary to refer on this issue are *Keshoram Poddar v. Nundo Lal Mallick* (5) (1927), 54 I.A. 152 and *Seshadri Aiyanga v. Narayana Nair* (6) (1950), A.I.R. Mad. 106.

In *Keshoram's* case (5) the appellant before the Privy Council was the tenant of premises to which the Calcutta Rent Act, 1920, originally applied. That Act enabled a tenant to apply to the "controller" appointed thereunder to fix the standard rent, with a right to apply to a prescribed tribunal for revision of the controller's order. The tenant applied in 1922 for such revision. While his application was still pending an amending Act of 1924 inserted in the principal Act a proviso that after March 31, 1924, the

Act should cease to apply to a class of premises which included those held by the tenant. Their lordships, reversing the judgment of the High court, held that the tenant was entitled to have his application for revision heard and determined despite the proviso. The material part of their lordships' judgment is this:

> "Their lordships think that the discussions as to the different effects of a

> repealing Act on the one hand, and an expiring Act on the other, which bulk largely in the judgments given, are really beside the point. The Act is the Act of 1920. It was a temporary Act and would have expired in three years from its inception, but by subsequent amendments its life was prolonged until March 31, 1924. It was, therefore, a living Act at the moment of the application to the president. Then there is the proviso. The view taken by the learned judges is that the effect of the proviso is to make the Act a temporary Act ending at March, 1924, as regards the higher valued premises, but an existing Act until 1927 as to other premises. Their lordships think that this is an erroneous view. As above said, the Act of 1920 still lives until 1927. The effect of the proviso is just as if the words therein had been inserted in the original Act, and the Act must be so read at the present time. Now, if that had been done it would, their lordships think, never have occurred to any one to say that there could be aught but one interpretation. The Act is good for premises of all values up to March, 1924, but only good for those of lower value after that.
>
> "The application of the Act is when the parties begin to move under it. This was done in the present case before March, 1924.
>
> "The rest is merely the working out of the application."

As has frequently been said, a proposition of law should not be torn from its context and endowed with the characteristic of general application, but should be read against the background of the circumstances in which it was declared. In the instant case counsel for the appellant sought to establish that the concluding sentences which I have quoted oblige us to hold that the respondent only began to move under the Ordinance when it was already too late, namely in May, 1955, from which, according to counsel's contention, it would follow that the magistrate's court had no jurisdiction to execute the order. I think that the judgment in *Keshoram's* case (5) produces no such consequence as that. In the first place, their lordships were concerned, not with the execution of an order as a decree, but with appellate proceedings which had been commenced before the partial expiry of the Act. To have held that a right of appeal, admittedly exercised in time by the tenant, had abated because he could no longer have initiated original proceedings under the Act might well have been startling, more especially as the delay in obtaining the desired appellate decision was entirely outside the tenant's control. Moreover, their lordships were concerned with a case in which the whole machinery of legal rights and remedies was governed by the single enactment in question, whereas in the instant case it is the Ordinance and the rules made thereunder which prescribe the steps until the order has been filed and notices thereof have been served but it is s. 98 of the Civil Procedure Ordinance which in general terms empowers the magistrate's court to order execution of *any* decree directing that "any conveyance, contract or other document" be executed.

I do not think that *Keshoram's* case (5) is a direct authority at all. To the extent, however, that it may be used as guidance by analogy I think that the decision is clearly more favourable to the respondent than to the appellants in the case before us. Once the respondent had obtained the order of the board, the only possible "application" of the Ordinance which remained open to him by way of enforcing his order was the filing of it in the magistrate's court and the service of notice thereof. The Ordinance itself offered no further steps; the order had by then become for all practical purposes a decree; in seeking to execute a decree of this particular kind one invokes, not the Ordinance, but the Civil Procedure Ordinance, s. 98. It may be said that the filing of the order had, indeed, a dual significance: it constructed not only the "application" of the Ordinance but also the setting in motion of the machinery of execution, for without that first step s. 98 was in this instance of no avail. But what, in my view, can *not* be said is that the next step – the application to the magistrate's court – constituted the "application" (within the meaning of the judgment in *Keshoram's* case (5)) of the Increase of Rent (Restriction) Ordinance; for the applicant, the present respondent, was by then acting independently of that Ordinance; all he had to do was

to point to his former order which now appeared in the magistrate's court register of decrees and say: "I ask for *that decree* to be enforced by execution of a lease."

I should add that in my view the Privy Council had no intention of over-riding the long-accepted rule expressed in *Steavenson v. Oliver* (1); that would never have been done by mere implication. Their lordships were only concerned with providing their short answer to the narrow question before them.

The immunity of *Steavenson's* case (1) from the disapproval of the Privy Council was impliedly observed in the other decision to which I have said that I would refer, namely *Seshadri's* case (6). There the High Court of Madras held that a tenant's petition for revision of an eviction order, presented before the expiry of the Act concerned but granted thereafter, was granted at a time when the court designated by the Act to hear such a petition still had jurisdiction. *Keshoram's* case (5) was cited at length in the judgment and was said to

> "suggest that the solution to the problem lies in ascertaining the intention of the legislature."

The decision in *Seshadri's* case (6) turned, however, on whether outstanding appellate proceedings abated. Accordingly, in my view it is not here directly in point. If, however, there is anything to be gathered from it for present purposes, it seems to me to support the view which I think we should take of the issue as to the jurisdiction of the magistrate's court in May, 1955.

In my opinion the appellants fail on that issue. The order of the board, on being filed within time (and notice having been duly served), was converted into a decree for the purposes of execution. There is nothing in the Ordinance as amended by the 1953 proviso to indicate any intention on the part of the legislature to stultify an order already duly obtained and so converted, as to which the board had no further function to perform, or to prevent or to limit the normal right of any decree-holder to invoke s. 98 of the Civil Procedure Ordinance. By filing the decree and serving notice the respondent took the final step open to him under the Increase of Rent (Restriction) Ordinance and at the same time the first step by way of setting in motion due process of execution. The magistrate's court was not, on the true view of the law, a mere ad hoc tribunal whose powers of ordering execution of this decree (as it had become) vanished on December 25, 1954; once lawfully on the file, under r. 3 of the Rules of Court, 1950 made pursuant to the Ordinance the order was to be "registered in the register of civil cases kept by the court," and, once on the register, it was ripe for execution like any other decree.

I pass to the appellants' second proposition. Its first limb was that the board had no jurisdiction in October, 1952, to make an order for the granting of a lease which, according to its terms as prescribed by the order, would (as it subsequently transpired) be for a term which endured beyond December 24, 1954. Mr. Khanna argued that the word "tenancy" in para. (*k*) of sub-s. (1) of s. 16 of the Ordinance – the paragraph under which the order was made – connoted nothing more than what is for convenience called "a statutory tenancy," that is to say more accurately the right of irrevocability created by rent restriction legislation. This argument appeared to me to be untenable. The language of para. (*k*) is

> "an order requiring the landlord to grant to the tenant a new tenancy . . . on such terms as may be reasonably equivalent to the old tenancy. . ."

The language of the corresponding provision of the Ordinance – para. (*o*) of sub-s. (1) of s. 5 – which applies where a demolition order has been served on the landlord is

> "an order requiring the landlord . . . to grant . . . a new tenancy . . . on such terms and conditions as the board may, . . . consider fair and reasonable."

In my view, apart from other considerations, the expression “requiring the landlord to grant” as used in both those contexts points irresistibly to the intention that the new tenancy is to be one in the full and proper, viz. the contractual, sense. A landlord does not grant what is called a statutory tenancy; a tenant acquires it by holding over. By para. (*k*) the board was thus empowered, in the circumstances of this case, to order

the appellants to grant to the respondent a new contractual tenancy on terms reasonably equivalent to those on which the latter held the old shop at the time when the appellants chose to demolish and to rebuild it. At that time the 1953 proviso was not to be enacted until some five months later. I think that in October, 1952, the board clearly had jurisdiction to make the order then made. It seems to me that the point has already been decided in the respondent's favour in *Alla Ditta Qureshi v. Ngara Provision Store and Others* (7) (1956), 23 E.A.C.A. 1. There, in circumstances similar to those in the instant case, the board made an order in March, 1951, that as soon as re-building was completed each tenant was to be readmitted on a lease for seven years. Nihill, P., said in his judgment, with which the other members of the court agreed:

> "Even so it is argued the board cannot impose conditions which may remain operative after a date when this restrictive legislation may have ceased to exist. I can find no authority . . . however; I do not hesitate in rejecting the argument, for its acceptance would involve such a fetter on the board's discretionary powers as to nullify its activities. The board cannot very well engage endlessly on speculation regarding the date of its termination and apply probabilities or improbabilities when considering the character of any conditions it thinks reasonable to impose. Whether such conditions will remain effective after the Ordinance has ceased to apply to the premises in question is another matter on which I now venture no opinion."

That brings me to the second limb of this proposition relating to the term or duration of the lease. Mr. Khanna submitted-that, in the event, when the law was altered and the Ordinance was no longer to apply to business premises, the unexpired part of the term of three years certain would, so to speak, have been cut off and rendered nugatory by process of law had the new lease already been granted pursuant to the order – from which it follows, as I understand the argument, that, since on December 24, 1954, the new lease had not yet been granted and had therefore not begun to run at all, the *whole* of the contemplated term of three years had thus become a will-o-the-wisp which the respondent must thereafter chase in vain.

I think it should first be borne in mind that the appellants were originally under no obligation to reconstruct the premises. They desired to do so, and accordingly applied to the board for an order which would give them possession for that purpose. They obtained the consent order and availed themselves of it in order to give effect to their wishes. It seems to me that they are thereby excluded from being heard to complain of its provision for a lease for three years certain with an option for a further two upon the principle that the courts will not usually allow a party both to approbate and to reprobate. It is true that that rule cannot be used so as to confer jurisdiction where none would otherwise exist. But I am not now concerned with any question of jurisdiction: that question has been disposed of in relation to the first limb of this proposition; I am only concerned with the contention that the lease to be granted under the order was, in the events which happened, unenforceable in law. I would therefore say that the appellants' contention on this second limb should fail on that ground alone.

But it also seems that this court has already declined to accept this second limb of Mr. Khanna's argument. In *Abdul Rehman and Another v. Gudka* (4), the point was dealt with and rejected ([1957] E.A. at p. 10).

A third aspect of the matter is this: this is not a case in which there is or ever has been an appeal against an order of the board; the order stood, in the shape and substance of a decree, in the magistrate's court; I do not think that it was ever open to that court to question its terms on an application to execute, on the principle expressed in Mulla's Code of Civil Procedure, (12th Edn.) p. 184, where it is said that

> "the court executing the decree has no power to go behind the decree and question its validity."

It is only when lack of jurisdiction is seen on the face of the decree that the executing court is to question it: see *Kumaretta v. Sabapathy Chettiar* (8) (1907), 30 Mad. 26

and *Girish Chunder Lahiri v. Shoshi Shikhareswar Roy* (9) (1900), 27 I.A. 110 where in the judgment at p. 124 it was said:

> "But in execution proceedings we are only construing the decree and not considering its merits."

For those reasons I think that this second limb of the appellants' second proposition also fails. Incidentally it was contended that what the board should have done was to order the granting of a lease for five years, determinable earlier if the Ordinance should expire. It may well be that the board *could* have so ordered, and that such an order would have been enforceable. But we are concerned with what the board did, not with what it might have done.

There remains the third proposition, that, even if the board had jurisdiction to make the order, even if a lease to commence (as it transpired) after the partial expiry of the Ordinance was enforceable, and even if the magistrate's court had jurisdiction to entertain an application for execution of such an order in May, 1955, nevertheless *the* lease the granting of which this consent order purported to direct was so uncertain as to be unenforceable.

The general position was, I think, that the magistrate's court had now power to settle the terms of the lease; if there was any gap creating a substantial doubt, or anything in the board's order which required a discretionary decision to perfect or to explain it, the board was the only tribunal (assuming that it could still act) to deal with the matter. But merely arithmetical or otherwise mechanical operations for giving effect to the order, or the mere implementation of the order in the light of the law, were within the proper functions of the court. The general questions are, therefore, whether the order itself contained sufficiently comprehensive and precise indications of the terms and conditions of the lease to be granted, and secondly whether the executing court confined itself to its proper function and employed only its limited means of satisfying itself that the form of lease proposed by the respondent for execution complied in all essential respects with the order and did not go beyond it and (by the same token) covered with certainty the various requirements of an instrument of its kind. In dealing, as I shall now do, with the various aspects of the matter reviewed by counsel I shall bear both those questions in mind. As regards the question as to the certainty or uncertainty of the order, Lord Sterndale, M.R., stated the proper approach when he said in *Edwards v. Jones* (10) (1921), 124 L.T. 740 at pp. 744–745:

> "The ingenuity of counsel will be able to argue pretty well of any agreement that it bears different constructions. The real question is whether on looking at it the court comes to the conclusion that the court cannot understand what it says, or that it is not clear to the mind of the court what it means."

Mr. Khanna submitted that there was nothing in the order which determined the date at which the lease was to commence. Both counsel cited a number of authorities. I refer first to *Brilliant v. Michaels* (11), [1945] 1 All E.R. 121, in which Evershed, J., (as he then was) held that a contract for a lease was enforceable notwithstanding that the commencement of the term was expressed by reference to the happening of a contingency which was at the time uncertain, provided that at the time when it was sought to enforce the contract the contingency had occurred. At p. 126 C he said:

> "The point is, or may be briefly put thus, that it is essential for the enforceability of a contract relating to the letting of land that the date of the commencement of the term should be certain or, at any rate, certainly ascertainable . . ."

He then cited a passage from Fry on Specific Performance, as follows:

> "Again a material term may well be supplied by construction or inference where the circumstances justify it: but if neither supplied by expression, construction nor inference the contract is incapable of performance."

I have already set out most of the provisions of the consent order. There is also para. (4) which reads:

> "(4) It is expressly understood that while the landlords will construct the building expeditiously they shall not be liable to the tenants for any damages for delay in completion and shall be under no obligation to give the tenants any alternative building."

In the head note of a leading authority on the point, *The Bishop of Bath's* case (12) (1605), 6 Co. Rep. 34b, the matter is stated thus:

> "That every lease for years should have a certain beginning, is to be intended when it is to take effect in interest or possession."

In my view there is the clearest possible inference from the true construction of the order as a whole – more particularly when looked at, as it should be, against the background of the Ordinance under which it was made – that the lease was to commence at the time when the rebuilt shop concerned was complete. By "complete" I mean ready and available for occupation; that moment of readiness and availability would be marked by the grating of the local authority's certificate of fitness. That was the date on which the appellants were obliged to let the respondent into occupation, and from which they were entitled to receive rent. But that moment had come and gone while the appellants were still avoiding compliance with the order. That was no fault of the respondent. Accordingly – and, as I think, justifiably – the respondent's advocate inserted in the draft lease the time of commencement which, in the event, had become appropriate; the words in the draft were "commencing from the date hereof." At the instance of Mr. Nazareth himself, however, those words were deleted at the hearing of the execution proceedings, leaving it to s. 110 of the Transfer of Property Act, 1882, to effect the same result by operation of law.

The appellants relied on, *inter alia*, *Re Lander and Bagley's Contract* (13), [1892] 3 Ch. 41 and *Edwards v. Jones* (10). In the former case, however, the contract had provided for possession to be given within one month from the date thereof, and it was held that the commencement of the term of three years was inferentially intended to be the day on which possession was to be given. The day on which possession had in fact been given was ascertained by evidence. In my view that decision is of no assistance to the appellants. In *Edwards v. Jones* (10) the question was different. There the ninety-nine years' lease was to commence

> "after (the proposed lessor) gets possession of the whole . . . land and premises on September 29 next."

The Court of Appeal (Younger, L.J., dubitante) held that there was no concluded agreement, either express or implied, as to the date of commencement: to say "after" a certain day was too vague. That was a different case from the one before us. I do not find other cases cited to us to be of any more assistance than are those.

In my view there is nothing in the appellants' contention as regards the commencement of the lease to be granted by them: the meaning of the order was clear, and it was duly and properly implemented by the court.

Next, there was an attempt to show that the premises to which the order purported to refer were unascertainable. It was, however, not denied that when counsel for the respondent submitted the draft lease to the appellants in March, 1955, the shop in question (and the other shop) had been completely re-built. The appellants' reaction was not then to quibble about the identity of the shop to which the respondent laid claim but to express their readiness to grant that lease if the respondent agreed to a greatly enhanced rent. This contention before us was a flimsy facade through which the truth gleamed brightly: from start to finish there never was any real difficulty about identifying the new premises concerned; indeed, at the material time nobody even pretended that there was. The only difference

between the old shop and the new one was that the latter was smaller, which for present purposes is of no account.

Another submission on behalf of the appellants was as to the alleged ultimate uncertainty as to the legal person or persons to whom the lease should be granted. I do not think that there was any more in this point than in the last-mentioned one. In the correspondence which was in evidence in the magistrate’s court there was no

suggestion of any uncertainty whatever. Under para. (3) of the consent order the respondent company might have produced evidence to show that some concern or concerns other than the respondent had qualified as prospective tenants, and might have applied for the lease to be granted to them or to one of them either alone or jointly with the respondent itself. No such thing was ever suggested. Nor was there any suggestion that the respondent company was not still precisely the same entity as "the said tenants" referred to in para. (3) of the order. The respondent company was asking for the lease to be granted to itself, and I am unable to understand how it can now be said that there was the slightest doubt as to their right so to ask. In my view the meaning of the paragraph is perfectly plain: if the respondent desired to have the lease granted to itself it only had to say so. And that is what it did. On a true construction of the paragraph the expression

> "in which Mr. B. T. Gathani and his family hold 51 % or more of the share capital"

does not, I think, qualify the expression "the said tenants"; the grammar and arrangements of the opening lines of the paragraph seem to me to be against any such construction. The intention was that, if a concern other than the respondent company were to be put forward as a tenant in place of or jointly with the respondent company, then the appellants would have the right to call for proof that such concern was controlled by the person named and his family.

Mr. Khanna's next point related to the amount of rent to be reserved. The memorandum of appeal raised the point under three headings: the order was said to be uncertain, first "because no lease can or should be executed without an exact and definite figure for rent," secondly because there could be no rent permissible "under the Ordinance" once it expired, and thirdly because the order was

> "founded upon the agreed fundamental assumption that the rent would continue to be controlled for the first three years of the term."

I refer back to para. (3) of the order, which I have already set out. In the first place the order indisputably provided that the starting rent was to be the rent which the respondent was paying at the time of the order (proved in the magistrate's court to have been Shs. 308/25 per month) and that the rent was to remain at that figure for three years subject only to

> "all increases in rent as may be from time to time permissible under the Ordinance during the said term."

Between the date when the order was made and the date of the partial expiry of the Ordinance no increase of rent was permissible under the Ordinance (a matter which was also proved in the magistrate's court).' It is self-evident that as from the latter date no increase was permissible "under the Ordinance." In my opinion the intention and meaning of the order – that is to say of the parties, for the order was made by consent – was that the rent for the first three years was to be tied down to the controlled rent *of the old shop* with any increase which would during that time have been permitted by the Ordinance if the old shop had continued to exist. The parties must be taken to have known that, if the old building were replaced by a new one (as in fact happened), the Ordinance would never in any event apply to the new shop, even though the new building were to consist partly of residential and partly of business premises: see para. (*b*) of sub-s. (2) of s. 1 of the Ordinance. Thus there cannot have been any assumption such as that for which Mr. Khanna contended, for the rent *of the new shop* could never be controlled by the Ordinance at all, from which it follows that the rent could not "continue to be controlled for the first three years of the term."

Again, apart from this negative aspect of the matter – the impossibility of attributing to the parties such an assumption – in my opinion the positive intention of the order was, in the words of the provision

pursuant to which the order was made, that the new tenancy should be on such terms as might be "reasonably equivalent to the old tenancy," that is to say, not at a rent which might at any moment be subject to a

large increase in accordance with open market rates, but at one which for three years would be closely related to the old rent for which the respondent had been liable. The object was of course to shield the respondent from the comparatively sudden imposition of a heavy burden, in addition to the inconvenience and expense of temporary removal to other premises, when the whole cause of their being disturbed in the conduct of their business was the appellant's desire to replace their old property by something of much greater value to them. With those considerations in mind the order is perfectly clear and precise as to the rent to be paid throughout the full five years of the lease if the respondent company exercises its option to renew; since the rent of the old shop would have ceased to be controlled before the expiration of the first three years, the rent for the new shop will be increased by twenty-five per cent. for the last two years of the term. The lease which has been executed provides for this. The magistrate's court did no more than ascertain the facts necessary for converting the provisions of para. (3) of the order into terms of money and satisfy itself that they were duly so converted.

There remain two general submissions by counsel for the appellants as to the proceedings in the magistrate's court with which I should perhaps deal comprehensively, although they are, I think, for the most part covered by what I have said as to the individual objections.

First, it was said that there was no evidence before that court upon which it could ascertain with certainty the terms of the lease to be executed. In my view the evidence there adduced was amply sufficient for that purpose in all respects.

Secondly, it was said that he court had itself settled the lease instead of merely ordering execution of a lease already manifestly clear and certain as to its terms and conditions. Here again I think that there is no substance in the point. I have already dealt with the amendment of the habendum as originally drafted. The other amendments made before the court were mere matters of form.

Accordingly I would dismiss this appeal with costs. I am happy to be able so to hold as a matter of law because in my opinion there are no merits of any sort or kind in the appellant's case. They have, I think, thus far shown that they are prepared to seek any and every technical loophole through which to escape from their clear obligation to honour their original agreement to the consent order which was made for their convenience and profit and of which they availed themselves to the full.

Mr. Nazareth submitted that we should make an order for immediate possession to be given to the respondent. By virtue of s. 34 of the Civil Procedure Ordinance this was a matter within the jurisdiction and powers of the magistrate's court executing the decree and no separate suit was or is required to be brought. Sub-r. (4) of r. 74 of the Eastern African Court of Appeal Rules, 1954 empowers us to make this further order if the case requires it. In my view the case does require it, and I understand that the shop in question is standing vacant and that there is nothing to prevent the appellants from immediately giving possession of it to the respondent. Accordingly I would so order.

Sir Newnham Worley P: I have had the advantage of reading beforehand the judgment prepared by the learned justice of appeal and entirely agree with it.

An order will be made in the terms proposed therein.

Sir Ronald Sinclair V-P: I also agree

Appeal dismissed with costs. Order that the appellant do give immediate possession of the rebuilt shop to the respondent.

For the appellants:
DN Khanna and *AR Kapila*
DN & RN Khanna, Nairobi

For the respondents:
JM Nazareth QC and *JJ Patel*
JJ Patel, Nairobi

Shiv Kumar Sofat v R
[1957] 1 EA 840 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	14 September 1957
Case Number:	7/1957
Before:	Rudd Ag CJ and Connell J
Sourced by:	LawAfrica

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[1] Criminal law – Theft – Theft of cash charged – Whether theft of cheques is theft of cash.

Editor's Summary

The appellant was convicted before the resident magistrate, Nairobi, on sixty-one counts each charging theft of cash by a person employed in the public service contrary to the Penal Code, s. 275, and was sentenced on each count to five years' imprisonment with hard labour, the sentences to run concurrently. In all instances the appellant had either fraudulently obtained cheques or fraudulently arranged for cheques to be paid into his banking accounts, and the ground of his appeal was that the convictions were wrong in law in that the evidence did not support the offences charged.

Held–

(i) in those instances where the railway administration had directly paid cheques into the appellant's accounts the money represented by them became the property of the bank, and although there was fraud on the part of the appellant and probably false pretences, there was no taking of the cheques nor was there conversion of them for there was no actual receipt of money; accordingly those convictions must be set aside.

(ii) in the remaining instances the appellant had obtained the cheques but on none of these counts, with the exception of count 32, was it established that there had been theft of cash as distinct from theft of the cheques; and since a cheque had never been held to be cash within the meaning of the criminal law, these convictions also must be set aside.

(iii) the facts supporting count 32 were different in that the appellant having obtained a cheque drawn in favour of a fictitious person, cashed it, keeping the money for himself, and in so doing was

guilty of theft of the cash he received; the appellant was rightly convicted on that count and in the circumstances the sentence imposed was not excessive.

Order accordingly.

[**Editorial Note** – See also *Shiv Kumar Sofat v. R.* reported at p. 471 ante.]

Cases referred to:

(1) *Foley v. Hill* (1848), 2 H.L. Cas. 28; 9 E.R. 1002.

(2) *R. v. Keena*, 11 Cox C.C. 123.

(3) *Menzour Ahmed s/o Sheikh Soleh Mohamed v. R.*, [1957] E.A. 386 (C.A.).

(4) *R. v. West*, [1948], 1 All E.R. 718; 64 T.L.R. 241.

(5) *R. v. Davenport*, [1954], 1 All E.R. 602.

(6) *R. v. Hampton*, 11 Cr. App. R. 117.

Judgment

Rudd Ag CJ: read the following judgment of the court: The appellant appeals from conviction of theft of cash by a person employed in the public service contrary to s. 275 of the Penal Code on each of sixty-one counts and from concurrent sentences of five years' imprisonment with hard labour in respect of the conviction on each count. The evidence adduced at the trial by the prosecution was not disputed on the appeal and even in the lower court there was no serious dispute as to the facts. The appellant did not give evidence or make an unsworn statement or call witnesses in his defence. Mr. O'Brien Kelly appeared for the appellant and Mr. Charters, Crown Counsel, for the Crown.

It was argued on the appeal and also in the lower court that the evidence did not conform with the particulars alleged in the several counts and that the appellant should

not in law have been convicted. since the evidence was not in accord with the particulars of the counts on the charge sheet.

The evidence satisfactorily established that the appellant was a clerk employed in the Accounts Section of the East African Railways and Harbours Administration in Nairobi. As such he prepared vouchers and other documents in support of claims for unpaid wages or salary, advances of salary, gratuities, overtime, travelling expenses, leave allowance and passage differences by alleged employees of the Administration. These claims were fraudulent. In many of the cases the alleged employees did not exist.

The Administration issued cheques in respect of these vouchers and the cheques were either paid direct into one of the appellant's bank accounts or else they came into the possession of the appellant who converted them to his own use after endorsing the payee's name on the cheque by passing them to traders as in the case of the cheques for the amounts stated in counts 31, 32 and 61 or into a bank account kept by the appellant either in his own name or in the assumed name of Dharam Saroop Sharman. The appellant had three bank accounts. One with Barclays Bank in his own name, another in the National Bank of India in his own name and a third in Barclays Bank which he operated under the assumed name of Dharam Saroop Sharman.

Where the vouchers related to a person who could be traced as an employee of the Administration it was proved that the employee did not know the appellant, had not authorised him to receive the cheque in question and had not received the cheque or its proceeds.

Except as regards count 32 there was no evidence that the appellant had actually received any cash or currency for any of the cheques. There is no doubt that in many of the instances intended to be covered by the several counts the appellant converted cheques for the amounts stated in the relevant counts but none of the counts was laid in terms which expressly alleged theft of a cheque or even theft of money. Everyone of them alleged theft of cash. Apart from differences of date and amount each count was in the same form and we quote count number 32 as a typical example, which reads as follows:

> "COUNT 32. THEFT BY A PERSON EMPLOYED IN THE PUBLIC SERVICE, contrary to s. 275 of the Penal Code.
>
> "SHIV KUMAR SOFAT, on December 23, 1953, at Nairobi in the Nairobi Extra Provincial District, being a clerk in the Accounts Section of the East African Railways and Harbours, stole cash of the value of Shs. 2,588/-, the property of Her Majesty."

We will deal with this particular count in detail later in the judgment. We find that we can deal with the other counts on a more general basis.

As regards counts 7, 8, 9, 10, 11, 12, 15, 16, 17 and 47 it does not appear that the appellant ever had possession either of the cheques or of cash. In most of these instances it was proved that the cheques were made out by the East African Railways and Harbours Administration in favour of Barclays Bank and were sent direct by the bank for the credit of Dharam Saroop Sharman. In other instances in these counts there are circumstances from which it can be presumed that that is what occurred. The cheques were cleared by the bank and the account of Dharam Saroop Sharman was credited without the cheques ever going into the hands of the appellant. In our opinion the conviction on these counts of theft of cash cannot be sustained. The cheques were paid into the bank on the basis of false and fraudulent vouchers prepared and submitted by the appellant. There was certainly fraud, probably there were false pretences and there was fraudulent accounting on the part of the appellant, but, in our opinion, there was no

conversion by the appellant even of the cheques in question on these counts. Once these cheques were sent to the bank and cleared the money represented by them became the property of the bank. See *Foley v. Hill* (1) (1848), 2 H.L. Cas. 28. They were credited to the appellant's account in the name of Dharam Saroop Sharman. This is not conversion of the cheques by the appellant. The cheques were converted into a credit to the appellant, not into cash, by the bank

when the bank received them from the Railway Administration, who made out the cheques in favour of the bank and not in favour of the appellant or of Dharam Saroop Sharman. There was no taking of the cheques by the appellant nor was there conversion of them, for there must be an actual receipt of money before there can be a conversion of it. *R. v. Keena* (2), 11 Cox C.C. 123. The appellant should have been acquitted of theft of cash on these counts.

We have not considered as to whether he might have been convicted of false pretences or not since that matter was not considered by the lower court or argued on appeal.

As regards count 32 the cheque in question was made out in favour of an alleged employee called Nand Lal and was sent to a post office box number. In fact there was no employee of the Administration called Nand Lal. The appellant obtained possession of this cheque and after endorsing it gave it to a merchant in exchange for Shs. 700/- worth of furniture and the balance of Shs. 1,888/- was received by him in cash. He represented to the merchant that he was the payee Nand Lal.

The facts relating to count 31 are very similar to those relating to count 32 with this important difference, that the appellant obtained another cheque in exchange for the Railway's cheque. The facts relating to count 61 were similar except that there was no evidence of the form of the proceeds received for the cheque. The other differences are immaterial.

As regards the other counts the best that can be stated in support of the convictions is that at best the evidence disclosed a theft by conversion of a cheque in respect of each count by the appellant. In some of these counts the conversion was more clearly proved than in others and it may well be that a fully detailed consideration of them would show that in a few cases there may have been some doubt as to whether fraudulent conversion by the appellant had been conclusively proved; but on none of these counts, with the exception of count 32, was it established that there was theft or conversion of money as distinct from a cheque by the appellant and, therefore, unless it can be held that the theft of a cheque can be considered to be in fact and in law a theft of cash we think that the convictions on every count in this appeal, with the exception of the conviction on count 32, should be set aside.

So far as we are aware a cheque has never been held to be cash within the meaning of the criminal law and in relation to a criminal charge. Cash is certainly money within the meaning of the Penal Code and a cheque is also money by definition in the Penal Code but it does not necessarily follow that the word "cash" is the correct description of a cheque. In the recent case of *Menzour Ahmed s/o Sheikh Soleh Mohamed v. R.* (1) a conviction for theft of a sum of Shs. 3,000/- was upheld by this court and by the Court of Appeal ([1957] E.A. 386) where the evidence was that the appellant in that case had stolen a cheque for that amount by converting it to his own use without receiving cash or other money in exchange for it. The basis of that decision was that a cheque was money within the definition of that word in the Penal Code and the words "a sum of 3,000/-" meant a sum of money and were capable of applying to a cheque for 3,000/-. Even so the Court of Appeal said ([1957] E.A. at p. 390):

> "In some cases the description in a charge of a cheque for the sum of money might mislead the person charged in his defence. If prejudice in fact resulted, a conviction on such a charge would no doubt be set aside on that ground. In the instant case although the 'money' which the appellant was charged with stealing would have been better described as a cheque for 3,000/-. It is admitted that the appellant was not in fact prejudiced by the form of the charge."

We respectfully agree. The Court of Appeal also quoted from the judgment in *R. v. West* (4) (1948), 64 T.L.R. 241 at p. 243:

“It is an essential feature of the criminal law that an accused person should be able to tell from the indictment the precise nature of the charge or charges against him so as to be in a position to put forward his defence and to direct his evidence to meet them.”

There is, of course, a clear distinction in law between the theft or conversion of a cheque and the theft or conversion of its proceeds in cash. This distinction may be of importance. See *Davenport's* case (5), [1954] 1 All E.R. 602, *R. v. Keena* (2) and *R. v. Hampton* (6), 11 Cr. App. R. 117.

The word "cash" is not a very precise term. Oridinally it was of eastern origin and meant "small copper coins." Later it came to mean "currency in coin." Still later bank notes and treasury notes which passed as currency became included in its connotation. In certain circumstances in connection with the construction of bequests it has been given a wide connotation so as to include cheques but such cases are not necessarily a sound guide for the wording of counts in criminal charges and indictments. It would seem, therefore, that its meaning in particular circumstances may be governed by the context in which it is used. Nevertheless, in our opinion, it is true to say that ordinarily and unless there are circumstances to show that a different meaning was intended the word "cash" refers to some sort of currency such as coins, treasury notes or bank notes of fixed ascertained value and that it does not ordinarily mean a cheque of the value of which may be uncertain or which can be stopped by the drawer. As a verb "to cash a cheque" means to turn it into ready money or currency. We do not consider it to be an appropriate word to use in a criminal charge of theft where it is intended to allege a theft or conversion of a cheque and, in our opinion, it cannot be said that anyone reading the counts in this case would necessarily assume from their terms that it was intended to charge the appellant with stealing a cheque. The fact that cash is within the meaning of the word "money" as defined in the Penal Code does not, in our opinion, justify the theft of a cheque being charged as a theft of cash. For this reason we are of opinion that the convictions and sentences imposed in this case in respect of the counts except count number 32 must be set aside.

As regards count number 32 the position is different. For there we think that the appellant stole the cheque in question and also that part of its proceeds, namely Shs. 1,888/- which he received in cash. The position as regards this count is that the appellant prepared and submitted for payment a fraudulent voucher in favour of an alleged employee called Nand Lal. No employee of that name could be traced in the records of the E.A.R. & H. Administration. In accordance with the directions prepared by the defendant this cheque appears to have been sent to P.O. Box No. 210. From there it came into the appellant's possession for he endorsed it and handed it over to the merchant to whom he represented himself as being the payee Nand Lal. It is clear that Nand Lal was a figment of the appellant's imagination conjured up for the purpose of fraud. The evidence that was adduced on the other counts was admissible to show that the appellant had followed a systematic course of similar frauds and to disprove accident or the possibility of a genuine mistake. When the appellant received the cheque he knew that it had been made out and sent under a complete mistake of fact. It was never intended to be issued to the appellant and it was not issued to him. The appellant knew that the payee did not exist and that the Railway Administration never intended the cheque to go to him. It was not a case of a cheque being sent knowingly to the appellant by the drawer under false pretences. The appellant knew that it was made out on a false voucher which he had himself prepared. When the appellant got possession of the cheque he must be held to have taken it with intent to use it for his own purposes. Any other intention is inconceivable upon the evidence in the case. He took it with that intent and therefore he could have been convicted of the theft of the cheque if he had been charged in terms appropriate to that offence but he has not been charged in such terms. Nevertheless the appellant knew that no one had a right to that cheque to use it for his own purposes. He knew that it was issued in error and in fact belonged to the Railways and Harbours Administration. The cheque was the property of that Administration and had not been given by them to any real person. When the appellant cashed it the Administration could claim the cash proceeds as money received to their use. Therefore, when the appellant endorsed this cheque and got some cash for

it he can be held to have received that cash to the use of the Railway, but he kept it for himself. It is perfectly clear that when he got the cash he took it with the animus of keeping it for himself, any other animus

would be quite incredible in the circumstances. In our opinion that is theft of the cash as well as theft of the cheque and we consider that the evidence established a theft of cash to the value of Shs. 1,888/- on the 32nd count. We amend the conviction accordingly.

We think that we are supported in this view by the dictum of Cockburn, C.J., in *Keena's* case (2):

> "If a servant receives a cheque for his masters and fraudulently appropriates it to his own use and converts it into cash it is sufficient to allege and prove that he either embezzled the cheque or money. But if it is alleged that he embezzled money it must be proved that the cheque was cashed."

As regards sentence the appellant was proved to have pursued a systematic course of fraud at the expense of his employers. He asked for five similar offences to be taken into consideration. In the circumstances we do not consider that the sentence of five years' imprisonment with hard labour imposed in respect of this count was excessive.

As regards the conviction on the 32nd count we alter it to a conviction of theft of 1888/- and we affirm the sentence.

Order accordingly.

For the appellant:
J O'Brien Kelly
J O'Brien Kelly, Nairobi

For the respondent:
DD Charters (Crown Counsel, Kenya)
The Attorney-General, Kenya

Sayed Hussein s/o Sayed Ibrahim s/o Sayed Mohamed v R
[1957] 1 EA 844 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	4 November 1957
Case Number:	350/1957
Before:	Sir Kenneth O'Connor CJ and Rudd J
Sourced by:	LawAfrica

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[1] Criminal law – Evidence – False statements of age – Cogency of medical evidence of bone-age.

Editor's Summary

The appellant was charged before the resident magistrate, Nairobi, on two counts of knowingly making a

false statement contrary to the Immigration (Control) Ordinance, s. 12 (1) (*b*) (Cap. 51) (since repealed), in that he had stated that his first son was born in 1940 and the younger in 1944. He was convicted and sentenced on each count to a fine of Shs. 3,000/- or in default to four months' imprisonment with hard labour. The principal grounds of appeal against both conviction and sentence were that it had not been proved that the appellant had made the statements, that if he had made them they had not been proved to be false because *inter alia* the evidence of a radiologist of the bone-age of the sons was inadmissible, and if the statements were found to be false there was no proof that the appellant had knowledge of their falsity.

Held–

(i) the magistrate was justified in drawing from the appellant's testimony the inference that the appellant admitted making the statements.

(ii) evidence given by the radiologist of the bone-age of the sons established by X-ray examination indicated that the first son was born in 1937 and the younger in 1950; that such evidence although not infallible was most unlikely to be out by three and six years respectively, particularly when tested in cross-examination.

(iii) it was not readily credible that the appellant could genuinely make such errors in estimating his sons' ages; the magistrate in reviewing all the circumstances, the evidence and the demeanour of the witnesses, concluded that the statements were made "knowingly," and there was no reason to differ from that finding.

Appeal dismissed.

Cases referred to:

(1) *Mahomed Syedol Ariffin v. Yeoh Ooi Gark* (1916), 43 I.A. 256.

(2) *Emperor v. Qudrat* (1939), 61 All. 871.

Judgment

Sir Kenneth O'Connor CJ: read the following judgment of the court: The appellant was, on August 22, 1957, convicted by a resident magistrate in Nairobi on two counts of knowingly making a false statement contrary to s. 12 (1) (*b*) of the Immigration (Control) Ordinance, (Cap. 51), now repealed. It was alleged that on February 20, 1957, for the purpose of obtaining dependants' passes, the appellant had knowingly made false statements to the effect (*a*) that the date of birth of Sayed Ahamed s/o Sayed Hussein, one of the appellant's sons, was June 1, 1944; and (*b*) that the date of birth of Sayed Hassan s/o Sayed Hussein, another of the appellant's sons, was March 21, 1940. The appellant was convicted on both counts and sentenced on each to a fine of Shs. 3,000/- or in default to four months' imprisonment with hard labour. Against these convictions and sentences he appeals.

The false statements were alleged to be contained in two applications for dependants' passes, said to have been made by the appellant on February 20, 1957.

According to the dates of birth given in the applications, the age of Sayed Ahamed would, in June, 1957, be thirteen years, and the age of Sayed Hassan would, in June, 1957, be seventeen years and three months. A radiologist gave evidence at the trial who said that, from X-ray examinations made in June, 1957, he estimated the bone-age of Sayed Ahamed as about seven years and the bone-age of Sayed Hassan as over twenty years, and that these ages were consonant with their physical appearance.

Mr. Khanna, for the appellant, submits:

(1) It was not strictly proved that the appellant made the applications containing the alleged false statements.

(2) If the appellant made the statements,

(*a*) it was not proved that they were false: the radiologist's evidence was inadmissible or worthless as direct evidence and could only be accepted as corroborative evidence if "direct" evidence of age had been given, and no such direct evidence was given. (Mr. Khanna did not define what he meant by direct evidence in this context, but we took him to mean a birth certificate or the evidence of someone present at the birth, or something of that kind); and

(*b*) if the statements were false it was not proved that the appellant had knowledge at the time of their falsity.

Mr. Khanna at first complained also of the wrongful exclusion of certain affidavits or certificates produced by the defence, but we understood him subsequently to abandon that point.

We will deal first with point (1) above. Mr. Khanna says that the appellant was interrogated and that a statement containing his answers (exhibit 14) was taken under s. 4 (*b*) of the Immigration (Control) Ordinance and afterwards admitted in evidence; and that that section was not applicable to the appellant who was not desiring to enter or leave the colony or believed to be a prohibited immigrant.

We agree that the sub-section was not applicable to the appellant, and we doubt whether the statement should have been admitted as evidence in chief. It might have been used in cross-examination, under s. 155 (3) of the Indian Evidence Act, to impeach the appellant's credit, if he had given evidence inconsistent with it, or it could possibly

have been proved under s. 157 to corroborate his testimony. However, the statement in our opinion, went no further than the appellant's evidence given in court and, if the learned magistrate was wrong in admitting it, this did not in fact occasion a failure of justice, and s. 381 of the Criminal Procedure Code applies. In considering whether it was proved that the appellant made applications for dependants' passes we propose to ignore exhibit 14.

The appellant was charged in count 1 with knowingly making a false statement for the purpose of obtaining a dependant's pass for one Sayed Ahamed s/o Sayed Hussein. As already mentioned, the false statement alleged was that the said Sayed Ahamed s/o Sayed Hussein's date of birth was June 1, 1944. The appellant was charged on count 2 with knowingly making a false statement for the purpose of obtaining a dependant's pass for Sayed Hassan s/o Sayed Hussein. The false statement alleged was that Sayed Hassan s/o Sayed Hussein's date of birth was March 21, 1940. In his evidence the appellant testified *inter alia* that his first child, Sayed Hassan, was born on March 21, 1940, and that Sayed Ahamed, the second son, was born on June 1, 1944. He continued: "I applied for dependants' passes for these two sons of mine." Later he said:

> "I have made no false statements for the purpose of my dependants' passes. What I have said in the applications I honestly believed to be true."

The learned magistrate inferred that the making of the statements charged was admitted by the appellant and that his defence was that they were not false statements, but true. We think that he was justified in making this inference and that there was just sufficient evidence of the making by the appellant of the applications and the statements alleged in the charges to be false to justify the magistrate's finding and that Mr. Khanna's first point fails.

As regards point 2 (*a*) above, Mr. Khanna argued that if the ages of the sons was intended to be challenged, there must be what he termed "direct" evidence: that the evidence of the radiologist as to bone-age was not such evidence: and that it could only be accepted as corroborative of "direct" evidence. As authority for this proposition Mr. Khanna referred to the case of *Mahomed Syedol Ariffin v. Yeoh Ooi Gark* (1) (1916), 43 I.A. 256. In that case there was an issue whether a mortgagor was, or was not an infant when he executed a mortgage. A doctor had examined him and had given a certificate: "This is to certify that in my opinion M. S. Ariffin is of the age of twenty-one years." The doctor, on examination, said that he formed the opinion that the appellant in that case was twenty-one, judging by his teeth, his appearance and his voice. Lord Shaw of Dunfermline who delivered the judgment of the Board said:

> "In their lordships' view such a certificate is worthless. It is not in truth a certificate but only an assertion of opinion."

We do not understand this to mean that the testimony of a medical witness, subject to cross-examination, is not receivable in evidence as an assertion of opinion to help in the determination of age, if he has, in fact applied scientific knowledge in forming that opinion.

Mr. Khanna also referred to Ratanlal and Thakore on Evidence (12th Edn.) at p. 122:

> "A doctor's opinion as to the age of a person based on his or her height, weight and teeth, does not amount to legal proof of the age of that person."

The authority given for that proposition is *Emperor v. Qudrat* (2) (1939), 61 All. 871. An extract from the judgment in that case is as follows:

> "It appears that the doctor based his opinion on the particulars given in his report with regard to height, weight, etc. The learned Assistant Sessions Judge is of opinion that the medical evidence does not amount to

legal proof of the age of Mst. Bhagmania. Under s. 45 of the Indian Evidence Act, ‘When the court has to form an opinion upon a point of . . . science . . . the opinions upon that point of persons specially skilled in such . . . science . . . are relevant

> facts. Such persons are called experts.' From the statement of the Civil Surgeon it does not appear that he brought any scientific knowledge to bear upon his opinion. The indications given by the doctor could be observed by a layman. It is true that a doctor is in a better position to form an opinion about the age of than a layman, but the statement of a doctor is no more than an opinion. This question has been considered in several cases."

Their lordships cited a passage from the judgment of the Judicial Committee in *M. S. Ariffin's* case (1) and continued:

> "In our opinion the learned Assistant Sessions Judge was right in holding that there was no legal proof of the age of Mst. Bhagmania."

The ratio decidendi is plain, namely, that it did not appear that the doctor had brought any scientific knowledge to bear in forming his opinion. That does not apply to the determination of bone-age by X-rays, for which scientific and medical knowledge is essential Sarkar on Evidence (9th Edn.) at p. 443 says:

> "Medical evidence as to age is from its very nature based upon conjectures and cannot be relied upon to determine with precision the exact age of a person."

But that dictum does not, in our opinion, apply to a qualified radiologist's evidence of determination of bone-age by X-rays. That determination is based on the developments of the bones, and epiphyses which have, in fact, taken place in the subject, as revealed in X-ray photographs, and on the interpretation which medical science places upon such developments. We think that the cases on age determination by clinical examination by doctors have little, if any, application to bone-age determination by X-rays interpreted by an expert radiologist. No doubt such evidence is not infallible; but it is receivable and if there is any other evidence of age, it must be weighed with such other evidence. Such evidence alone might not be sufficient to establish a person's exact age, but we think it most unlikely that the evidence of a qualified radiologist as to the bone-age of persons under twenty-one, particularly when tested in cross-examination, would be out by as much as six years and three years respectively.

We know of no authority for the proposition that a qualified radiologist's evidence of bone-age can only be corroborative of other "direct" evidence of age. We think that the learned magistrate was not in error in receiving the radiologist's evidence and acting upon it.

If we are right in this, there was evidence upon which the learned magistrate could reasonably find that the statements made by the appellant as to the ages of his sons could not possibly be, and were not in fact, true. We think that Mr. Khanna's second point fails.

Mr. Khanna correctly submitted that the prosecution must prove, not only that the appellant's statements as to the ages of his sons were false but that he knew them to be false at the time that he made them. Mr. Khanna pointed out that the appellant had not left Kenya since 1944: he could not, therefore, have seen Sayed Ahamed during the period February, 1944, to February 10, 1957, and could not have been present at his birth which took place outside the colony, whatever the date of that birth was. As regards Sayed Hassan, Mr. Khanna pointed out that there was no evidence of precisely when he was born or that the appellant was present or had means of learning of his birth: the appellant could not have seen him from February, 1944, till he entered the colony in 1957.

The learned magistrate was quite aware that the appellant left India in 1944, and did not return: he says so in his judgment. If the statement in the appellant's application is right, Sayed Hassan was then four years old. On the radiologist's evidence of Sayed Hassan's age accepted by the learned magistrate

Sayed Hassan was then, in fact, over seven years of age. We think it incredible that the appellant did not then know the difference between a seven-year old and a four-year-old son, or that he had so far forgotten his first-born son's age by 1957 as to believe that he was born in 1940. Neither is it readily credible that he would genuinely over-estimate the age of his second son by about five years.

The learned magistrate fully appreciated that it was necessary for it to be shown by the prosecution that the false statements were made "knowingly." He reviewed the circumstances, the evidence and the demeanour of the witnesses on this question of fact and reached the conclusion that they were so made. We see no reason to differ from that conclusion.

The appeal will be dismissed.

Appeal dismissed.

For the appellant:
DN Khanna
DN & RN Khanna, Nairobi

For the respondent:
JS Rumbold (Crown Counsel, Kenya)
The Attorney-General, Kenya

In the Matter of the Estate of the late Sudi Bin Kwambira of Likoni v In the Matter of an Application for Letters of Administration de bonis non by Khamis Bin Sudi

[1957] 1 EA 848 (SCK)

Division:	HM Supreme Court of Kenya at Mombasa
Date of judgment:	29 May 1957
Case Number:	40/1956; 7/1942
Before:	Mayers J
Sourced by:	LawAfrica

(In the Matter of Caveat by Mwinyi Faki Bin Sudi and four others.)

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[1] Costs – Review – Whether Remuneration of Advocates Order allows for attendance to take minutes of evidence – Meaning of "For all other necessary attendances" under the head "Attendance" in the Sixth Schedule of the Remuneration of Advocates Order, 1955 – (*K.*).

Editor's Summary

The applicant, an unsuccessful plaintiff in an administration suit, claimed allowances in respect of attending, examining and taking minutes of evidence of certain witnesses. The respondent objected to these items on the ground that no provision was made for them under the heading "Attendance" in the Sixth Schedule to the Remuneration of Advocates Order, 1955. The relative provisions of that schedule

are quoted in the judgment. Paragraphs (*a*) to (*i*) (both inclusive) of these provisions relate to attendances upon a judge or other officer discharging judicial or quasi judicial functions or at a court or a court's office, whereas para. (*j*) simply states "For all other necessary attendances" and then goes on to prescribe the fee per hour. It was argued in support of the objection that para. (*j*) must be construed eiusdem generis with the provisions of paras. (*a*) to (*i*) and this contention the taxing officer upheld. The applicant applied for a review of taxation and contended that the cardinal rule of construction is that a statute is to be construed in the sense of those who made it and that the rules committee who framed the Remuneration of Advocates Order must have had regard to the old provisions of the rules relating to attendances which were revoked by the Remuneration of Advocates Order and one of which rules read: "Examining and taking minutes of evidence of each witness." It was further argued for the applicant that the para. (*j*) ought not to be read eiusdem generis with the paras. (*a*) to (*i*) but regarded as a provision which applied to attendances of any nature for which special provisions had not been made. The respondents contended that if the words of a statute are free from ambiguity, resort must not be had to the former

state of the law; that the paras. (*a*) to (*i*) were free from ambiguity and therefore para. (*j*) must be construed eiusdem generis with paras. (*a*) to (*i*) and limited to attendances of the same nature as those specifically provided for.

Held–

(i) the contention that the framers of the Remuneration of Advocates Order, 1955, must have had regard to the old provisions failed because the fact that although some of the attendances provided for in the old provisions are again specifically provided for under the Remuneration of Advocates Order, and the fact that there is no specific provisions under that order for attendance to take minutes of evidence, is in itself some indication of an intention on the part of the framers of the order not to provide for such attendances.

(ii) paragraph (*j*) must be read eiusdem generis with paras. (*a*) to (*i*).

Application dismissed with costs.

Cases referred to in judgment:

(1) *Bank of England v. Vagliano Brothers*, [1891] A.C. 107.

Judgment

Mayers J: This is an application for a review of taxation in which, although the amount at stake is relatively trivial, a question of some importance to the legal profession in general is involved.

Items 16 to 23 (both inclusive) of the bill of costs filed on behalf of the unsuccessful plaintiff in an administration suit claimed allowances in respect of attending, examining and taking minutes of evidence of certain witnesses.

Upon the taxation objection was taken to these items on the ground that no provision was made for them under the heading “Attendance” in the Sixth Schedule to the Remuneration of Advocates Order, 1955. The relative provisions of that Schedule are as follows:

	(5) *Attendances*	*Ordinary Scale*		*Higher Scale*	
		Shs.	*Cts.*	*Shs.*	*Cts*
(*a*)	On any necessary application to or formal attendance on the registrar or deputy registrar	15.	00	21.	00
(*b*)	At offices of court or registrar on routine matters:				
	(i) Principal	10.	00		–
	(ii) Clerk	7.	50		–
(*c*)	To make or oppose any application or motion before the judge in court or before the judge or district registrar in chambers, not less than	30.	00	50.	00
(*d*)	At court on any matter on a date fixed by the court for hearing or for calling over lists when case cannot be taken:				

	(i)	if in court	21.	00		–	
	(ii)	if in chambers	15.	00		–	
(*e*)	At court for orders if defendant served and plaintiff proves his case, or defendant appears and admits the claim and judgment is given		50.	00		–	
(*f*)	At court on settlement of issues or for orders		21.	00	30.		00
(*g*)	At court conducting cause:						
	(i)	every whole day	315.	00	420.		00
	(ii)	half-day	157.	00	210.		00
	(iii)	one hour or less	84.	00	105.		00
(*h*)	To hear a reserved judgment or to obtain judgment on arbitrator's award or commissioner's report		21.	00	30.		00

(*i*)	With judge on a view, if in court hours, the same fees as for attendance in court conducting case; if out of court hours, per hour, including travelling time in addition to all expenses properly incurred in getting to and from the place viewed	84.	00	–
(*j*)	For all other necessary attendances ..... at the rate of Shs. 84/- per hour.			

The argument in support of this objection was that as paras. (*a*) to (*i*) (both inclusive) relate to attendances upon a judge or other officer discharging judicial or quasi judicial functions or at a court or a court's office, para. (*j*) (above set out) must be construed eiusdem generis with the provisions of paras. (*a*) to (*i*) (*supra*). This contention was upheld by the learned taxing officer.

Upon the application for review Mr. Gautama, who appears for the applicant, contended that the cardinal rule of construction is that a statute is to be construed in the sense of those who made it and that the rules committee who framed the Remuneration of Advocates Order must have had regard to the provisions (hereinafter referred to as the old provisions), of the rules relating to attendances which were revoked by the Remuneration of Advocates Order. Those provisions appear under the heading "Attendances" in the First Schedule to s. 3 of Part 14 of the Rule of Court contained in Vol. V of the Subsidiary Legislation of Kenya. One of the items which there appear (at p. 468 of Vol. V, Subsidiary Legislation) is in the following terms:

> "Examining and taking minutes of evidence of each witness." Clearly therefore these items could have been allowed under the old provisions.

Mr. Gautama further argued that para. (*j*) of the heading "Attendances" under the Remuneration of Advocates Order ought not to be read eiusdem generis with paras. (*a*) to (*i*) under that heading, but regarded as a provision which applied to attendances of any nature for which special provisions had not been made in paras. (*a*) to (*i*).

Mr. Inamdar, who appeared for the respondents, contended that on the authority of *Bank of England v. Vagliano Brothers* (1), [1891] A.C. 107, at p. 144 if the words of a statute are free from ambiguity the court may not in seeking to construe those words have regard to the former state of the law, and that taken by themselves paras. (*a*) to (*i*) under the heading "Attendances" in the appropriate schedule of the Remuneration of Advocates Order were free from ambiguity and therefore para. (*j*) must, in accordance with the rule that where specific words are followed by general words the latter must be construed eiusdem generis with the specific words, be construed as limited to attendances not specifically provided for in paras. (*a*) to (*i*) but of the same nature as those so provided for, that is to say, before a judge or officer discharging judicial or quasi-judicial functions or at a court or office of a court.

I do not think that the contention that the framers of the Remuneration of Advocates Order must have had regard to the old provisions assists Mr. Gautama, because the fact that although some of the attendances provided for in the old provisions are again specifically provided for under the Remuneration of Advocates Order, there is no specific provision under that order for attendance to take minutes of evidence is in itself some indication of an intention on the part of the framers of that order not to provide for such attendances. This course is merely an application of the well established principle expression unius exclusio alterius.

Upon examination of paras. (*a*) to (*i*) of the heading "Attendances" under the Remuneration of Advocates Order, it seems to me quite clear that those paragraphs are not exhaustive of all attendances which might be necessary in the ordinary course of litigious business upon a judge or other officer

discharging judicial or quasi-judicial business. Thus para. (*e*) provides for attendance at court for orders if a defendant

is served and the plaintiff proves his case or the defendant appears and admits a claim and judgment is given. There is, however, no express provision in paras. (*a*) to (*i*) providing for an attendance at court for orders if the defendant were not served or if the plaintiff did not prove his case. Hence para. (*j*) must be read eiusdem generis with paras. (*a*) to (*i*) and therefore this application will be dismissed with costs.

Application dismissed with costs.

For the applicant:
SR Gautama
SR Gautama, Mombasa

For the respondent:
IT Inamdar
Inamdar & Inamdar, Mombasa

Re the Highlands Commercial Union Limited
[1957] 1 EA 851 (HCT)

Division:	HM High Court for Tanganyika at Dar-Es-Salaam
Date of judgment:	26 November 1957
Case Number:	27/1954
Before:	Crawshaw J
Sourced by:	LawAfrica

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[1] Company – Winding-up – Alleged misfeasance or breach of trust or duty of directors – Limitation – Indian Limitation Act, art. 36, *art.* 115, *art.* 116 *and art.* 120 *– Companies Ordinance* (*Cap.* 212), *s.* 270 (*T.*).

Editor's Summary

An order for the winding-up of the company was made on April 10, 1954. On April 9, 1957, the liquidators applied to the court under s. 270 of the Companies Ordinance for an order requiring the respondents, who were at one time directors of the company, to repay certain sums of money which the liquidators alleged had been, between December, 1952, and October, 1953, wrongfully credited to the accounts of the respondents with the company. These sums were alleged to have been so credited to the directors as "bonus" at a time when there were no profits available for the same, and the liquidators' case was founded on misfeasance or breach of trust or duty on the part of the respondents. The respondents took a preliminary point that the application of the liquidators was time-barred since either art. 36 or art. 115 of the Indian Limitation Act governed the transactions. Art. 36 provides that the period of limitation is two years from the date of the transaction where the claim is for

"compensation for any malfeasance, misfeasance or non-feasance independent of contract and not herein specially provided for."

The period of limitation under art. 115 is three years from when the contract is broken where the claim is for

"compensation for breach of any contract, express or implied, not in writing registered and not herein specially provided for."

The liquidators relied on art. 120 which prescribes a six years' period of limitation from the time the cause of action accrues for a "suit for which no period of limitation is provided elsewhere . . ." or alternatively on art. 116 which prescribes the same period for a claim for "compensation for the breach of a contract registered."

Held–

(i) if it could be shown that the respondents had in fact been delinquent in the manner alleged, then–

(*a*) it was not independent of contract, and art. 36 would not apply, and

(*b*) in the circumstances of the case it was a breach of contract and art. 115 or art. 116 applied.

(ii) the word "registered" in art. 115 and art. 116 includes registration under the Companies Ordinance, and that when directors are registered as such they become subject to the contractual obligations between themselves and the company created by the registered articles of association.

(iii) the appropriate article of the Indian Limitation Act is therefore art. 116, and the application would be in time even if the terminus a quo is, to put it at its earliest, December, 1952; accordingly no finding was necessary whether, in applications under s. 270 of the Companies Ordinance, time begins to run at the time of the default or the date of the winding-up order or on the appointment of the liquidators.

Order accordingly.

Cases referred to:

(1) *Bank of Multan Limited v. Hukamchand* (1922), 71 I.C. 899.

(2) *In the matter of The Union Bank, Allahabad, Limited* (1925), 47 All. 669.

(3) *Bhim Singh v. Official Liquidator, Union Bank of India, Ltd*. (1927), 8 *Lah.* 167.

(4) *Govind Narayan Kakade v. Liquidator, Sholapur Bank Ltd.,* (1930), 54 Bom. 226.

(5) *In re City Equitable Insurance Co., Ltd*., [1925] 1 Ch. 407.

(6) *New Fleming Spinning & Weaving Co., Ltd. v. Kessowji Naik* (1885), 9 Bom. 373.

(7) *Shiam Lal Diwan v. Official Liquidator, U.P. Oil Mills Co.* (1933), 55 All. 912.

(8) *Jaunpur Sugar Factory* (*Official Liquidators*) *v. Bahari & Co.* (referred to in *Shiam Lal Diwan v. Official Liquidator, U.P. Oil Mills Co.*).

(9) *Karachi Bank Ltd. v. Shewaram & Others* (1933), A.I.R. Sind 103.

(10) *Rippon Press v. Nama Venkatarama Chetty* (1919), A.I.R. Mad. 646.

(11) *Rama Seshayya v. Sri Tripurasundari Cotton Press* (1926), A.I.R. Mad. 615.

(12) *Tricomdas Cooverji Bhoja v. Gopinagh Jiu Thakur* (1917), 44 Cal. 759.

Judgment

Crawshaw J: This is a preliminary point raised by the respondents on an application made under s. 270 of the Companies Ordinance by the liquidators of the applicant company. In that application it is alleged that the respondents, who were at one time directors of the company, wrongfully credited to their respective accounts with the company certain sums of money, by way of bonus, at a time when no profits were available therefor, and in so doing were guilty of misfeasance or breach of trust or duty, and it is asked that an order be made requiring these persons to pay the said sums to the liquidators.

The monies are alleged to have been credited some time between December, 1952, and October, 1953. The winding-up order was made on April 10, 1954, and this application was filed on April 9, 1957. The respondents submit that the application is subject to art. 36 of the Indian Limitation Act or, in the alternative, art. 115, and that under either the application is out of time. Mr. Murray, for the applicants, submits on the contrary that art. 120 is the appropriate one or, alternatively, art. 116. Both parties have

cited a number of cases in support of their submissions and referred to others which are against them. In fact, it is recognised by all parties that there is much conflicting Indian case law on the point.

Section 270 of the Companies Ordinance, which is worded the same as s. 276 of the English Companies Act, 1929, except that the latter does not contain sub-s. (3), gives (in the language of the marginal note) the court power to assess damages against delinquent directors. Sub-s. (3) reads as follows:

> "(3) The Indian Limitation Act, 1908, as applied to the territory, or any Ordinance that may be substituted therefor, shall apply to an application under this section as if such application were a suit."

The equivalent section of the Indian Companies Act is 235 and it contains a subsection to the same effect as our sub-s. (3).

The articles referred to read as follows:

> "36. For compensation for any malfeasance, misfeasance, or non-feasance independent of contract and not herein specially provided for."

The period is two years from when the malfeasance, etc., takes place:

> "115. For compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for."

The period is three years from when the contract is broken.

> "116. For compensation for the breach of a contract in writing registered."

The period is six years from when the period of limitation would begin to run against a suit brought on a similar contract not registered.

> "120. Suit for which no period of limitation is provided elsewhere in this schedule."

The period is six years from when the right to sue accrues.

Rustomji, on the Law of Limitation (5th Edn.) (1938), at p. 657, describes art. 36 as a general article applicable to torts (i.e. wrongs independent of contract), which are not provided for by other articles, and adds:

> "The *most* general art. 120 has, of course, no application to an action for damages for a tort, the case being covered by the specific art. 36."

This edition of Rustomji, as well as Chitaley (1932 Edn.) on the same subject, to which I have also been referred, mentions the conflict of judicial opinions in India, but neither expresses a view as to what the correct law is, or rather was, for s. 235 of the Indian Act was amended in 1936 to make the position clear by imposing a period of three years' limitation to run from the date of the first appointment of a liquidator or from the misfeasance, etc., whichever is the longer. A 1930 Supplement to the 4th edition of Rustomji, however, says,

> "It is submitted that the view of the Allahabad High Court (47 All. 669) is more in consonance with the intention of the legislature";

this view was that art. 120 applied to cases of this nature.

The respondents maintain that on the allegations in the points of claim no question of contract arises and that neither the winding-up order nor the appointment of liquidators creates any new rights in respect of which time would commence to run. It will be convenient, I think, to consider first which article applies as if it is art. 36 the application is clearly time-barred in any event, whilst if art. 120 or art. 116 is applicable then it is not time-barred even though the wrong entries were made as long ago as December, 1952. If 115 applies, then it will be necessary to consider when time began to run. I will therefore now consider the case law.

In *The Bank of Multan Limited v. Hukamchand* (1) (1922), 71 I.C. 899, it was held that art. 36 was applicable, the application being against an ex-director in respect of an alleged act of misfeasance or breach of trust. It was also held that time ran from the date of the act complained of.

In *In the Matter of Union Bank, Allahabad, Limited* (2) (1925), 47 All. 669, breach of trust by certain directors was alleged in respect of dividend paid out of capital; the company having made no profit. Walsh, J., said (at p. 685),

> "I am satisfied that although the directors honestly did what they did . . . the duty imposed upon them by the articles was such-giving due weight to everything which they have said – as to place the onus upon them of showing that they acted reasonably. I, therefore, hold that they are *prima facie* liable under s. 235, and that they have failed to discharge the onus which the law imposes upon them by s. 281 (similar to our s. 345)."

The court dissenting from the decision in the *Bank of Multan* case (1), he said,

> ". . . I am of opinion that this claim is not independent of contract. I am unable also to see how art. 115 or art. 116 can be made to apply to a claim under

> this section. To my mind these deal with claims for compensation made in respect of a specific breach of a specific contract made by one or more individuals with the person making the claim."

The learned judge then went on to say that he found difficulty in applying art. 115 to a claim by a liquidator, and that,

> "If any article is to be applied at all to the date from which the liability first came into existence by reason of the act of misfeasance, or breach of trust, which the person is proved to have committed, it seems to me that the only article which at all fits the case is art. 120."

He also expressed the view that, "the time begins to run from the date when the liquidation took place," whatever article is applied. Mukerji, J., agreed that art. 120 applied, but that if either art. 115 or art. 116 applied it would be art. 116, as

> "Registration with the Registrar of Companies is as much a registration within the art. 116 as registration under Act XVI of 1908"

(the Indian Registration Act, which is similar to our Registration of Documents Ordinance, Cap. 117). He gave it as his opinion that

> "the right to sue would accrue only after the appointment of the liquidator, if not after he discovers the misapplication of the money."

In the case of *Bhim Singh v. Official Liquidator, Union Bank of India Ltd*. (3) (1927), 8 Lah. 167, losses incurred by reason of neglect and default of an ex-director were alleged. The above cases were considered and the earlier Lahore case, *The Bank of Multan* (1) was followed. Fforde, J., without himself giving substantial reasons, expressed the opinion that "all applications under s. 235 are governed by art. 36"; the court, however, appeared to be mostly concerned with when time began to run.

In the case of *Govind Narayan Kakade v. Liquidator, Sholapur Bank Limited* (4) (1930), 54 Bomb. 226, breach of trust, negligence and misfeasance were alleged on the part of *inter alia*, certain directors. In long and very thorough judgments the three cases cited above were, *inter alia*, referred to, and it was held that art. 120 applied, as, in the words of Marten, C.J. (at p. 246),

> ". . . the present claim against the directors for misfeasance or breach of trust is clearly not 'independent of contract' and consequently art. 36 does not apply."

He observed that the relation between the bank and the directors was in part governed by the articles of association which constituted in part a contract between the company and its directors, and in coming to this conclusion he referred to the case of *In re The City Equitable Fire Insurance Company* (5), [1925] 1 Ch. 407, to which I have been referred by counsel, and to other English cases. As the contract was in part dehors the articles of association and in part within he came to the conclusion that neither art. 115 nor art. 116 could be applied, but then went on to say (1930), 54 Bom. (at p. 252):

> "Another answer to the argument on art. 115 is that the misfeasance to be established in the present case must be a breach of trust or misfeasance in the nature of breach of trust as pointed out by Lord Macnaghten in *Cavendish Bentinck v. Fenn*, and that art. 115 is not strictly applicable to a misfeasance of that character, nor is art. 116, as 'breach of contract' is not the sole liability sued on, nor is it the usual nomenclature for a breach of trust whether specific or quasi. But whichever answer is adopted, this leaves us only with art. 120. Accordingly in my judgment art. 120 is the appropriate article to adopt, and in this respect I arrive at the same conclusion as that in *In the matter of the Union Bank, Allahabad, Limited.* So, too, in *Kathaiwar Trading Company v. Virchand Dipchand*. Sir Charles Sargent's judgment treats art. 120 as the appropriate article for a suit against directors for misapplication of the company's fund in ultra vires transactions, though the actual decision was that the suit was barred by laches."

The learned judge expressed the view that otherwise the word "registered" in art. 115 and art. 116 included registration under the Indian Companies Act, 1913. He was also of the opinion, following the Lahore Court in this respect, that the right to sue accrued at the date of the breach of trust. Patkar, J., agreed with Marten, C.J., in general, but, after quoting from Scott, J., in *The New Fleming Spinning & Weaving Co., Ltd. v. Kessowji Naik* (6) (1885), 9 *Bom*. 373, said ((1930), 54 Bom. at p. 270),

> "The liability, therefore, of a director of a bank is of a person whose relations with the company were not independent of contract and who occupies the position of a quasi trustee. A suit, therefore, for any misfeasance, against a director would not fall under art. 36 nor would it fall under art. 115 or art. 116 for the suit is not for a specific breach of any specific contract with the person making the claim, i.e. the liquidator. The liability of the defendant is based not a breach of contract but on a breach of duty amounting to a breach of trust. It is not, therefore, necessary to go into the question whether the word 'registered' in art. 116 means registered according to the Indian Registration Act. I think, therefore, that the residuary art. 120 would apply."

I find it difficult to understand his observation as to the contract not being made with the liquidator, for the claim as I see it is by the company although the liquidator makes the application. The question seems to me to be whether there was a contract with the company for the purposes of art. 115 or art. 116.

In the case of *Shiam Lal Diwan v. The Official Liquidator, U.P. Oil Mills Company* (7) (1933), 55 All. 897, the unreported case of *Official Liquidators, Jaunpur Sugar Factory v. Bahari & Co*. (8) was referred to where, in a decision given in 1930, it was apparently said that:

> "In the case of directors, who are governed by the articles of association, it cannot be said that their misfeasance would be independent of their contractual liability,"

and it was further held that art. 115 and art. 116 would be inapplicable from the very nature of the case because the remedy is being sought not on account of any breach of a particular contract, as those articles contemplate, but on account of a breach of a general duty. It was held that art. 120 was the relevant one.

In *Karachi Bank Limited v. Shewaram and Others* (9) (1933), A.I.R. Sind. 103, a part of the headnote reads:

> "Misfeasance coming under proceedings under s. 235 is not independent of contract within the meaning of art. 36, Limitation Act, as the relation between the director and the company is a contractual one; and hence limitation for a suit under the section is not governed by art. 36."
>
> "An omission by directors to come to any conclusion whatsoever on an important piece of business duly proposed for the decision of the board is a breach of duty which continues as long as the decision is deferred and the starting point of limitation is governed by cl. (3), art. 115."

The learned judge accepted the applicant's submission that the contract implied an obligation on the part of the directors to

> "guide their conduct in accordance with the ordinary habits or rules of business by which prudent men are guided in the conduct of their own affairs."

Having held there was a breach of contract the learned judge saw no reason to look beyond art. 115 (or art. 116, which however he discarded as he was of opinion that the contract was not "registered" within the meaning of that article), art. 120 being residuary only.

In the *Shiam Lal* case (7), the latest in time to which my attention has been drawn, and which related to acts of misfeasance, misappropriation and negligence of duty against the managing agents of the company, the earlier cases were exhaustively reviewed (except that of *Karachi Bank Ltd*. (9) which had

been decided only a few

months earlier), and Sulaiman, C.J., approved the view of those courts, including the Bombay Court, which had held that art. 120 applied in such type of cases. He said, however, that he did not wish to imply that there could not be other cases in which a different article might apply in applications under s. 235. The other judges agreed as to the applicability of art. 120 although there was not unanimity as to the terminus a quo.

It has been argued on behalf of the respondents, as I have said, that the points of claim make no mention of any breach of contract but only misfeasance and breach of trust, and that the question of contract cannot now be raised. What the points of claim in para. 6 and para. 7 respectively do say, however, is that the respondents are in breach of duty to the company and that the said payments were made improperly and invalidly and constitute a misfeasance and breach of trust in relation to the company on the part of the respondents as directors. These allegations are almost identical with those considered by the Sind Court in the *Karachi Bank* case (9) where the same objection was raised. That court, however, held that the allegations were quite sufficient on which to argue the question of contract, and I respectfully agree. In other cited cases also the expressions “breach of trust” and “breach of duty” are used when considering whether the misfeasance was independent of contract or not.

As will be seen from the cases cited, the weight of authoritative opinion, especially in the later cases, is overwhelmingly that art. 36 does not apply to transactions of the nature of the ones in question. There is a substantial preponderance of opinion that art. 120 applies although, as has been said, the Sind Court in the *Karachi Bank* case (9) saw no reason to apply such an ultimate residuary article when art. 115 and art. 116 cover claims for compensation for breach of any contract expressed or implied. Apart from saying that art. 115 and art. 116 apply only to particular and specific breaches of contract, none of the decisions seem to have given any clear reason why the breaches then under consideration could not be so classed, except to say that they are breaches of trust or duty. These two articles are themselves residuary in their class, i.e. they apply to all actions ex contract not specially provided for otherwise, and they appear to me to be in very general terms. It seems to me, therefore, that if the transaction is not independent of contract it must be dependent on contract, and that one must see what that contract is. The contract in the instant case, as I see it, is either expressed in the articles of association (there is nothing to show it is otherwise expressed) or implied. Art. 27 contemplates remuneration of the directors. Art. 41 applies arts. 89 to 96 of Table “A” to the Companies Ordinance, art. 91 of which reads “No dividend shall be paid otherwise than out of profits.” Exactly what was the nature of the “bonus” which the respondents are alleged to have wrongly paid themselves I am not clear, but the points of claim refer to the articles of association which provided that directors’ remuneration shall be fixed from time to time by the company in general meeting. It is alleged that in fact no resolution authorising the payments was passed. If the liquidator is able to prove his points, it seems to me therefore that the payments were in breach of express conditions in the articles of association, whether the payments were in the nature of remuneration or dividends. If such is the case, it seems that the respondents, as directors, are in breach of contract. They are paid officers of the company, and in consideration therefore they are under an obligation to comply with the articles of association which govern their relationship with the company. I feel very hesitant in going against that body of opinion already cited which, as I apprehend it, might apply art. 120 to the circumstances of this case. I have considered whether the alleged “breach of duty” is in the nature of a quasi contract which might take it out of art. 115 or art. 116, but I think this is not so. It seems to me that if art. 120 is to be applied it would be on the basis that the contract which takes the matter out of art. 36 creates a relationship between the company and the directors not specific enough to bring a breach of duty by the latter within art. 115 or art. 116, but at least to create the directors

quasi-trustees. If this is so in the instant case, then I would hold that art. 120 applied and this application would appear to be in time. For the reasons I have given, however, I am of the opinion that art. 115 or art. 116 are applicable in the circumstances of this case. The claim is for repayment of monies

misapplied, and I do not think this is outside the meaning of the words therein "compensation for the breach of any contract." It is clear from the text to art. 115 and art. 116 in Chitaley and the cases cited therein that a wide interpretation is placed on the word "compensation" and that it can include sums certain as well as unliquidated damages.

The next question therefore is whether art. 115 or art. 116 is applicable, dependent on whether the contract can be said to have been registered for the purpose of art. 116. In *Ripon Press v. Nama Venkatarama Chetty* (10) (1919), A.I.R. Mad. 646, Wallis, C.J., referred to the definition of "registered" in the General Clauses Act, 1897, which reads,

> " 'Registered' used with reference to a document shall mean registered in British India under the law for the time being in force for the registration of documents,"

and went so far as to hold that the words therein "the law for the time being in force" did not mean the Indian Registration Act, 1908, alone, but included registration under the Companies Act which provides (as does the Tanganyika Ordinance) for the registration of the memoranda and the articles of association which are documents, and also registration under other special laws such as the Copyright Act. This view was followed by the Allahabad Court in the case of the *Union Bank of Allahabad* (2) and by the Bombay Court in the *Govind* case (4). In the latter case the court considered, but differed from, the court of Madras in the case of *Rama Seshayya v. Sri Tripurasundari Cotton Press* (11) (1926), A.I.R. Mad. 615, to which further reference will be made shortly. In the *Karachi Bank* case (9), however, the Sind court held that registration of articles of association was not registration within the meaning of art. 116, but it is to be observed that the basic ratio decidendi there appears to have been that the word "registered" was defined in the Indian General Clauses Act as referring to documents registered under the Registration Act, 1908. There is no definition of the word "registered" in our Interpretation and General Clauses Ordinance, (Cap. 1), although we have a Registration of Documents Ordinance, (Cap. 117), under s. 12 of which any document may be registered. In *Tricomdas Cooverji Bhoja v. Gopinagh Jiu Thakur* (12) (1917), 44 Cal. 759, the question came before the Privy Council whether a claim for rent under a registered lease came within art. 110 or art. 116. Art. 110 reads simply "for arrears of rent" and is therefore essentially applicable independent of registration. Lord Sumner, however, said as follows (at p. 767):

> "Both these Acts (i.e. the Acts of 1871 and 1877) draw, as the Act of 1859 had drawn, a broad distinction between unregistered and registered instruments much to the advantage of the latter. The question eventually arose whether a suit for rent on a registered contract in writing came under the longer or the shorter period. On the one hand, it has been contended that the provision as to rent is plain and unambiguous, and ought to be applied, and that in any case, 'compensation for the breach of a contract' points rather to a claim for unliquidated damages than to a claim for payment of a sum certain. On the other hand, it has been pointed out that 'compensation' is used in the Indian Contract Act in a very wide sense, and that the omission from art. 116 of the words, which occur in art. 115, 'and not herein specially provided for,' is critical. Art. 116 is such a special provision, and is not limited and therefore, especially in view of the distinction long established by these Acts in favour of registered instruments, it must prevail . . . their lordships accept the interpretation so often and so long put upon the Statute by the courts in India, and think that the decisions cannot be disturbed."

So far as rent under a registered lease is concerned, this decision appears to have been followed (see Chitaley, p. 1530). Coutts-Trotter, C.J., in the *Rama Seshayya* case (11), which overruled the earlier Madras case, in referring to Lord Sumner's views that favour should wherever possible be given to registered instruments, says, "that appears to be a method of approaching the case which is binding on

us," but later,

when considering whether registration of memoranda and articles of association could come within art. 116, he says

> "that seems to us to be putting an intolerable strain upon the word 'registered' and one which the draughtsman of this Statute could not possibly be thought to have contemplated."

It can, of course, be argued that there is a difference between registration under the Companies Ordinance and, because of the definition of "registered" in the Indian General Clauses Act, registration under the Registration Act, and it is I think this which Coutts-Trotter, C.J., had in mind. In view of the dictum of Lord Sumner and of the general and unrestricted (as applied to Tanganyika anyway) use of the word "registered" in art. 116 it seems to me that it would be wrong to say that registration under the Companies Ordinance cannot be registration for the purpose of that article, and I am inclined to side with the authorities who say that it can be – the more especially as we have no definition of the word "registered" as they have in India.

In coming to this last conclusion I have considered what the position would be if the contractual obligations between the company and the directors were not wholly contained in the articles of association, but part therein and part outside. As I have said, this was a matter which Marten, C.J., considered in the *Govind N. Kakade* case (4), and in the circumstances of which he held that the terms being partly within and partly without, art. 120 of the Limitation Act applied and not art. 115 or art. 116. In the circumstances of the instant case, however, the conditions in respect of which the respondents are alleged to be in breach are, as I have already observed, specifically contained in the articles of association, and for that reason alone I would say art. 116 applied. It is obvious, however, that not every single possible duty of a director can be contemplated, let alone be provided for in the articles of association, and in many cases reliance must be placed on the general obligations and duties which directors incur by the very nature of their appointment as directors. These, as has been recognised by the courts, may vary according to the nature and size of the business of which they, as directors, are in control but they will vary in degree only. It must be implicit, though by implication only, in all cases that their duty in general is to conduct the affairs of the company in an honest and reasonably business-like manner. This, as I understand it, is recognised by law, though what is dishonest and what is unreasonable or a breach of duty may in any particular case be a matter (as in the instant case) for determination by the court. That implied contracts can come within art. 116 is instanced by Chitaley. It seems to me that as soon as directors are registered as such they immediately become subject not only to the specific provisions of the articles of association but, by implication of law, to the duties and obligations which the very nature of their appointment carries with it, and that they must be read as part of the contract.

I hold therefore that art. 116 applies and that this application is in time, whether time begins to run from the alleged breach of duty or from the date of the winding-up or a later date.

I should like to associate myself with the views that Indian judges have expressed from time to time prior to the amendment to their s. 235 (3) in 1936, of the desirability of clarification of that sub-section. A similar amendment to s. 270 might perhaps be considered by our legal draughtsmen, and so do away with the uncertainty caused by so many conflicting opinions of the Indian courts which, although they do not bind this court, must in the absence (so far as I am aware) of our case law on these matters, be given due consideration.

Order accordingly.

For the liquidators:

WD Fraser Murray
Fraser Murray, Thornton & Co, Dar-es-Salaam

For the first and second respondents:
W Dharsee
Dharsee & McRoberts, Dar-es-Salaam

For the third respondent:
NR Sayani
Sayani & Co, Dar-es-Salaam

For the fourth respondent:
KA Master
KA Master, Dar-es-Salaam

R v Ivan Terence Lacey
[1957] 1 EA 859 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	8 March 1957
Case Number:	41/1957
Before:	Sir Kenneth O'Connor CJ and Forbes J
Sourced by:	LawAfrica

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[1] Arrest – Fugitive offender – Warrant issued in Uganda for person suspected of offence committed there – Suspect in Kenya – Warrant not produced in Kenya – Whether arrest can be effected – Fugitive Offenders Act, 1881, *s.* 13 *and s.* 16 *– Criminal Procedure Code, s.* 28 (*g*) (*K.*).

Editor's Summary

The Supreme Court called for and examined the record of this case at the request of the Crown. No order was sought against the accused Lacey but a ruling of the court was requested for future guidance. As there was no conviction and no order was asked for to the prejudice of Lacey who was already out of the jurisdiction of the court, the court proceeded to adjudicate in its revisionary jurisdiction without Lacey being present. The facts of the case were as follows. In December, 1956, Lacey who was in Mombasa, was suspected of having committed an offence in Uganda. On December 19, 1956, the Uganda police telephoned the Mombasa police saying that an authenticated warrant for Lacey's arrest had been issued in Uganda on the charge of obtaining money by false pretences and conspiracy, and asked for his arrest and return to Uganda. Lacey was accordingly arrested and taken before a resident magistrate at Mombasa. The magistrate was told by the police officers of the existence of a warrant in Uganda and that it would be sent to Mombasa and requested the magistrate to remand Lacey in custody for fourteen days

pending the arrival of an escort from Uganda. The magistrate refused the application and held that the provisions of s. 13 of the Fugitive Offenders Act, 1881, had not been complied with in that if there was an authenticated warrant in Uganda for the arrest of the accused then it should have been produced before a magistrate in Kenya for the necessary endorsement. The magistrate accordingly directed that Lacey be released. The following day Lacey was again arrested and taken before another magistrate when an application was made by the Crown for a provisional warrant under s. 16 of the Fugitive Offenders Act, 1881, the provisions of which are referred to in the judgment at page 860. The magistrate dismissing the application held that as there was no warrant before him duly authenticated as directed by the Fugitive Offenders Act, 1881, he could take no action regarding his return to any British possession in which any warrant may have been issued; that the procedure under s. 16 of the Act was inapplicable where the person concerned had in fact been apprehended and was before the court. At neither of the hearings was the attention of the magistrate drawn to s. 28 (*g*) of the Criminal Procedure Code which empowers any police officer to arrest, without an order from a magistrate and without a warrant,

> "any person whom he suspects upon reasonable grounds of having been concerned in any act committed at any place out of the colony which if committed in the colony would have been punishable as an offence, and for which he is under the . . . Fugitive Offenders Act, 1881, or otherwise liable to be apprehended and detained in the colony."

The Crown now relied upon this section and asked the court for its ruling.

Held–

(i) it is not necessary in Kenya (as it would be in England) for a police officer to have a properly authenticated and endorsed warrant, or a provisional warrant, in his possession before he can effect an arrest under the Fugitive Offenders Act, 1881; accordingly, the decision of the first magistrate was wrong;

(ii) the second magistrate was right in deciding that s. 16 of the Fugitive Offenders Act, 1881, did not apply where the fugitive had already been arrested; but

(iii) he was wrong in ordering the immediate release of the prisoner as the police had power to arrest him without a warrant under s. 28 (*g*) of the Criminal Procedure Code; the prisoner should have been dealt with under s. 32 and s. 35 of the Code and could have been remanded in custody or released on bail for a reasonable period pending the arrival of the warrant from Uganda and further proceedings under the Fugitive Offenders Act, 1881.

Judgment

Sir Kenneth O'Connor CJ: read the following judgment of the court: This matter comes before us for revision on a request by the Crown that this court should, under s. 361 of the Criminal Procedure Code, call for the record of the Mombasa Criminal Case No. 15140 of 1956, *R. v. Lacey*, and rule as to the correctness of the decisions in that case. Lacey is now out of the jurisdiction and the Crown does not seek any order against him which would be to his prejudice (see s. 363 (2) of the Criminal Procedure Code). The Crown simply desires to have a ruling of this court for future guidance.

As there has been no conviction, and no order is asked for to the prejudice of Lacey, we think that we are justified in proceeding to adjudicate in our revisionary jurisdiction without Lacey being represented, rather than requiring the Crown to proceed by way of case stated under s. 367 of the Criminal Procedure Code.

An outline of the facts is as follows:–

In December last, Lacey, who was at the time in Mombasa, was suspected of having committed an offence in Uganda. Correspondence had passed between the Uganda police and the Kenya police. On December 19, 1956, a telephone message was received by the Mombasa police from the police in Uganda stating that an authenticated warrant for Lacey's arrest had been issued in Uganda on charges of obtaining money by false pretences and conspiracy. The Uganda police asked for Lacey's arrest in Mombasa and return to Uganda.

Two Kenya police officers went to Lacey in Mombasa, told him of the warrant and the charges, arrested him and took him before a resident magistrate in Mombasa. The police officers told the learned resident magistrate of the existence of a warrant in Uganda and that it would be sent to Mombasa, and requested that Lacey be remanded in custody for fourteen days pending the arrival of an escort from Uganda.

This request was opposed by the advocate for Lacey on the ground that it was incumbent on the person arresting to produce the warrant of arrest and that there was no evidence that the police officers had any Kenya authority to effect the arrest. The learned magistrate dealt with the matter as follows:–

> "I am satisfied that the provisions of s. 13 of the Fugitive Offenders Act, 1881, have not been complied with. If there is an authenticated warrant in Uganda for the arrest of the accused then it should have been produced before a magistrate in Kenya for the necessary endorsement. This has not been done and so far as this court is aware there is no authority extant in Kenya at present authorizing the arrest of the accused and I direct that he be released forthwith."

On the following day Lacey was again arrested and taken before another resident magistrate (the first resident magistrate being away from Mombasa on that day) when an application was made by Crown Counsel for a provisional warrant under s. 16 of the Fugitive Offenders Act, 1881. That section empowers a magistrate in a British possession of a group to which Part II of the Fugitive Offenders Act,

1881, applies, before the endorsement, in pursuance of Part II of that Act, of a warrant for the apprehension of any person, to issue a provisional warrant for the apprehension of that person, on such information and under such circumstances as would, in the magistrate's opinion, justify the issue of a warrant if the offence of which such person is accused were an offence punishable by the law of the said possession and had been committed within his jurisdiction; and the section further provides that such a warrant may be backed and executed accordingly: provided that a person arrested under a

provisional warrant may be released if the original warrant is not produced and endorsed within the requisite time.

The learned resident magistrate dealt with the matter as follows:

> "Prisoner is before me having been arrested by a police officer without a warrant. There is no warrant before this court duly authenticated as directed by the Fugitive Offenders Act, 1881, for the apprehension of the prisoner and I therefore can take no action regarding his return to any British possession in which any warrant for his apprehension may have been issued. In my opinion procedure under s. 16 of Act which Crown are now seeking to invoke is inapplicable in case like present where the person has in fact been apprehended and is before court. I refuse to entertain the present application and direct that the prisoner be released forthwith."

It will be observed that from first to last the provisions of s. 28 (*g*) of the Criminal Procedure Code were not brought to the attention of either of the magistrates in Mombasa. The Crown now relies upon s. 28 (*g*) which reads:

> "28. Any police officer may, without an order from a magistrate and without a warrant, arrest–
>
> (*g*) any person whom he suspects upon reasonable grounds of having been concerned in any act committed at any place out of the colony which, if committed in the colony, would have been punishable as an offence, and for which he is under the . . . Fugitive Offenders Act, 1881, or otherwise, liable to be apprehended and detained in the colony."

It appears that, under this section, any police officer in Kenya has a statutory right to arrest without warrant any person whom he suspects upon reasonable grounds of having committed, at a place out of the colony, an act which, if committed in the colony, would be punishable as an offence and for which the person is liable, under the Fugitive Offenders Act, 1881, to be apprehended and detained in the colony. In our opinion, therefore, it is not necessary in Kenya (as it would be in England) for a police officer to have a properly authenticated and endorsed warrant, or a provisional warrant, in his possession before he can effect an arrest under the Fugitive Offenders Act, 1881. Accordingly we think that the decision of the first learned magistrate in Mombasa was wrong.

As to the decision of the second learned magistrate in Mombasa, we think that he was right in deciding that s. 16 of the Fugitive Offenders Act, 1881, did not apply where the fugitive had already been arrested, but that he was wrong in ordering the immediate release of the prisoner, as the police had power to arrest him without a warrant under s. 28 (*g*) of the Criminal Procedure Code. The prisoner should have been dealt with under s. 32 and s. 35 of the Criminal Procedure Code and could have been remanded in custody or released on bail for a reasonable period pending the arrival of the warrant from Uganda and further proceedings under the Fugitive Offenders Act, 1881.

For the applicant:
JP Webber (Crown Counsel, Kenya)

For the appellant:
The Attorney-General, Kenya

Hasham Kara v City Council of Nairobi

[1957] 1 EA 862 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	9 February 1957
Case Number:	373/1956
Before:	Sir Kenneth O'Connor CJ and Rudd J
Sourced by:	LawAfrica

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[1] Practice – Subordinate court – Prosecution by local authority under Public Health Ordinance, 1948 (*Cap.* 105) *– Non-compliance with demolition order – Discrepancy between order as pronounced and formal order drawn – Whether defect fatal – Public Health Ordinance,* 1948 (*Cap.* 105)*, s.* 121 *and s.* 124 (*K.*).

[2] Practice – Summary trials – Limitation of time in certain cases – Criminal Procedure Code s. 216 (*K.*).

Editor's Summary

The appellant was the owner of a plot in Nairobi on which were erected a main dwelling house and subsidiary outhouses which were used as servants' quarters. In answer to a notice relating to nuisance served on the appellant under the Public Health Ordinance, the appellant appeared before the resident magistrate, Nairobi, and stated he had no objection to the demolition of the buildings. The magistrate accordingly passed judgment that the tenant should vacate by September 30, 1954, and that demolition should commence by October 1, 1954, and should be completed by November 30, 1954. Notices were accordingly issued and served but by an oversight they required the vacation and demolition of the building situated on the plot instead of buildings situated on the plot. The tenants vacated the main building whereupon it was demolished, but the outhouses were not demolished until September 28, 1956. On January 19, 1956, the appellant wrote to the Medical Officer of Health informing him that

> "all the buildings with the exception of the boys' quarters were demolished in accordance with the order"

that these quarters were occupied by the Africans who were engaged to carry out the work and who were warned that their occupation of the quarters was illegal; and that as they had failed to take any notice of his instructions, the City Council should take up the matter of demolishing the outhouses. He also indicated that they could start demolition work at once. The City Council did not undertake the demolition of these outhouses and the occupants continued to pay the rent to the appellant after the date fixed for the completion of the demolition. On August 29, 1956, the appellant was charged in the resident magistrate's court with failing to comply with a court order to demolish a building, contra s. 124 (3), Public Health Ordinance, on a complaint or charge presented by the chief city inspector. This complaint or charge was not counter-signed by the magistrate who did not draw up or sign any other charge. At the hearing on October 22, 1956, the charge was read and every element of it explained to the appellant who pleaded not guilty. The outhouses were demolished on September 29, 1956, 667 days after the date specified in the order of July 30, 1954. The appellant was convicted and fined Shs. 1,000/50 which is equivalent to Shs. 1/50 for each day of default or three months' imprisonment with hard labour. Section 124 (3) of the Public Health Ordinance which creates the offence also provides that the defaulter shall be liable for the daily fine provided in s. 121, which section is quoted in extensor in the judgment at p. 864. The appellant appealed against the conviction and sentence and contended that under s. 126 of the

Criminal Procedure Code there was no jurisdiction to impose a fine at a daily rate in respect of any day on which there was a default in compliance with the demolition order which was more than one year after the date fixed for completion of the demolition – s. 216 of the Criminal Procedure Code quoted in full in the judgment at p. 864. It was further contended that the proceedings and conviction were bad because the magistrate had not drawn up or caused to be drawn up and signed a formal charge in accordance with s. 89 of the Criminal Procedure Code; that he had exercised all diligence to comply with the

demolition order and that this was a good defence to the charge and finally that the order for the demolition did not apply to the outhouses inasmuch as the formal order referred to the building on the plot instead of the buildings on the plot.

Held–

(i) there was no doubt that the offence was a continuing one and since it continued for more than thirteen days the maximum permissible fine exceeded Shs. 1,000/- and therefore s. 216 of the Criminal Procedure Code had no application to this case.

(ii) (*a*) the charge was irregular in that it was not signed by the magistrate but that the irregularity was curable under s. 90 (2) and (in this court, though not below) under s. 381 of the Criminal Procedure Code and

(*b*) there was no failure or miscarriage of justice consequent upon the failure of the magistrate to record an order that a charge be drawn up in terms of the complaint and to sign such a charge.

(iii) there was evidence to support the magistrate's finding that the appellant had not exercised all diligence to comply with the demolition order; and

(iv) the magistrate was correct in holding that the use of the word building instead of buildings in the formal order that was drawn up later was a mere slip: the appellant's letter clearly showed that he was not under any misapprehension as to the effect of the real order that was made against him.

Appeal dismissed.

Cases referred to:

(1) *Board of Trade v. Ernest,* [1920] 1 K.B. 816.

Judgment

Sir Kenneth O'Connor CJ: read the following judgment of the court. The appellant appeals from a conviction for failing to comply with an order to demolish a building contra s. 124 (3) of the Public Health Ordinance. He is the owner of a plot in Nairobi on which was erected a main dwelling house and subsidiary outhouses which were used as servant's quarters.

On July 24, 1954, the appellant was served with a notice to answer a complaint supported by an affidavit of the Deputy Medical Officer of Health, Nairobi, that a nuisance existed with respect to buildings being dwellings and comprising all the buildings on the said plot owned by him in that the said buildings being dwellings were so dilapidated that repairs or alterations of the same were not likely to remove the nuisance and make such dwellings fit for human habitation. The appellant was required by this notice to appear and show cause why an order for demolition of the said buildings should not be made pursuant to s. 124 (1) of the Public Health Ordinance.

On July 30, 1954, the appellant duly appeared before the resident magistrate, Nairobi, and stated that he had no objection to the demolition of the buildings and that there were two tenants whom he named in occupation of them. The magistrate then passed judgment that the tenants should vacate by September 30, 1954, and that demolition should commence by October 1, 1954, and should be completed, including

the removal of materials, by November 30, 1954, and that notice should issue to the appellant and to the tenants.

Notices issued accordingly and were duly served, but by an oversight they required the vacation and demolition of the building situated on the plot instead of the buildings situated on the plot.

The two tenants, named by the appellant, vacated the main building whereupon it was demolished, but the outhouses were not demolished until September 28, 1956.

On January 19, 1956, the appellant wrote a letter to the medical officer of health in which he referred to the order for demolition and stated as follows:

> "I wish to place it on record that all the buildings with the exception of the boys' quarters have been demolished in accordance with the order. The boys'

> quarters in question were occupied by the Africans who were engaged to carry out the work and these Africans are still unlawfully occupying the same. I have warned them against their said illegal occupation and as they have failed to take any notice of my instructions I request that the council should take up the matter of demolishing the structure in question in accordance with the provisions of law. I have no objection if the council starts demolition at once. The materials to be handed over to me after demolition."

The City Council did not undertake the demolition of the outhouses on the plot. The outhouses continued to be occupied as dwellings by Africans, some of whom were prostitutes, and the occupants paid rent to the appellant after the date fixed for the completion of the demolition.

The proceedings which resulted in the conviction which is appealed from were instituted on August 29, 1956, by a complaint or charge presented in the resident magistrate's court by the chief city inspector and certified by him to be true to the best of his knowledge and belief. It stated the offence complained of as follows:

> "Complaint or Charge:
>
> "Failure to comply with a court order to demolish a building owned by you, contra s. 124 (3) Public Health Ordinance, Cap. 130, Laws of Kenya.
>
> "In that on July 30, 1954, in Criminal Case No. M. 3132 of 1954, the resident magistrate, Nairobi, made an order under the provisions of s. 124 (1) Public Health Ordinance, Chapter 130, Laws of Kenya, copy of this order being served on you on August 10, 1954, ordering you as owner to commence the demolition of a building owned by you and situated at L.R. 209, Plot No. 1530, Forthall Road, Nairobi, on October 1, 1954, and to be completed including removal of materials by November 30, 1954, which order you failed to comply with."

This complaint or charge was not counter-signed by the magistrate who did not draw up or sign any other charge.

On October 22, 1956, the appellant appeared in the resident magistrate's court. The record of the proceedings shows that on that day the charge was read and every element of it explained to the appellant who pleaded not guilty. The outhouses were demolished on September 29, 1956, 667 days after the date fixed for the completion of demolition under the judgment or order of July 30, 1954. The appellant was convicted and fined Shs. 1,000/50 which is equivalent to Shs. 1/50 for each day of default or three months' imprisonment with hard labour.

Section 124 (3) of the Public Health Ordinance provides that if any person fails to comply with an order for demolition under s. 124 (1) he shall be guilty of an offence and shall be liable for the daily fine provided in s. 121. The said daily fine is provided in s. 121 (1) which reads as follows:

> "121. (1) Any person who fails to obey an order to comply with the requirements of the local authority or medical officer of health or otherwise to remove the nuisance shall, unless he satisfies the court that he has used all diligence to carry out such order, be liable to a fine not exceeding eighty shillings for every day during which the default continues; any person wilfully acting in contravention of a closing order issued under the last preceding section shall be liable to a fine not exceeding eighty shillings for every day during which the contravention continues."

It was argued on the appeal that under s. 126 of the Criminal Procedure Code there was no jurisdiction to impose a fine at a daily rate in respect of any day on which there was default in compliance with the demolition order which was more than one year after the date fixed by the demolition order for the completion of the demolition. This argument was based on a submission that the offence was a recurring offence and not a continuing offence. Section 216 of the Criminal Procedure Code provides as follows:

"216. Except where a longer time is specially allowed by law, no offence, the maximum punishment for which does not exceed imprisonment for six months

> and/or a fine of Shs. 1,000/-, shall be triable by a subordinate court, unless the charge or complaint to it is laid within twelve months from the time when the matter of such charge or complaint arose."

In *Board of Trade v. Ernest* (1), [1920] 1 K.B. 816 at p. 823 Avory, J., said:

> "The ordinary way to treat an offence as a continuing offence is to provide a penalty for each day during which the offence continues."

That is precisely what was enacted in s. 121 (1) of the Public Health Ordinance.

We have no doubt but that the offence was a continuing one and since it continued for more than thirteen days the maximum permissible fine exceeded Shs. 1,000/- and therefore s. 216 of the Criminal Procedure Code had no application to this case.

It was further contended that the proceedings and conviction were bad because the magistrate had not drawn up or caused to be drawn up and signed a formal charge in accordance with s. 89 of the Criminal Procedure Code.

The record shows that in fact the appellant was charged and that the charge was explained to him and he pleaded to it. We have no doubt but that the magistrate treated the complaint as the charge in the case. In our opinion this was not a case in which there was no charge. We are satisfied that the correct view to take is that the charge was irregular in that it was not signed by the magistrate but that the irregularity is curable under s. 90 (2) and (in this court, though not below) under s. 381 of the Criminal Procedure Code. The complaint is in a form which is perfectly appropriate to a charge. It does not contain any unnecessary extraneous matter which might have embarrassed the defence nor is there any element of uncertainty or duplicity in it. There was no failure or miscarriage of justice consequent upon the failure of the magistrate to record an order that a charge be drawn up in terms of the complaint and to sign such a charge. In our opinion the appeal should not be allowed on this ground.

We would, however, point out for the guidance of magistrates trying offences under the Public Health Ordinance that the procedure prescribed by s. 89 of the Criminal Procedure Code should always be followed scrupulously and that failure to do this may result in the proceedings being set aside, and that such a result would certainly follow if any prejudcie had thereby been caused to the defence or if there was uncertainty or duplicity as to the matters complained of; but that was not so in this case.

It was further argued that the appellant had exercised all diligence to comply with the order of July 30, 1954, and that this was a good defence to this charge. The point was raised in the lower court and the magistrate directed himself on it as follows:

> "It is next suggested that if the defendant can satisfy the court that he has exercised all diligence then he has an answer to the charge under s. 121. I do not see that this is so. Defendant is charged under s. 124 (3) which applies the penalty enacted in s. 121 but nothing else. It says nothing about the defences enacted in s. 121. I think any diligence the defendant used can only go towards mitigation of the penalty and one could easily imagine instances in which the diligence might completely neutralise the penalty."

In our opinion, that direction was correct in law and we agree with it. In any event, the magistrate found that the appellant had not exercised all diligence to comply with the order of July 30, 1954, and we consider that there was evidence to support that finding.

Finally it was argued that the order for demolition did not apply to the outhouses in as much as the formal order that was served on the appellant referred to the building on the plot instead of the buildings on the plot. The original notice which was served on the appellant on July 24, 1954, clearly alleged that

the nuisance existed with respect to all the buildings being dwellings and comprised all the buildings on the plot. The appellant appeared but did not contest the truth of that allegation and consented to the demolition order that was sought. He clearly consented to a demolition order applying to all the buildings on the plot and we are satisfied that it was such an order that was pronounced in court on July 30, 1954.

The magistrate was, therefore, correct in holding that the use of the word building instead of buildings in the formal order that was drawn up later was a mere slip. The appellant's letter of January 11, 1956, clearly shows that the appellant was not under any misapprehension as to the effect of the real order that was made in the resident magistrate's court on July 30, 1954.

We dismiss the appeal.

Appeal dismissed.

For the appellant:
DJ Ganatra
DJ Ganatra, Nairobi

For the respondent:
KB Keith
Kaplan & Stratton, Nairobi

Ratanji Mulji v R
[1957] 1 EA 866 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	27 August 1957
Case Number:	205/1957
Before:	Rudd Ag CJ and Connell J
Sourced by:	LawAfrica

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[1] Criminal law – Corruption – Offer of bribe to arresting police constable – Prevention of Corruption Ordinance, 1956, *s.* 3 (3) (*K.*).

[2] Arrest – Police officer exceeding power of arrest in good faith – Effect of Municipalities Ordinance (*Cap.* 136), *s.* 125 (*K.*).

Editor's Summary

The appellant was convicted by the resident magistrate at Nakuru of being in an African location between 7 p.m. and 6 a.m. without permission contrary to By-law 331 of the Nakuru Municipality By-laws and also of corruption contrary to s. 3 (2) of the Prevention of Corruption Ordinance, 1956. He was sentenced to a fine on one count and imprisonment for the other offence of corruption. The appellant had been found about 11.10 p.m. in the Somali Location at Nakuru and failed to give a satisfactory account of his presence there. He was taken into custody by an inspector of police accompanied by a police constable and a police driver, and it was alleged that whilst on the way to the police station in a

999 car the appellant offered the inspector Shs. 20/- saying “Take this money and let me go” and when the inspector of police declined the appellant said “You better take this money, I do not want to go to the police station.” He was later released at the police station. On appeal against his conviction and sentence for corruption it was argued that the arrest was unlawful and that if the arrest was unlawful it would not be an offence under the Prevention of Corruption Ordinance if the appellant did offer money as alleged. Section 125 of the Municipalities Ordinance sets out when a police officer or an officer of the council or board may arrest a person without warrant and the proviso to this section reads:

> “Provided that no person shall be arrested or detained without warrant unless reasonable grounds exist for believing that, except by the arrest of the person offending, he could be found or made answerable to justice without delay, trouble or expense.”

The appellant apparently had not given his name and other particulars to the police officer, and apparently was not asked for these particulars.

Held – there was nothing to show that the appellant had given his name and other particulars to the inspector of police, therefore it could not be said that the inspector exceeded his powers when he decided to take the appellant to the police station.

Per curiam – . . . "We are by no means convinced that if a police officer happens in good faith to exceed his power of arrest in a particular case that the person arrested would not be guilty of an offence under the sub-section if he offered a bribe to the police officer to secure his release . . ."

Appeal against conviction dismissed. Appeal against sentence allowed and sentence varied.

Cases referred to in judgment:

(1) *Christie v. Leachinsky*, [1947] 1 All E.R. 567.

Judgment

Rudd Ag CJ: read the following judgment of the court: The appellant was convicted in the court of the resident magistrate, Nakuru, of being in an African location between 7 p.m. and 6 a.m. without permission contrary to By-law 331 of the Nakuru Municipality By-laws on the first count and of corruption contrary to s. 3, sub-s. (2) of the Prevention of Corruption Ordinance, 1956, on the second count. He was sentenced to a fine of Shs. 100/- on the first count and to three months' imprisonment with hard labour on the second count. No appeal has been filed in relation to the first count; but the appellant has appealed against conviction and sentence in respect of the second count.

The facts are that the appellant was found about 11.10 p.m. in the Somali Location at Nakuru and failed to give a satisfactory account of his presence there. He was taken into custody by an inspector of police accompanied by a police constable and a police driver and taken to the police station in a 999 car. On the way to the police station the appellant offered the inspector Shs. 20/- saying "Take this money and let me go," and when the inspector told him that he did not want anything from the appellant the appellant said "You better take this money. I do not want to go to the police station."

It is clear that the appellant wished to be released from arrest, but the learned magistrate found that the bribe was also offered with intent to avoid the matter being reported at the police station; for he said that there would have been no difficulty in imposing the conviction if the appellant had been charged with bribery to avoid being reported to the duty officer and this finding was not attacked by Mr. Shaw who argued the appeal on behalf of the appellant; but the appellant was charged with trying to induce the inspector to release him from arrest and Mr. Shaw argued that the arrest was unlawful and that if the arrest was unlawful it would not have been an offence under the Prevention of Corruption Ordinance if the appellant offered money to the inspector to secure his release from unlawful arrest; accordingly he argued that the offence as charged had not been established. Sub.-s. 3 (2) of the Prevention of Corruption Ordinance is in very wide terms and reads as follows:

> "Any person who shall by himself, or by or in conjunction with any other person, corruptly give, promise or offer any gift, loan, fee, reward, consideration, or advantage whatever, to any person, as an inducement to, or reward for, or otherwise on account of, any member, officer, or servant of any public body doing or forbearing to do, or having done or forborne to do, anything in respect of any matter or transaction whatsoever, actual or proposed or likely to take place, in which the said public body is concerned, shall be guilty of a felony."

We are by no means convinced that if a police officer happens in good faith to exceed his power of arrest in a particular case that the person arrested would not be guilty of an offence under the sub-section if he offered a bribe to the police officer to secure his release, although all the circumstances of the case would

have to be taken into consideration in the assessment of sentence; but in the instant appeal we do not consider that the appellant's apprehension for the purpose of taking him to the police station was unlawful. The power of arrest in such cases is governed by s. 125 of the Municipalities Ordinance (Cap. 136) which reads as follows:

> "Any police officer may arrest without warrant any person who commits any offence against this Ordinance or any by-law in force within any municipality, and any officer of the council or board, as the case may be, in uniform or wearing a visible badge of office and authorised thereto in writing by the council or board, may arrest without warrant any person who in his presence commits any such offence and may detain such person until he can be delivered into the custody of a police officer to be dealt with according to law:
>
> > "Provided that no person shall be arrested or detained without warrant unless reasonable grounds exist for believing that, except by the arrest of the person offending, he could not be found or made answerable to justice without delay, trouble or expense."

In our opinion it has certainly not been established that the proviso of that section applied in the present case. The learned magistrate expressed the opinion that the police inspector did not have the proviso in mind, but our perusal of the record does not establish any strong ground for that opinion. It is true that the inspector does not appear to have asked the appellant for particulars of his name and address, but the appellant was not previously known to the inspector.

It is by no means certain that the inspector would have accepted the correctness of such particulars if they had been given by a person whom he did not know and we do not think that it would have been improper for the inspector to require such a person to go with him to the police station so that his identity could be satisfactorily established, and if necessary, checked. That appears to be what actually happened. The appellant was released from arrest at the police station.

The inspector asked the appellant to give an explanation for his presence in the location at that hour of the night and the appellant told him that he had lost his way. The inspector did not accept that explanation and it was rejected also by the lower court at the trial. There is nothing to show that the appellant gave his name and other particulars to the inspector. In the circumstances we consider that it cannot be said that the inspector exceeded his powers when he decided to take the appellant to the police station.

Mr. Shaw also argued on the basis of *Christie v. Leachinsky* (1), [1947] 1 All E.R. 567, that the appellant's arrest was unlawful in as much as he was not told the reason for his arrest; but this contention was abandoned when it was pointed out by the court that the inspector said in evidence that he told the appellant that he was arresting him for being in a native location between 7 p.m. and 6 a.m.

We have no doubt that upon the evidence the appellant was rightly convicted on the second count.

As regards sentence we do not subscribe to the view that a person should automatically be sent to gaol for such an offence. Although we do not wish to say anything to minimise the seriousness of the offence of corruption which always requires a deterrent punishment we think that the sentence in any particular case must depend on the circumstances and in the instant appeal we consider that the ends of justice would be satisfied by a sentence of a fine of Shs. 500/-. Accordingly we alter the sentence to a fine of Shs. 500/-.

Appeal against conviction dismissed. Appeal against sentence allowed and sentence varied.

For the appellant:
OJ Shaw
Carson & Gentles & Co, Nakuru

For the respondent:

DD Charters (Crown Counsel, Kenya)
The Attorney-General, Kenya

Elfie Heinrichsdorff-Gies and another v Henry George Dodd and another

[1957] 1 EA 869 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	9 September 1957
Case Number:	80/1956
Before:	Sir Newnham Worley P, Sir Ronald Sinclair V-P and Bacon JA
Sourced by:	LawAfrica

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[1] Trust and trustee – Breach of trust – Loan of trust funds without independent valuation of security – Subsequent valuation showing value of security less than amount lent – Trustee Act, 1893*, s.* 8 (1) *and s.* 9 (1).

Editor's Summary

The appellants were the beneficiaries under a settlement made in 1951. The trust deed appointed two trustees of whom one was the first respondent. The second original trustee retired in 1952 and the second respondent was in 1953 appointed to take his place. The appellants sued the respondents, both of whom were practising advocates, alleging breaches of trust in 1951 and 1952, the second respondent being joined mainly as an accounting party. The breaches of trust alleged included the retention uninvested of trust funds and the investment on loan of Shs. 200,000/- in an unauthorised security, namely, a right of occupancy, or without having an independent valuation made of the security. The trust deed contained clauses that the trustees should be entitled to invest or hold the trust funds as liquid capital, that one of the authorised investments should be leasehold property having not less than sixty years to run and that no trustee should be

> "liable for any loss not attributable to his own dishonesty or to the wilful commission or omission by him of an act known by him to be a breach of trust . . ."

The trial judge dismissed the action on the ground that the plaint did not disclose a cause of action since the trust deed itself authorised the trustee to act as alleged in the plaint. On appeal it was contended for the appellants that it had been alleged in the plaint that "no, or no proper, independent valuation of the property was made" when the Shs. 200,000/- was lent thereon; that the plaint also alleged that a valuation made in 1955 valued the security at Shs. 149,000/-, and, accordingly the plaint had sufficiently pleaded a *prima facie* breach of trust having regard to the provision in s. 8 (1) of the Trustee Act, 1893, that not more than two-thirds of the value of the property should be lent.

Held–

(i) the trustees were expressly authorised to retain the trust funds as liquid capital and since no allegation was made in the plaint that the first respondent exercised his power of retention

improperly, no inference of neglect or default by him could be drawn;

(ii) since the appellants had pleaded that there was no independent valuation and that the loan made exceeded the value of the property, those facts coupled with the presumption that the first respondent knew the law, established a *prima facie* breach of trust.

Per **Sir Newnham Worley P:**

> "If the appellants intended in this case to ask another judge of the High Court to distinguish or differ from"

the decision in *Director of Lands and Mines v. Sohan Singh* infra

> "the issue should have been specifically and clearly raised in the plaint so that it could be pleaded to in the defence."

Appeal allowed. Cases remitted to the High Court for determination.

Cases referred to:

(1) *Cann v. Cann* (1884), 51 L.T. 770.

(2) *Director of Lands and Mines v. Sohan Singh* (1952), 1 T.L.R. (R.) 631.

September 9. The following judgments were read:

Judgment

Sir Ronald Sinclair V-P: This is an appeal from a decree of the High Court of Tanganyika dismissing the plaintiff-appellants' suit on the ground that the plaint does not disclose a cause of action.

The appellants' case as disclosed in the plaint is as follows. The appellants are German nationals resident in Germany, the first appellant being the mother of the second appellant who is a minor. The respondents were at the time when the plaint was filed the trustees of a settlement made by a deed dated October 16, 1951, between one Jean Frederick Tame, the settlor, and the first respondent and Mahadeo Purshotam Chitale, the trustees. A copy of the trust deed is annexed to the plaint and forms part of it. In 1952 Mahadeo Purshotam Chitale retired as a trustee of the settlement and in October, 1953 the second respondent was appointed in his stead. The respondents are advocates practising in Tanganyika.

The trust deed recites that an action in which the first appellant (referred to as "the mother") was the plaintiff and the settlor was the defendant, was compromised on the terms that the settlor should pay to the trustees the sum of Shs. 250,000/- to be held as to Shs. 150,000/- for the benefit of the mother and as to Shs. 100,000/- for the benefit of her daughter, the second appellant, on the terms of the trust deed. Clause 1 of the trust deed reads:

> "1. The trustees (which expression shall include the trustee or trustees for the time being hereof) shall hold the said capital sum of Shillings Two hundred and fifty thousand (Shs. 250,000/-) and shall divide the said sum into two funds, the first consisting of the capital of Shillings one hundred and fifty thousand (Shs. 150,000/-) which, together with any stocks, shares and securities representing the same shall be called the Mother's Trust Fund, and the second shall consist of the capital sum of Shillings One hundred thousand (Shs. 100,000/-) which together with any stocks, shares and securities representing the same shall be called the Daughter's Trust Fund upon trust that they shall either retain the same as liquid capital or at the discretion of the Trustees invest the same in any investments hereby authorised and may from time to time at the like discretion transpose such investments into other hereby authorised."

By cl. 2 the trustees are directed to hold the mother's fund in trust for her absolutely and by cl. 3 they are directed to hold the daughter's fund and the income thereof in trust for her absolutely, but on protective trusts for her benefit during her minority with powers to apply the whole or such part as they think fit of the income for or towards her maintenance education or benefit with power to pay the same to her parent or guardian or guardians without seeing to the application thereof. Clause 4 authorises the trustees to invest in, *inter alia*,

> "any securities for the time being authorised by law for the investment of trust money or on legal mortgage or charge of freehold or leasehold property in the United Kingdom or Tanganyika such leasehold property having not less than sixty (60) years to run at the time of such investment being made . . ."

Clause 5 is as follows:

"5. No trustee purporting to act in the execution of the trusts and powers hereof shall be liable for any loss not attributable to his own dishonesty or to the wilful commission or omission by him of an act known by him to be a breach of trust and in particular shall not be bound to take any proceedings against a

co-trustee for any breach or alleged breach of trust committed by such co-trustee."

The phraseology of that clause is nonsensical. It should read:

"the wilful commission of an act, or a wilful omission, known by him to be a breach of trust"

I construe the clause as having that meaning.

In para. 6 of the plaint it is averred that on March 8, 1951, the first respondent as trustee of the settlement received the sum of Shs. 250,000/- for the benefit of the settlement and that he

"invested and dealt with moneys subject to the trust of the settlement in breach of trust as follows:

"(*a*) He did retain the said moneys without investing them from March 8, 1951, until November 13, 1951, when he remitted Shs. 17,478/- (Shillings Seventeen thousand four hundred and seventy eight) thereof to the first plaintiff.

"(*b*) He did continue to retain the balance of the said moneys from March 13, 1951, until February 6, 1952, or thereabouts without investing the same.

"(*c*) He did on February 6, 1952, or thereabouts deposit Shs. 20,000/- (Shillings Twenty thousand) thereof upon a current banking account and Shs. 212,500/- (Shillings two hundred twelve thousand and five hundred) upon a bank deposit account at ¾% per annum with the Standard Bank of South Africa Limited, Dar-es-Salaam.

"(*d*) On October 30, 1952, or thereabouts the first defendant invested a principal sum of Shs. 200,000/- (Shillings two hundred thousand) upon the security of the right of occupancy of the land and buildings comprised in Title Nos. 6524, 6982 and 6989. No, or no proper, independent valuation of the property was made at the time of the said investment and the amount of the said loan exceeded the value of the said security. The said security was not a proper investment for the sum of Shs. 200,000/- (Shillings two hundred thousand) or any other sum at all. On May 2,1955, the said property was valued by Messrs. Cassam Satchu and Company Limited of Dar-es-Salaam at a total of Shs. 149,000/- (Shillings one hundred and forty nine thousand).

"(*e*) The first plaintiff has received from the defendants or one or either of them the following further sums from the settlement:

On June 24, 1952	Sl	4,000/-
On December 25, 1952		6,000/-
On November 21, 1953		9,822/37
On January 10, 1954		5,000/-
a total of and no more	Sl	24,822/37"

Then follows the prayer. I do not think it necessary to refer to the relief claimed since the cause of action is admittedly founded on the breaches of trust alleged in para. 6. The acts constituting the alleged breaches of trust are specified in sub-paras. (*a*), (*b*), (*c*), (*d*) and (*e*) of that paragraph and the question for decision on this appeal is whether those acts, or any of them, could constitute a breach or breaches of trust for which the first respondent would be *prima facie* liable. In deciding that question it is the law in

force in England on January 1, 1922, relating to trusts and trustees which must be applied: s. 2 of the Land (Law of Property and Conveyancing) Ordinance (Cap. 114.). The learned trial judge held that the trust deed itself authorised the trustee to act in the manner complained of in the plaint.

Mr. Salter conceded that the acts specified in sub-paras. (*a*) and (*e*) of para. 6 do not in either case amount to a breach of trust. That is clearly so and I do not intend to make any further reference to them.

With regard to the allegations in sub-paras. (*b*) and (*c*), it was submitted that the retention by the first respondent of the principal trust moneys uninvested for such

long periods was a breach of his duty as a trustee. I am unable to accept that submission. Where trustees are directed to invest the trust fund, any unreasonable delay in so doing is a breach of their duty: *Cann v. Cann* (1) (1884), 51 L.T. 770. But in the instant case the trustees were expressly authorised by cl. 1 of the trust deed to retain the two trust funds as liquid capital. Such a power was no doubt considered necessary in the particular circumstances of this trust where the beneficiaries are German nationals living in Germany and the first appellant, being entitled to her portion of the fund absolutely, might at any time call on the trustees to pay it to her. As the trustees were expressly empowered to retain the trust funds as liquid capital, I think they would be guilty of a breach of trust only if they exercised that power improperly. But there is no allegation in the plaint that the first respondent exercised the power improperly and no facts have been pleaded from which improper exercise of the power could be inferred. In the circumstances of this case I do not think that any inference of neglect or default on the part of the first respondent can be drawn merely from the length of time that the funds remained uninvested.

As to sub-para. (*d*), it was contended that a breach of trust is pleaded in three alternative ways:

(1) that a right of occupancy was not an authorised security for the investment of the trust funds in that the investment clause of the trust deed does not authorise investments on the security of a right of occupancy which, it was said, is not leasehold;

(2) in the alternative that the property was not an authorised investment for the sum of Shs. 200,000/- advanced;

(3) in the further alternative that, if it was an authorised investment for the sum advanced, the first respondent acted imprudently in advancing Shs. 200,000/-or any sum on the security of this particular property.

I shall deal seriatim with these alternatives.

In my view sub-para. (*d*) does not raise any question as to a right of occupancy being an unauthorised security. It was argued that the words

> "The said security was not a proper investment for the sum of Shs. 200,000/- (Shillings two hundred thousand) or any other sum at all"

must be read as meaning that the property was an unauthorised security; but when the sub-paragraph is read as a whole I cannot construe those words as alleging that the security itself was unauthorised. This argument appears to have been merely an afterthought. It was never advanced before the High Court and it is obvious from the defence filed by the first respondent that he did not think there was any allegation that the property was not a form of security authorised by the trust deed. It was unjust to lead him to think that the investment was being challenged only on the ground that an unauthorised amount had been lent on the security of the property and then suddenly to face him with a suggestion that the security itself was being challenged as unauthorised.

Turning to the second of the breaches of trust which it was contended is pleaded in sub-para. (*d*), namely that the property was not an authorised investment for the sum of Shs. 200,000/-, sub-s. (1) of s. 8 and sub-s. (1) of s. 9 of the Trustee Act, 1893, on which the appellants rely read:

> "8 (1) A trustee lending money on the security of any property on which he can lawfully lend shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, provided that it appears to the court that in making the loan the trustee was acting upon a report as to the value of the property made by a person whom he reasonably believed to be an able practical surveyor or valuer instructed and employed independently of any owner of the property whether such surveyor or valuer carried on business in the

locality where the property is situate or elsewhere, and that the amount of the loan does not exceed two equal third parts of the value of the property as stated in the report, and

that the loan was made under the advice of the surveyor or valuer expressed in the report.

"9 (1) Where a trustee improperly advances trust money on a mortgage security which would at the time of the investment be a proper investment in all respects for a smaller sum than is actually advanced thereon the security shall be deemed an authorised investment for the smaller sum, and the trustee shall only be liable to make good the sum advanced in excess thereof with interest."

From those provisions, it was argued, it follows that, where the report of an independent valuer is not obtained, it is, at least *prima facie*, a breach of trust to lend more than two-thirds of the actual value of the property at the time when the investment is made. Accordingly, since it was averred in the plaint that

"no, or no proper, independent valuation of the property was made at the time of the said investment and the amount of the said loan exceeded the value of the said security"

a breach of trust was sufficiently pleaded.

For the respondents it was contended that in view of the provisions of cl. 5 of the trust deed no action could lie against the first respondent unless the trust suffered a loss which was

"attributable to his own dishonesty or to the wilful commission or omission by him of an act known by him to be a breach of trust."

In order to show a cause of action, therefore, it was argued, it was necessary to allege in the plaint that the first respondent had acted dishonestly or had been guilty of an act or omission known by him to be a breach of trust as a result of which the trust had suffered a loss; that had not been done.

A settlor has full power to abridge the ordinary duties of trustees, and a special indemnity clause may be so worded as to exempt trustees from responsibility in respect of acts which would otherwise be breaches of trust: see Lewin on Trusts, (15th Edn.) p. 201 and the authorities there cited. Generally, the extent of the liability incurred by a trustee who is responsible for a breach of trust is measured by the extent of the loss or depreciation which his act or omission has caused to the trust estate (33 Halsbury's Laws, (2nd Edn.) p. 309). In the present case the settlor has expressly exempted the trustees from liability for any loss not attributable to their own dishonesty or to the wilful commission of an act or a wilful omission known by them to be a breach of trust. I think, therefore, that in order to show that the appellants were entitled to relief, it was necessary to plead facts which, if proved, would establish that the first respondent acted either dishonestly or knowingly in breach of his duty.

But it is not necessary to plead either (i) law or (ii) the presumption that the defendant knew the law. The appellants have pleaded these facts: (*a*) there was no independent valuation at the time of the investment, and (*b*) the amount of the loan exceeded the value of the security. If those two facts were correct, then, coupled with the presumption that the first respondent knew the law, *prima facie* he committed a breach of trust by knowingly investing in an unauthorised manner as shown by s. 8 (1) and s. 9 (1) of the Trustee Act, 1893. In my view, therefore, a breach of trust for which the first respondent could be liable was sufficiently pleaded. It is unnecessary to consider the other alternative breach of trust which it was said was pleaded in sub-para. (*d*).

As the relief claimed includes an account, the second respondent was properly joined as an accounting party.

I would therefore allow the appeal, set aside the decree of the High Court and order that the suit be proceeded with. I think the costs of the appeal should in all the circumstances follow the event of the trial.

I would add that nothing I have said should be taken as limiting the right of either party to apply at any stage for leave to amend the pleadings or the power of the High Court to allow amendments.

Sir Newnham Worley P: I have had the advantage of reading the judgment prepared by the learned vice-president and agree with it.

I only wish to add a few words on the contention, put forward for the first time before us, that para. 6 (*d*) of the plaint put in issue the question whether a right of occupancy was an authorised security for the trust funds, being neither a freehold nor a leasehold property. In 1952 the High Court of Tanganyika (Abernethy, J.) held that "for all general purposes" there was no distinction between a right of occupancy and a lease, and that the law relating to leases in England was applicable to rights of occupancy in Tanganyika: see *Director of Lands and Mines v. Sohan Singh* (2) (1952), I.T.L.R. (R.) 631 at p. 634. That decision appears to be still good law in Tanganyika, and was presumably known to the pleaders who drafted the plaint, and the written statement of defence. If the appellants intended in this case to ask another judge of the High Court to distinguish or differ from that decision the issue should have been specifically and clearly raised in the plaint, so that it could be pleaded to in the defence.

The order will be in the terms proposed by the learned vice-president.

Bacon JA: I agree.

Appeal allowed. Case remitted to the High Court for determination.

For the appellants:
CW Salter QC and *RN Donaldson*
Donaldson & Wood, Dar-es-Salaam

For the respondents:
A Reid and *RS Thornton*
Fraser Murray, Thornton & Co, Dar-es-Salaam

Gokuldas Khimji Hindoo v R
[1957] 1 EA 874 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	6 November 1957
Case Number:	97/1957
Before:	Sir Ronald Sinclair V-P, Briggs and Forbes JJA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Zanzibar at Zanzibar – Windham, J

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[1] Customs – Illegal importation – What constitutes "importation" – Customs Management Decree s. 2, *s.* 3, *s.* 21, *s.* 25, *s.* 46, *s.* 47 (1), *s.* 49, *s.* 51 *and s.* 199 (1) (*Z.*) – *Interpretation Decree,* 1953, *s.* 2 (*Z.*) – *Imports Control Decree,* 1954, *s.* 4 *and s.* 10 (1) (*Z.*) – *Zanzibar Order-in-Council,* 1924, *s.* 1 (*Z.*).

Editor's Summary

The appellant was convicted and fined by the magistrate at Zanzibar on three counts, namely, (1) importing gold without a licence contrary to s. 4 of the Imports Control Decree, 1954, (2) unlawfully importing restricted goods without a licence contrary s. 49 of the Customs Management Decree and (3) smuggling gold, by unlawfully importing it with intent to evade the regulation of its importation. The appellant was a hawker and moneylender in Zanzibar whose custom it was to go on board ships in the Zanzibar harbour and set up his stall and sell his wares there while they were in harbour. The appellant went on board s.s. "Karanja" on September 14, 1956, and there sold to a passenger eleven watches for Shs. 2,550/- who in turn left with the appellant as security two pieces of the gold in question while he (the passenger) went to find the purchase money. The passenger did not return and as the ship was about to sail the appellant consulted the ship's purser and took the gold with him when he left the ship. At the Customs barrier he did not declare the gold and only produced it when the Customs officer made him turn out his pockets. The appellant's appeal to the High Court (reported at p. 203) was dismissed and on second appeal the only

point was whether on the facts found, the appellant in law "imported" the gold. The appellant argued that the gold had already been "imported" by the person from whom he obtained it at the moment when the s.s. "Karanja" came within the three-mile limit and so within the territorial waters of Zanzibar. But the High Court on examination of the general policy of the relevant Decrees and of certain provisions therein held that the statutory definitions of the word "import" must be considered to be, at least in part, repugnant, and that

> " 'importation' for the purpose of the Customs Management Decree – and the same considerations apply to the Imports Control Decree, 1954 – is a continuing act which, while it may begin when the vessel containing the goods in question enters the territotial waters of the Protectorate, continues until the goods, if landed at all, have been landed and, where there is a Customs post, have passed the customs barrier."

Held–

(i) as regards the first two counts, there were no sufficient reasons for considering the statutory definitions to be repugnant; they must have their normal force, and they showed conclusively that in this case the appellant did not "import" the gold.

(ii) as regards the third count, there may have been prejudice as the question of intention, a necessary element in the offence of smuggling, might have been dealt with much more thoroughly if the appellant and his advisers had not been satisfied that importation could not be established against him.

Decision of Windham, C.J. ([1957] E.A. 203 (Z.)) reversed. Conviction on all counts quashed.

No cases referred to in judgment

November 6. The following judgment was read by direction of the court.

Judgment

This is an appeal from a judgment of the High Court of Zanzibar dismissing an appeal by the appellant from convictions and sentences of the magistrate's court. We cannot improve on the learned chief justice's statement of the facts, which was as follows:–

> " 'The appellant was convicted on three counts in respect of the illegal importation into the Protectorate of two pieces of gold weighing together about 11 troy ounces and having a value of about Shs. 2,763/-, and was sentenced to fines totalling Shs. 600/-. He was acquitted on two other counts. The counts on which he was convicted were the following. First, importing the gold without a licence to do so, contrary to s. 4 of the Imports Control Decree, 1954; secondly, unlawfully importing restricted goods (i.e. the gold) without a licence to do so, contrary to s. 49 of the Customs Management Decree (Cap. 91); thirdly, smuggling the gold, by way of unlawfully importing it with intent to evade the regulation of its importation, contrary to s. 199 (1) of the Customs Management Decree (Cap. 91).
>
> "The appellant is a hawker and moneychanger in Zanzibar whose custom it is to go on board ships in Zanzibar harbour and set up his stall and sell his wares there while they are in harbour. This he did on the s.s. "Karanja" on September 14, 1956. The ship was lying out in the harbour. There the appellant sold to a passenger eleven watches for Shs. 2,550/-. The passenger took the watches but said that he was unable to pay for them in cash then and there; he therefore left with the appellant as security the two pieces of gold in respect of which the appellant was later charged while he (the passenger) went to find the purchase price in

cash somewhere on the ship. Just before the ship sailed the passenger had still not returned with the money, and the appellant, since he had to go ashore immediately without either the watches or their price, took with him the gold, after having told the ship's purser what had happened and asked his advice. Up to this point there was necessarily no conflict of evidence, because the story of the appellant himself, corroborated on some points and contradicted on none by

> a fellow-hawker whom he called, was the only evidence as to what happened on the ship. The appellant went ashore from the "Karanja" on a small boat plying in the harbour.
>
> "From this point onwards the appellant's story of what happened differed materially from that of the prosecution witness, who were all Customs officials. The learned trial magistrate accepted their version and rejected that of the accused. According to the version of the Customs officials (including Inspector John Fernandez of the Customs Preventative Force), whose stories were consistent with each other in all essential particulars, the appellant, having disembarked from the small boat with his goods and come ashore and entered the baggage room for Customs examination, was asked by Inspector Fernandez if he had anything to declare, whereupon he answered that he had only his brief case containing cash, which he emptied out. The inspector then drew attention to his bulging pockets, whereupon the appellant replied that they contained money in notes, which he then likewise emptied out. The inspector continued his evidence in these words: – 'I asked him if he had anything else and he said he hadn't. I then said I wasn't satisfied and I wanted to search his person. When I said this the accused put his hand in his pocket and took out a piece of gold, saying "I have got this." I produce this piece of gold (exhibit A). I again said I was not satisfied and I wanted to search his person. I felt his hip-pocket and I felt something. I told the accused to wrench it out and he produced another small piece of gold – exhibit B.'
>
> "Assuming for the moment that the learned trial magistrate's findings of fact were justified, including his finding that the appellant, at least on arrival at the customs, intended to bring the two pieces of gold past the barrier without declaring them, and assuming also that on the facts as found the appellant can be said to have 'imported' the gold within the meaning of that expression in the charging sections, then it is conceded that the appellant was properly convicted under the three counts to which I have earlier referred, since he admittedly had no licence to import the gold, either under s. 4 of the Imports Control Decree, 1954, or under s. 49 of the Customs Management Decree."

The learned chief justice upheld the learned magistrate's findings of fact, and these cannot now be questioned. The only remaining issue before the learned chief justice, and the substantial one before us, was the question whether on the facts found the appellant in law "imported" the gold.

His contention is very simple. It is that the gold had already been "imported" by the person from whom he obtained it at the moment when the "Karanja" came within the three-mile limit and so within the territorial waters of Zanzibar. Any movement of the gold thereafter may have been "carriage coastwise" or "inland transportation," but could not have been "importation" in law. The learned chief justice accepted that the statutory definitions of "import" contained in s. 3 of the Customs Management Decree and s. 2 of the Interpretation Decree, 1953, which applies to the word when used in the Imports Control Decree, 1954, together with the definition of "Protectorate" in the Interpretation Decree, 1953, and in section 1 of the Zanzibar Order-in-Council, 1924, must, if applied strictly, have the effect for which the appellant contends. With this we respectfully agree. But on an examination of the general policy of the Decrees and of certain specific provisions therein the learned chief justice held that for the purposes of these charges the definitions must be considered to be, at least in part, repugnant and that

> " 'importation' for the purpose of the Customs Management Decree – and the same considerations apply to the Imports Control Decree, 1954 – is a continuing act which, while it may begin when the vessel containing the goods in question enters the territorial waters of the Protectorate, continues until the goods, if landed at all, have been landed and, where there is a Customs post, have passed the Customs barrier."

He based this interpretation largely on general considerations which he expressed thus,

> "Now it is quite clear from a general perusal of the Customs Management Decree, and of the Imports Control Decree, 1954, that a paramount object of each of them is to prevent certain kinds of goods from entering the Protectorate, that is to say entering the actual island of Zanzibar (or Pemba) and not merely the territorial waters, without the payment of duty or the possession of a licence by the person whom I will loosely term the importer, that is to say the person who brings or seeks to bring the goods ashore. Such an object could be defeated in a very easy and widespread manner wholly at variance with the purpose of the legislation if the interpretation which learned counsel for the appellant seeks to place upon the expression 'to import' were to be adopted, namely that the importation takes place once and for all, so far as importation by sea is concerned, the moment that the vessel bearing the goods comes within three miles of the Zanzibar coast. For if that were so, then any person going on board the ship upon her coming into harbour could with impunity take the goods ashore without declaring them, since he would not be 'importing' them at all because they would have already been imported three miles out to sea, long before he ever boarded the vessel or saw them. That would be the case, as the learned trial magistrate pointed out, whenever a person went on board and bought controlled or dutiable articles from a ship's shop and came ashore without declaring them. Clearly this would defeat the intention of the legislature."

We think with respect that this argument is unsound, in that it entirely fails to take into account the provisions of s. 21 and s. 25 of the Customs Management Decree. The former section provides that

> "from the time of importation until delivery for home consumption or until exportation"

goods being imported shall be "subject to the control of the Customs." It was common ground before us that the words "delivery for home consumption" indicate the stage at which goods have passed examination on shore, duty on them, if any, has been paid, and they have been released to the consignee. Section 25 provides that

> "no goods subject to the control of the Customs shall be moved, altered or interfered with"

except on specified terms, and prescribes punishments. It is therefore clear that the grave consequences which the learned chief justice envisaged, if the statutory definitions were to be applied strictly, would not in fact follow. Indeed, if the learned chief justice's construction of the word "importation" were correct, it would seem that s. 25 would be, at least pro tanto otiose. We see no grounds of general policy which would justify rejection of the statutory definitions.

In addition the learned chief justice relied on s. 46, s. 47 (1) and s. 51 of the Customs Management Decree. The first of these, he says,

> "provides that 'for the purposes of securing the due importation of goods . . . the goods shall be entered, unshipped and may be examined.' This necessarily implies that the importation of the goods has not taken place, or at least has not been completed, until they are unshipped, which is quite incompatible with any argument that the importation must be deemed to have taken place once and for all three miles out at sea."

We think that this pays insufficient attention to the meaning of the word "due." As we understand the matter, every importation of goods is *prima facie* unlawful in the sense that in order to regularise it – to make it a "due" importation – certain formalities have to be gone through. All these take place subsequently to the actual moment of importation. If they are carried out with success, the importation is regularised ex post facto. Section 47 (1) provides that importation may be prohibited or restricted, not only as regards the Protectorate as a whole, but also as regards "any area or place

therein." No doubt importation into a specific area on land, for example into the Zanzibar prison, would have a special sense, and in this reference the same goods might be imported twice, once into the Protectorate and again into the prohibited area; but this does not point to a continuing process of importation. Furthermore the process indicated in the judgment on first appeal would itself have been completed before any question of importation into the special area arose. As regards s. 51, the learned chief justice rightly observed that this appears at first sight to support the appellant's contention. He says, however,

> "But it also clearly implies, to my mind, that if prohibited or restricted goods from the ship in harbour are transhipped or landed in the Zanzibar Protectorate without authority then they will be deemed to have been unlawfully imported. But if the importation took place once and for all three miles out at sea, before anything unlawful had been done in respect of them (the section providing that their mere presence on the ship does not make them unlawful imports) then there could be no subsequent unlawful importation, since there could be no subsequent importation at all."

We think this reasoning is sufficiently met by the remarks made above, that all importation is unlawful unless regularised by measures subsequent to the importation itself.

One further argument, directly applicable only to the count under the Imports Control Decree, 1954, was relied on by the Crown. Section 10 (1) of that Decree provides that

> "a valid import licence shall be produced with the Customs import entry at the time and place of the importation of the goods . . ."

If, it is said, the place of importation is a point on the three-mile limit and the time is the moment of passing that point, this section clearly cannot be complied with. The argument is valid so far as it goes, but we think it can be met first, by the consideration that this Decree must for certain purposes be read with the Customs Management Decree, and it is clear from that that the import entry is subsequent to actual importation, and secondly, by treating the words "at the time" as being a somewhat loose expression referring to the whole period during which imported goods are under the control of the Customs, and the words "at the . . . place" as a similarly loose expression indicating generally the port of entry. We think the argument is not of sufficient weight to show that the statutory definitions are generally repugnant.

We are accordingly of opinion that there are no sufficient reasons for considering the statutory definitions to be repugnant in this reference. We think that they must have their normal force, and that they show conclusively that in this case the appellant did not "import" the gold. He may well have been guilty of an offence against s. 25 or some other offence, but these would not be minor and cognate to the offences of importing. We think therefore that the convictions and sentences on the first two counts must be quashed.

A further point arises with regard to the conviction for smuggling. Smuggling is defined in s. 2 of the Customs Management Decree as meaning "any importation, exportation, carriage coastwise or inland transportation" of goods in certain circumstances. In the particulars of this count, the appellant is alleged to have committed the offence of smuggling by importing the gold. We think it is clear that, though he did not import it, he must have either carried it coastwise or, more probably, transported it "inland," i.e. within the boundaries of the Protectorate. We were inclined to think that, since the appellant's account of the facts prior to landing was accepted, the misstatement of the legal nature of his acts in landing the gold was neither material not prejudicial, and accordingly the conviction might stand; but Mr. Murray has convinced us that there may have been prejudice in this way. Intention to evade the restrictions on import

of gold was a necessary element of the offence of smuggling. This aspect of the case might have been dealt with much more thoroughly if the appellant and his advisers had not been satisfied that importation could not be established

against him. We think it possible that there may have been prejudice and we are not prepared to uphold the conviction of smuggling on this rather special ground.

In the result the appeal is allowed and the convictions and sentences are set aside. The fines must be refunded and the order of forfeiture of the gold is also set aside. We make no order, however, as to the disposal of the gold itself, which is now in the hands of the Government. Mr. Murray conceded that he could not in the circumstances ask for an order that it should be returned to the appellant. The matter accordingly rests between him and Government.

Appeal allowed. Conviction on all counts quashed.

For the appellant:
WD Fraser-Murray
Dinshaw Karai, Zanzibar

For the respondent:
BAG Target (Crown Counsel, Tanganyika)
The Attorney-General, Zanzibar

Kabarak arap Chepkiru v R
[1957] 1 EA 879 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	26 February 1957
Case Number:	37/1957
Before:	Sir Kenneth O'Connor CJ
Sourced by:	LawAfrica

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[1] Criminal law – Trial by special magistrate – Appeal – Charge of retaining stolen property – Unascertainable from record of what offence accused convicted – No compliance with s. 169 *or s.* 209 *of Criminal Procedure Code* (*K.*) *and Circular to Magistrates – Whether trial satisfactory – Penal Code s.* 317 (*K.*).

Editor's Summary

The appellant was charged with retaining stolen property contra s. 317 of the Penal Code and convicted and sentenced by a special magistrate who heard the case. In his judgment the magistrate said that the charge should have been one of possession of stolen stock, under s. 10 of the Stock and Produce Theft Ordinance (Cap. 206). This would have to have been tried by a first class magistrate and the trial magistrate, who had second class powers, had no power to try it. It appeared from the record that the

charge put to the appellant was “Possession of stolen property 317 Penal Code,” to which he replied “I did not steal these cattle.” It was plain from the record that the ingredients of a charge of retaining stolen property were never explained to the appellant as should have been done and it appeared from his plea that he thought he was required to answer a charge of theft of the cattle. There was no evidence of guilty knowledge on the part of the appellant though the appellant was alleged to have said to one witness

> “We will not tell the Bwana these oxen were in my boma, we will say they were found on the road.”

There was also nothing to show that s. 209 of the Criminal Procedure Code was complied with; it was not clear of what offence the accused was convicted, that is, under s. 10 of the Stock and Produce Theft Ordinance or under s. 317 of the Penal Code; nor was the appellant given an opportunity of saying anything after conviction in mitigation of sentence. The appellant appealed against the conviction and sentence.

Held–

(i) the trial was unsatisfactory in various respects.

(ii) as the record of the case stood it was not clear whether the appellant was convicted under s. 10 of the Stock and Produce Theft Ordinance or under s. 317 of the Penal Code.

Appeal allowed. Conviction and sentence set aside.

[**Note**: The Circulars to Magistrates are to be found at the end of each volume of the Kenya Law Reports.]

No cases referred to in judgment

Judgment

Sir Kenneth O'Connor CJ: On February 19, 1957, I set aside the conviction and sentence in this case. The following were my reasons:

> The appellant was charged on January 9, 1957, with retaining stolen property contra s. 317 of the Penal Code. The particulars of the charge read:
>
> > "Accussed on December 23, 1956, at Kaptagat in the Uasin Gishu District of the Rift Valley Province retained six oxen valued at Shs. 3,000/-. The property of P. S. Steenkamp, knowing or having reason to believe them to have been stolen."

On a charge of retaining property knowing it to have been stolen, the ingredients of the charge which must be proved are:

(*a*) that the property was stolen;

(*b*) that the accused retained it;

(*c*) that the accused knew that the property had been stolen at the time he retained it.

The trial was unsatisfactory in various respects.

The magistrate said in his judgment that he considered that the charge should be one of possession of stolen stock. If he meant a charge under s. 10 of the Stock and Produce Theft Ordinance (Cap. 206), it would have to have been tried by a court of a first class magistrate and the magistrate, who has second class powers, had no power to try it. However, a charge under s. 10 of the Stock and Produce Theft Ordinance was not substituted and the charge remained a charge under s. 317 which was within the magistrate's powers to try.

Unfortunately, however, the charge put to the accused, appears from the record to have been "Possession of stolen property 317 Penal Code." Mere possession of stolen property does not (as explained above) constitute an offence under s. 317 Penal Code. To the charge so put, the appellant is recorded as answering "I did not steal these cattle." It is plain that the ingredients of a charge of retaining stolen property were never explained to the accused, as should have been done (see Circular to Magistrates No. 2 of 1955); and it looks, from his plea, as if he thought he was being required to answer a charge of theft of cattle.

After the plea had been taken the magistrate (quite correctly) proceeded to record the evidence of two prosecution witnesses. The most that these witnesses established was that a witness sent to investigate a theft of oxen (the theft was not proved) had been told by the appellant that the oxen were at his boma one morning and that he did not know where they had come from; that another witness had seen, at the appellant's boma, cattle which the witness knew were not the appellant's; and that the appellant, on being asked where they had come from said that he did not know. Clearly there was no proof of guilty knowledge here. On the way to the office, the appellant said to the witness

"We will not tell the Bwana these oxen were in my boma, we will say they were found on the road."

This was evidence that the appellant did not want to acknowledge having had possession of the animals, and possibly some evidence that he knew that they were stolen.

The record stops at the examination of the second prosecution witness.

There is nothing to show that s. 209 of the Criminal Procedure Code was complied with, or whether the appellant was informed that he could call witnesses and give evidence in his own behalf or whether he did or did not give evidence on oath. There is a statement in the judgment:

> "He (the appellant) states that he does not know how they (the cattle) came to be in his boma,"

a defence which the magistrate said that he could not accept.

But whether the magistrate was applying s. 10 of the Stock and Produce Theft Ordinance which throws the burden of proving his innocence on the accused, or the very different onus of proof under s. 317 where proof of every ingredient of the offence beyond reasonable doubt rests upon the prosecution, does not appear. Had the judgment complied with s. 169 of the Criminal Procedure Code, this might have appeared. As the record stands, it is not clear of what offence the accused was convicted.

The appellant was not given an opportunity of saying anything after conviction in mitigation of sentence. (see para. 6 of Circular to Magistrates No. 9 of 1954).

Crown counsel could not support the conviction and I had no alternative but to set it aside. I have gone into the reasons at greater length than usual because the work done by special magistrates (and in particular by this magistrate) is of great value and I think that if and when it becomes necessary to set aside one of their decisions they are entitled to have a full explanation of the reasons.

Appeal allowed. Conviction and sentence set aside.

For the appellant:
AQ Malik
MH Malik & Co, Nairobi

For the respondent:
GP Nazareth (Crown Counsel, Kenya)
The Attorney-General, Kenya

Shantilal Gordhanbhai Patel and others v R
[1957] 1 EA 881 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	29 April 1957
Case Number:	398/1956; 390/1956; 1/1957
Before:	Rudd Ag CJ and Pelly Murphy J
Sourced by:	LawAfrica

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[1] Criminal law – Charge – Appellants charged alternatively with conspiracy to defraud and theft in respect of same transaction – Whether charge proper.

[2] Criminal law – Evidence – Corroboration – Whether retracted confessions can amount to corroboration of accomplice's evidence.

Editor's Summary

The three appellants and one Jashbhai Patel were employees of Brooke Bond E.A. Limited and at the material time were employed at the company's office at Nairobi. On January 3, 1955, an increase in the price of tea sold by the company became effective and for some time prior to this date the company restricted its sales of tea to regular customers. It was alleged that the three appellants and Jashbhai Patel conspired together to remove tea from the company's Nairobi warehouse, both before and after the date the price became effective and to sell it to various traders in Nairobi at a price midway between the old and new prices. It was also alleged that they conspired to alter the company's books to show that the tea had been sent, prior to the date of the price increase and in the normal course of business, to various distributing depots throughout Kenya and to pay into the company's bank the old price of the tea removed and sold by them. By this conspiracy, it was alleged that the company was defrauded of Shs. 30,504/40. All the appellants were accordingly charged with and convicted of a conspiracy to defraud the company and theft of the tea. The second appellant, Morarbhai Bhikhabhai Lad, was further charged on nine counts of fraudulent false accounting and was convicted on seven of them. Jashbhai Patel

who pleaded guilty at the trial later gave evidence for the Crown. The appellants appealed against their convictions and sentences. It was contended on their behalf that the failure to give particulars of the conspiracy had occasioned a failure of justice and secondly that the evidence on record did not prove the conspiracy alleged by the Crown: they were charged with having

"conspired together with intent to defraud Brooke Bond E.A. Limited, of the sum of Shs. 30,504/40"

and the Crown case proved that, if the tea which the appellants and Jashbhai Patel removed had remained in the company's possession and been sold by the company at the increased price, the company would have received Shs. 76,990/- whereas it received only Shs. 46,485/60. As regards the count of theft against all the appellants and fraudulent false accounting against the second it was contended that the evidence of Jashbhai Patel the accomplice should not have been believed; that there was no evidence, or at least insufficient evidence, in support of that given by Jashbhai Patel; that the confessions made by the appellants to a Mr. Potts were not voluntary; and that the retracted confessions of the first and second appellants to Inspector Pavey did not and could not amount to corroboration of the accomplice's evidence.

Held–

(i) the conspiracy was a conspiracy to steal tea and not one to defraud the company of money and for that reason the convictions on the latter count would be quashed.

(ii) the magistrate was fully entitled to rely on the confession of the third appellant which was admissible against all the appellants.

(iii) the magistrate was entitled to accept, as he did, the evidence of the retracted confessions to Inspector Pavey as being corroboration of the accomplice's evidence.

Appeal allowed in part. Order accordingly.

Judgment

Rudd Ag CJ: read the following judgment of the court: These three appeals from convictions and sentences passed by the learned resident magistrate, Nairobi, were consolidated by us and we granted leave to appeal out of time in respect of two of them. There were originally four accused persons but one of them, Jashbhai Patel, pleaded guilty and later gave evidence for the Crown. Throughout the record of the proceedings in the lower court the appellants are, however, referred to as the first, second and fourth accused. Where it is necessary in this judgment to refer to them individually they are respectively called the first, second and third appellants.

Mr. Bhatt argued this appeal on behalf of the first and third appellants and Mr. A. B. Patel on behalf of the second appellant. Mr. O'Beirne appeared for the Crown.

All three appellants and Jashbhai Patel were employees of Brooke Bond E.A. Limited and at the material time were employed at the company's Nairobi office.

On January 3, 1955, an increase in the price of tea sold by the Brooke Bond Company became effective. Pending this increase in price the company restricted its sales of tea to regular customers. The Crown case was that the three appellants and Jashbhai Patel conspired together to remove tea from the company's Nairobi warehouse (both before and after the price increase became effective) and to sell it to

various traders in Nairobi at a price midway between the old and the new price; to alter the company's books to show that the tea had been sent, prior to the date of the price increase and in the normal course of business, to various distributing depots run by the company throughout Kenya and to pay into the company's bank the old price of the tea removed and sold by them. As a result of the conspiracy and the actions of the appellants and Jashbhai Patel in putting it into effect, the Crown alleged that they defrauded the company of Shs. 30,504/40. The duties of the appellants and Jashbhai Patel as employees of the company were such that the removal and sale of the tea, and the

falsification of the books were, if those persons acted in concert, easily accomplished.

All the appellants were charged and convicted of (*a*) conspiracy to defraud and (*b*) theft of the tea. The second appellant was additionally charged on nine counts of fraudulent false accounting and was convicted on seven of those counts.

The first ground of appeal urged on behalf of all the appellants relates to the charge of conspiracy. It was argued first that the failure to give particulars of the conspiracy had occasioned a failure of justice and secondly that the evidence on record did not prove the conspiracy alleged by the Crown. The count in question stated that the appellants

> "conspired together with intent to defraud Brooke Bond E.A. Limited, of the sum of Shs. 30,504/40"

and the evidence given on behalf of the Crown proved that, if the tea which the appellants and Jashbhai Patel removed had remained in the company's possession and been sold by the company at the increased price, the company would have received in payment Shs. 76,990/- whereas it received the sum of Shs. 46,485/60 made up of cheques lodged with its bankers by the appellants and Jashbhai Patel.

In view of the fact that the appellants and Jashbhai Patel were charged with theft of the tea removed by them it would have been improper to charge them in addition with conspiring to steal the tea in question and we think that it may have been for this reason that the Crown adopted the ingenious alternative of charging a conspiracy to defraud the company of a sum of money which the company would have received for the tea if it had not been removed, less the money paid for it by the appellants and Jashbhai Patel to the company. This somewhat novel theory of a conspiracy to defraud – a conspiracy where no representations were made to the company whereby the company was to be induced by fraud to part with something of value – probably accounts for the lack of particulars of the conspiracy given in the charge, of which lack the appellants complain. It is perhaps proper to say here that no complaint was made against this count in the court below and, in fact, counsel for the appellants who appeared before the magistrate specifically said that they had no complaint to make as to the substance of the charges.

In our judgment, however, the conspiracy was a conspiracy to steal tea and not one to defraud the company of money and for that reason we quash the convictions of, and set aside the sentences passed on, all the appellants on the first count.

As to the convictions on the remaining counts, namely, theft as against all the appellants and fraudulent false accounting as against the second, the arguments of counsel for the appellants may be summarised thus–

(*a*) that the evidence of Jashbhai Patel the accomplice should not have been believed;

(*b*) that there was no evidence, or at least insufficient evidence, in support of that given by Jashbhai Patel;

(*c*) that the confessions made to Mr. Potts, a prosecution witness and a person in authority over the appellants, were not voluntary in that an inducement had been held out to the appellants by Mr. Potts;

(*d*) that the retracted confessions of the first and second appellants to Inspector Pavey did not and could not amount to corroboration of the accomplice's evidence.

The judgment of the learned magistrate dealt fully with all these matters and there is nothing on the record or in the arguments raised before us to show that he erred in any way in coming to the conclusion that the charges had been proved by the evidence given before him. The evidence is analysed in such detail in the magistrates' judgment that we think it unnecessary to recapitulate it here. Suffice it to say

that in relation to the first and second appellants, the magistrate was entitled to accept as he did the evidence of the retracted confessions to Inspector Pavey as being corroboration of the accomplice's evidence.

It is to be observed that the magistrate, although he had held that the extra-judicial confessions made to Mr. Potts were voluntary, did not allow these confessions to weigh with him in connection with the first and second appellants. He did consider that the confession made to Mr. Potts by the third appellant was admissible against the appellants because in the first place he found that the words “leave the police out of this” had not been said in the presence of this appellant and secondly because, in his statement to Inspector Pavey (which the magistrate held to have been made voluntarily), this appellant adopted the prior statement he had made to Mr. Potts. We consider that the magistrate was fully entitled to rely on this evidence in the case of the third appellant.

If the convictions on the first count had been sustainable we would not have interfered with the orders for payment of compensation. Section 31 of the Penal Code allows of the award of compensation to a person injured by an offence, such compensation to be paid by the person convicted of the offence irrespective of whether or not the person convicted is ordered to pay a fine. However, the convictions on the first count have had to be quashed and the orders for compensation are set aside with the rest of the sentences on that count.

It has been urged that the sentences are excessive and that the magistrate failed to take into account the matters put to him in mitigation. The magistrate has in fact recorded that he has borne in mind the mitigating circumstances. So far from considering that the substantive sentences are excessive we think that they are lenient, but the imprisonment ordered in the case of default of recovery of the amount awarded for costs as part of the sentence on the second count will be without hard labour. Appeals against conviction and sentences on count one are allowed. The convictions and sentences including the orders of payment of compensation made in respect of that count are set aside. The appeals from conviction in respect of the other counts are dismissed. The appeals from sentence in respect of the second count are allowed only to the extent that the imprisonment ordered in default of recovery of distress of the amount awarded for costs shall be without hard labour. In other respects the appeals from sentence in respect of the second count are dismissed. The appeals in respect of counts four, five, six, eight, nine, ten and eleven are dismissed.

Appeal allowed in part. Order accordingly.

For the first and third appellants:
BD Bhatt
BD Bhatt, Nairobi

For the second appellant:
AB Patel
K Bechgaard, Nairobi

For the respondent:
DPR O’Beirne
The Attorney-General, Kenya

R v Leonard Kinyanjui s/o Kimani

[1957] 1 EA 885 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	11 September 1957
Case Number:	257/1957
Before:	MacDuff J
Sourced by:	LawAfrica

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[1] Criminal law – Practice – Non-compliance with s. 169 *of Criminal Procedure Code* (*K.*) *– Appellate Court obliged to examine facts to ascertain whether such non-compliance has occasioned "failure of justice" – Criminal Procedure Code s.* 381 (*K.*).

[2] Criminal law – Evidence – Plea – Whether an admission in a plea to one count can be used as evidence on another count.

Editor's Summary

The accused was charged on the first count of making false statement contra s. 110 of the Traffic Ordinance, 1953, in that he denied that he was the driver of a vehicle involved in an accident, and on the second count of dangerous driving contra s. 45 (1) of the same Ordinance. He pleaded not guilty to the first count and on the second count he pleaded guilty in the following words – "I admit driving dangerously but there was another vehicle involved." The accused was tried and convicted on the first count and fined Shs. 60/- and on the second count fined Shs. 40/-. The case came before the Supreme Court for revision at its own instance and at the hearing the Crown urged that the fines imposed were inadequate. On the other hand, it was contended for the accused that the conviction on the first count should be set aside in that the evidence for the prosecution was not sufficient to show the guilt of the accused beyond a reasonable doubt; that the plea on the second count was not an unequivocal plea of guilty; and that the sentence imposed was not manifestly inadequate. The judgment of the trial magistrate, also, did not make any reference, direct or indirect, to the question as to whether the prosecution had proved, or he found as a fact, that the statement made was false as required by s. 169 of the Criminal Procedure Code. It was urged for the Crown that the magistrate must be assumed to have done so in that he found the accused guilty as charged.

Held–

(i) there had undoubtedly been a failure to comply with the provisions of s. 169 of the Criminal Procedure Code with the result that the court was faced with the duty of examining the facts with a view to determining whether there had been a failure of justice within the meaning of s. 381 ibid; *Baland Singh v. R.* (1954), 21 E.A.C.A. 209 followed.

(ii) as, from the record, it was not possible to say whether there had been a failure of justice or not, on the first count, this uncertainty must be resolved in favour of the accused;

(iii) the accused's plea to the second count that "I admit driving . . .," which involved an admission, is not evidence and should not have been taken into consideration in deciding the point whether the accused was the driver or not, on the first count;

(iv) the plea of the accused to the second count was not an unequivocal plea of guilty.

Conviction and sentence on both counts set aside. Case remitted to the subordinate court for re-trial before another magistrate.

Cases referred to in judgment:

(1) *Baland Singh v. R.* (1954), 21 E.A.C.A. 209.

Judgment

MacDuff J: The present hearing in revision is at the instance of my learned brother Pelly Murphy. The accused was convicted, after pleading not guilty, on the first count of making a false statement contrary to s. 110 of the Traffic Ordinance, 1953, and after pleading guilty, on the second count of dangerous

driving contrary to s. 45 (1) of the same Ordinance. He was fined Shs. 60/- on the first count and Shs. 40/- on the second count.

Mr. Nazareth for the prosecution has argued that the penalties imposed are manifestly inadequate. Mr. Morgan for the accused has submitted:

(*a*) that the conviction on the first count should be set aside in that the prosecution evidence is not sufficient to show the guilt of the accused beyond a reasonable doubt.

(*b*) that the plea on the second count is not an unequivocal plea of guilty.

(*c*) that the sentence imposed is not manifestly inadequate.

At the time I saw no reason to call upon counsel for the Crown to reply. On a further perusal of the record however I asked him to argue two further points.

1. that the conviction on the first count should be set aside for the reason that the learned magistrate has made no finding in respect of the falsity of the statement made.

2. that the plea taken by the learned magistrate on the second count in view of the wording of the particulars of this count does not amount to an unequivocal plea of guilty.

In regard to the first point there are two points requiring proof, the second of which is whether or not the statement made was false. I am unable to find in the judgment of the learned magistrate any reference, direct or indirect, to the question as to whether the prosecution had proved, or he found as a fact, that the statement made was false. It is urged that the learned magistrate must be assumed to have done so in that he found the accused guilty as charged. I am unable to accept this contention.

The position would appear to be that under the provisions of s. 381 of the Criminal Procedure Code, no finding shall be reversed or altered on revision on account of any omission in a judgment unless such omission has in fact occasioned a failure of justice. The attitude to be taken by this court is set out by the East African Court of Appeal in *Baland Singh v. R.* (1) (1954), 21 E.A.C.A. 209, that:

> "Any failure to comply with the provisions of s. 169 is an irregularity (which) . . . will entitle, and indeed oblige the Court of Appeal to examine the facts with a view to determining whether there has been a 'failure of justice' within the meaning of s. 381 . . ."

There has undoubtedly been a failure to comply with the provisions of s. 169 with the result that the court is faced with the duty of examining the facts. On this point the record shows the following facts. Wanganga s/o Areno, a constable in the traffic department gave evidence in these words:

> "I saw car KFN 401 travelling at high speed coming toward Khoja Mosque. It fell down and overturned. I then saw the driver crawling out, started running. I chased him and caught him. I took him to Inspector Allinson at the traffic office."

That is the only evidence that accused's statement that he was not driving was false. The record also shows that there was another African in the vehicle, the same witness in answer to questions put to him by the learned magistrate saying:

> "I saw one other African in the vehicle with the accused. Both ran away, one was caught by the other askari. He (presumably the other African) said accused was the driver."

This last statement of course is clearly inadmissible. This evidence however appears to be rather at variance with that given by Inspector Allinson to this effect:

> "Accused stated that his driver was on Murehe. No such man was there, nor had any constable seen such a man."

The record also shows that the prosecuting officer addressed the magistrate in these words.

> "Evidence is clear that accused made a false statement and agreed that he admitted being the driver."

I can find nothing in the record to support the latter part of this statement. If the magistrate did accept it, and since he has recorded it without objection, one can only think that he did, then the only possible admission was the plea of the accused to the second count, which is not evidence and which should not have been taken into consideration in deciding this point on the first count. I am therefore compelled to take the view that I am uncertain whether the learned magistrate has taken into account inadmissible evidence and statements which he should have disregarded, or that if he had relied solely on the bare evidence of Wanganga, under the circumstances shown to have existed, he must have come to the conclusion that the falsity of the statement made had been proved beyond a reasonable doubt, with the result that I cannot say that there has been a failure of justice. That uncertainty must be resolved in favour of the accused. The conviction on the first count is set aside and sentence quashed. The fine if paid is to be refunded.

In regard to the second count the accused was charged with "dangerous driving contrary to s. 45 (1) of the Traffic Ordinance, 1953," and the particulars of the offence close with these words:

> "in such a manner as to be a danger to the public that he without cause, swerved off the road into a newly dug road site."

To this the accused pleaded "I admit driving dangerously but there was another vehicle involved." This latter statement should I think have put the learned magistrate upon enquiry as to whether the accused was admitting every element of the charge, and there are several elements including some not set out in the charge. More particularly is this so when the record shows that when first charged with this offence before another magistrate, the accused pleaded, "I swerved to avoid collision with an oncoming vehicle," and the magistrate accepted the plea as being one of Not Guilty. Counsel for the Crown does not support the conviction for the same reasons. I therefore hold the plea of the accused to the second count charged not to have been an unequivocal plea of guilty. The conviction and sentence on that count are also set aside and the case remitted to the subordinate court for re-trial before another magistrate. The fine if paid is to be refunded.

Conviction and sentence on both counts set aside. Case remitted to the subordinate court for a re-trial before another magistrate.

For the Crown:
GP Nazareth (Crown Counsel, Kenya)
The Attorney-General, Kenya

For the accused:
MJE Morgan
Mervyn Morgan & Co, Nairobi

R v Alfred Granville Ross
[1957] 1 EA 888 (SCK)

Division: HM Supreme Court of Kenya at Nairobi

Date of judgment: 15 February 1957

Case Number: 1/1957

Before: Sir Kenneth O'Connor CJ

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[1] Criminal law – Bail – Accused on bail in pursuance of order of Court of Appeal – Whether Supreme Court has power to alter provisions of bail – Accused advised to proceed out of jurisdiction for medical treatment – Whether Supreme Court has power to vary terms of bail in such a case – Criminal Procedure Code, s. 127, *s.* 128 *and s.* 130 (*K.*).

Editor's Summary

The applicant had appealed to the Court of Appeal against his conviction and that court ordered a re-trial before the Supreme Court, bail being allowed on the same terms as were ordered by the committing magistrate, namely, his own recognisances in the sum of Shs. 100,000/- with two sureties for a like sum and surrender of his passport. In pursuance of this order the applicant was released on bail. He now applied by motion to the Supreme Court to vary the provisions for bail so as to enable him to leave the jurisdiction for the purpose of receiving medical treatment in the United Kingdom and supported his application by an affidavit by a doctor. The Crown opposed the application and filed an affidavit by a medical officer stating that the majority of types of mental illness could be treated in Kenya. The main issue was whether the Supreme Court had power to vary the provisions for bail taken out in pursuance of an order of the Court of Appeal. The applicant contended that the court had such power, because s. 3 (3) of the Criminal Procedure Code gives it power to exercise jurisdiction according to the practice of (*inter alia*) the King's Bench Division in England in any matter to which the procedure prescribed by the code is inapplicable or which is not regulated by any other law in force in Kenya, and because a judge of the King's Bench Division in England has plenary powers at common law to grant an order for bail and to attach conditions to the grant. The applicant further contended that the court had power to vary the order of the Court of Appeal because it was an order made in exercise of the powers of the Supreme Court under the derivative jurisdiction of the Court of Appeal and that the Supreme Court would have power to act for example under s. 127, s. 128 or s. 130 of the Criminal Procedure Code. For the Crown it was argued that if the order was an order of the Court of Appeal the Supreme Court had no jurisdiction to vary it.

Held–

(i) the court was not satisfied that it had the power to vary or interfere with an order of the Court of Appeal admitting a person to bail except where it is necessary to act for the purpose of implementing and giving full effect to an order of that court, e.g., under s. 127, s. 128 or s. 130 of the Criminal Procedure Code, and this was not such a case;

(ii) even if the court had the power to vary such an order the court would not grant the application as there appeared to be no authority, either English or local, for the proposition that an accused person awaiting trial should be allowed to proceed out of the jurisdiction for the purpose of obtaining medical treatment;

(iii) the condition of the applicant was not so serious or so much, if at all, beyond the scope of therapeutic facilities available in Kenya as to make immediate intervention necessary.

Application dismissed.

Cases referred to in judgment:

(1) *R. v. Spilsbury*, [1898] 2 Q.B. 615.

Judgment

Sir Kenneth O'Connor CJ: This is a motion asking the court to alter the provisions for bail of Alfred Granville Ross, who is an accused person in forthcoming proceedings in the Supreme Court, to enable him to leave the jurisdiction for the purpose of receiving medical treatment in the United Kingdom. The application is supported by an affidavit by Dr. Gregory, a doctor of medicine in Nairobi, in which the deponent states that Mr. Granville Ross is suffering from Neuro-psychopathy, that his condition has deteriorated in the last two years, that he is in urgent need of specialized treatment of a kind unobtainable in East Africa, and that unless he undergoes this kind of treatment without delay, his health is likely to be seriously impaired if not permanently endangered. Doctor Gregory is further of opinion that Mr. Ross will not be able to stand trial in a case involving lengthy hearings, unless he first undergoes treatment of the kind envisaged.

The modifications to the provisions for bail which are asked for are that a condition imposed by the magistrate under which Mr. Ross has surrendered his passport should be cancelled and that Mr. Ross be permitted to leave the jurisdiction and go to the United Kingdom for medical treatment.

There is an affidavit in reply sworn by Doctor Crawford, the medical officer at Mathari mental hospital, who states *inter alia* that neuro-psychopathy indicates that a person is suffering from a psychological disorder and does not by itself indicate the type of mental illness, and that psycho-therapy is available in Kenya, and that the majority of types of mental illness can be treated in the colony: he has not examined the accused in this case and cannot say what type of treatment he might require.

The position as regards bail is that, by an order of the Court of Appeal dated November 17, 1955, ordering a re-trial before the Supreme Court, Mr. Ross was directed to be released, on his furnishing bail on the same terms as were ordered by the committing magistrate when he was originally committed to appear before the Supreme Court. Pursuant to that order Mr. Ross is on bail to appear before the Supreme Court whenever required on his own recognizance in the sum of Shs. 100.000/- with two sureties in the sum of Shs. 100,000/- and his passport remains withdrawn as directed by the magistrate. As mentioned, bail has been taken pursuant to an order of the Court of Appeal for Eastern Africa and, if I thought that it ought to be varied, I should have to be satisfied that I had power to vary it. This application is not made to me as a judge ex officio of the Court of Appeal: it is an application made to the Supreme Court.

Mr. O'Donovan for the applicant contends that I have power to vary an order granting bail because s. 3 (3) of the Criminal Procedure Code gives this court power to exercise jurisdiction according to the practice of (*inter alia*) the King's Bench Division in England in any matter to which the procedure prescribed by the code is inapplicable or which is not regulated by any other law in force in the colony, and because a judge of the King's Bench Division in England has plenary powers at common law to grant an order for bail (*R. v. Spilsbury* (1), [1898] 2 Q.B. 615) and to attach conditions to the grant (Criminal Law Journal, Vol. 7 p. 153). Mr. O'Donovan further contends that I have power to vary the order of the Court of Appeal because it was an order made in exercise of the powers of the Supreme Court under the derivative jurisdiction of the Court of Appeal and that the Supreme Court would have power to act, for example under s. 127, s. 128 or s. 130 of the Criminal Procedure Code.

Mr. Webber, for the Crown, contended that if the order was an order of the Court of Appeal, this court had no jurisdiction to vary it. He addressed a further argument on the hypothesis that the order was an order of the committing magistrate. I need not deal with this latter argument, because I think that the

order admitting the applicant to bail is clearly an order of the Court of Appeal. I think that this court has power to vary an order of a magistrate or, perhaps, an order of the Supreme Court admitting an accused person to bail; but I am not satisfied that I have power to vary or interfere with an order of the Court of Appeal admitting an accused person to bail, except where it is necessary to act for the purpose of implementing and giving

full effect to an order of the Court of Appeal e.g. under s. 127, s. 128 or s. 130 of the Criminal Procedure Code. There is no question of implementing the order of the Court of Appeal here. What I am asked to do is to render it ineffective, or much less effective, by permitting the object of it to depart from the jurisdiction. This, I think, I have no power to do.

In case I am wrong as to the extent of my powers, I should add that, even if I had the power, I should not grant the application. No authority, either English or local, has been cited to me for the proposition that an accused person awaiting trial should be allowed to proceed out of the jurisdiction for the purpose of obtaining medical treatment. So far as I can see, if the applicant were to be allowed to depart, neither his sureties (if I were to make an order conditional upon their agreeing to continue liable), nor the court, nor the authorities in Kenya would have power to secure the applicant's return to answer the existing charges. Moreover, I am not satisfied that the condition of the applicant is so serious or so much, if at all, beyond the scope of therapeutic facilities available in Kenya, as to make immediate intervention necessary. I am informed that the trial is provisionally fixed for March 26, so that no great delay is expected. If the applicant should then be unfit to stand his trial, a procedure for dealing with that eventuality is laid down in the Criminal Procedure Code.

The application is refused.

Application dismissed.

For the applicant:
B O'Donovan and *M Kean*
Sirley & Rean, Nairobi

For the respondent:
JP Webber (Crown Counsel, Kenya)
The Attorney-General, Kenya

Kantibhai C Patel v R
[1957] 1 EA 890 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	27 August 1957
Case Number:	157/1957
Before:	Rudd Ag CJ and Connell J
Sourced by:	LawAfrica

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[1] Criminal law – Appeal – Evidence – Uncorroborated evidence of alleged accomplice – Criminal Procedure Code, s. 381 (*c*) (*K.*).

Editor's Summary

The appellant was convicted before the resident magistrate, Thomsons Falls, of fraudulent false accounting contrary to s. 325 of the Penal Code, and sentenced to fifteen months' imprisonment with hard labour. The circumstances of the fraud were that the appellant, who was in charge of an oil company's depot, instructed his clerk to prepare documents to show that sixty empty oil drums had been returned by a customer whose account was accordingly credited with the sum of Shs. 2,400/-. The appellant having then declared the drums to be unserviceable was entitled to dispose of them for Shs. 7/50 each, and the sum of Shs. 450/- representing disposal of all the drums was paid in by the appellant to the depot's account. In fact the drums were non-existent and the sale fictitious, and but for discovery of the transaction the company would have been defrauded of Shs. 1,950/-. The substance of the appeal against conviction and sentence was that the appellant's clerk who gave evidence for the prosecution, must have been an accomplice, and as the magistrate failed to warn himself of the danger of convicting on the uncorroborated evidence of the clerk, the conviction should be quashed.

Held – at the trial both the magistrate and defence counsel were of the opinion that the clerk was innocent and acted on the instructions of the appellant, but assuming that the magistrate would have been better advised to have treated the clerk as an

accomplice, the direction in the Criminal Procedure Code, s. 381 (*c*), would not permit the conviction to be set aside unless there had been a failure of justice; and from the evidence as a whole the only reasonable conclusion was that the appellant was guilty of the offence charged; the sentence imposed was by no means excessive.

Appeal dismissed.

Cases referred to:

(1) *Davies v. Director of Public Prosecutions,* [1954] 1 All E.R. 507; [1954] A.C. 378.

(2) *R. v. Lewis,* [1937] 4 All E.R. 360; 26 Cr. App. R. 110.

Judgment

Rudd Ag CJ: read the following judgment of the court: The appellant appeals from conviction and sentence for fraudulent false accounting contrary to s. 325 of the Penal Code. He was employed by the Standard Vacuum Oil Company as a depot keeper in charge of the company's depot in Thomsons Falls, and was in charge of the running of the depot and responsible for stocks in the depot. The company used to allow a credit of 40/- a drum to customers returning empty oil drums to the depot. When a drum was so returned it was taken into stock as a serviceable drum, but if it was considered as suitable for discard as unserviceable an application would be made to the company in Nairobi for authority to place it in the category of unserviceable drums. It would be rendered unserviceable by holing and could then be sold as an unserviceable drum for Shs. 7/50 to anyone who was prepared to buy it. The demand for unserviceable drums exceeded the supply and customers were given preference; but an unserviceable drum could be sold to a person who was not a customer. In the month of August, 1956, documents were prepared in the depot purporting to show that sixty empty oil drums were returned to the depot by a firm called Popular Stores and a credit note for Shs. 2,400/- was made out on the appellant's instructions in favour of Popular Stores and dated August 16, 1956. It is in evidence as exhibit 13. In actual fact no drums had been returned by the Popular Stores and the whole transaction was bogus and imaginary. An application was then made to the Nairobi branch for discard of sixty drums as unserviceable and it was granted. The next step was to make out four cash sale vouchers each for the sale of fifteen unserviceable drums at Shs. 7/50 per drum. The cash shown on each of these vouchers was actually paid into the oil company's account but the drums were non-existent and the sales were fictitious, with the result that Popular Stores were shown on the books as entitled to a credit for Shs. 2,400/- in respect of drums which they had never returned and sixty unserviceable drums which, in fact, did not exist were shown to have been disposed of for a total of Shs. 450/- by four sales which never took place. If the matter had not been discovered the company would have been defrauded of the difference between Shs. 2,400/- and Shs. 450/-, that is to say Shs. 1,950/-.

One of the witnesses for the Crown was a clerk employed by the company to work under the appellant. The clerk's duties were to check railage returns and control the work of Africans in the yard. It was not his duty to sell or issue receipts; but if the appellant were absent at any time the clerk would be in charge and the appellant would check when he came back. The clerk gave evidence that on August 16 the appellant instructed him to write out the credit note, exhibit 13, in favour of Popular Stores and the clerk did so. The clerk also said that he wrote out two cash sale vouchers, exhibits 3 and 4, purporting to show two cash sales each of fifteen drums. These sales were in fact fictional. He said that he wrote these

documents upon the instructions of the appellant.

The charge against the appellant was that he made a false entry in a credit note, exhibit 13. In fact, as we have already mentioned, this credit note was made out by the clerk but it was not contested that the clerk made it out on the instructions of the appellant.

The main point of the appeal was that Mr. Patel, counsel for the appellant, submitted that this clerk must have been an accomplice to the fraud and consequently that the conviction should be upset because the trial magistrate had not found the clerk to be

an accomplice and had convicted the appellant upon the clerk's evidence without warning himself that it was unsafe to do so unless the clerk's evidence had been corroborated. Mr. Patel did not appear on behalf of the appellant at the trial. It would appear from the record that the counsel who did appear at the trial did not at all suggest that the clerk was an accomplice. In fact he submitted that the clerk was acting innocently on the instructions of the appellant. The magistrate found that the clerk was not an accomplice and so did not warn himself that it would be unsafe to convict upon the evidence of the clerk without independent corroboration implicating the appellant. The clerk admitted that he had never seen drums being brought to the depot by the Popular Stores; that he never saw more than two or three drums being brought in by anyone and that the number of unserviceable drums never amounted to sixty. Further, he admitted that he had signed a document, exhibit A, purporting to show that he had sold 114 discarded drums, each drum having been mutilated with a "V" shape knotted cut in the chain and a big hole and he admitted that that document was not true but said that he signed it on or about August 29 or 30 on the instructions of the appellant.

We have not had the advantage of seeing and hearing the clerk give his evidence; but the magistrate and defence counsel at the trial had that advantage and were of the opinion that the clerk was innocent and merely acted on the instructions of the appellant who was his superior. We are reluctant to differ from the magistrate in the circumstances. Nevertheless, in our opinion, if counsel for the appellant at the trial had adopted a different attitude and had not invited the trial magistrate to consider that the clerk was an honest witness and not an accomplice, it would not have been improper to have treated the clerk as an accomplice. If the clerk was not an accomplice there could, of course, be no valid objection to the conviction; but if he should have been treated as an accomplice then the learned trial magistrate should have administered a warning to himself that it was unsafe to convict upon the evidence of the clerk unless it was corroborated. In deciding this appeal we have taken into account the possibility that the clerk may have been an accomplice and that in that case the magistrate should have administered to himself the appropriate warning which, in fact, he did not do. It is now well settled that where a conviction is based upon the evidence of an accomplice and the court has not administered to itself the appropriate warning then, even if there was in fact evidence which amply corroborated the evidence of the accomplice, the mere fact that there was such corroborative evidence will not justify the upholding of the conviction. See Supplement to Archbold (33rd Edn.), para. 810, and the cases there cited, particularly the case of *Davies v. Director of Public Prosecutions* (1), [1954] A.C. 378. Archbold says the conviction will be set aside even if, in fact, there was ample corroborative evidence unless the Court of Criminal Appeal can apply the proviso to s. 4 of the Criminal Appeal Act, 1907. That proviso is in these terms:

> "Provided that the court may, notwithstanding that they were of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

The corresponding section of our Criminal Procedure Code is s. 381 (*c*) which is in a more mandatory form and reads as follows:

> "381. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account – . . .
>
> (*c*) of any misdirection in any charge to a jury,
>
> unless such error, omission, irregularity or misdirection has in fact occasioned a failure of justice:
>
> "Provided that in determining whether any error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and

should have been raised at an earlier stage in the proceedings."

There can be no doubt but that the court may dismiss the appeal if they are satisfied

that on the whole of the facts and with a correct direction the only proper verdict would have been one of guilty. Archbold, para. 579 at p. 348, and *R. v. Lewis* (2), 26 Cr. App. R. 110. Therefore, on the assumption that the clerk should have been treated as an accomplice, if there was not merely ample corroboration of the clerk's evidence, which would not be enough to save the conviction, but such overwhelming corroboration that on the evidence as a whole and the whole circumstances of the case the only reasonable conclusion was that the appellant was guilty then, in our opinion, the failure to treat the clerk as an accomplice and to give the necessary direction in that case as to the necessity for corroboration would not and should not prevent the appeal from being dismissed.

In this appeal we are quite satisfied that on the evidence as a whole the only reasonable conclusion that could be arrived at on the evidence was that the appellant was guilty. Appellant's counsel at the trial was a criminal lawyer of great experience and, as we have already mentioned, he invited the trial magistrate to treat the clerk as an honest witness and not as an accomplice. In the circumstances we think that it should not lightly be assumed that the trial magistrate was not justified in treating the clerk as an untainted witness, but leaving that aside and assuming that the magistrate would have been better advised to have treated the clerk as an accomplice we consider that the other evidence against the accused was overwhelming and it was not disputed. The appellant was in charge of the stock at the depot and there was good evidence that Popular Stores did not return sixty empty drums and that there never were sixty unserviceable drums in the depot in August, and that in fact, there were no unserviceable drums in the depot in August, yet the appellant signed an application to treat sixty drums, which were non-existent, as unserviceable, exhibit 1. He wrote out a listing sheet, exhibit 14, showing the credit given to Popular Stores for the sixty drums. He prepared a transfer account, exhibit 2, showing the transfer of sixty non-existent drums from the serviceable stock to the unserviceable stock. He prepared cash sale vouchers, exhibits 5 and 6, purporting to vouch two sales each of fifteen unserviceable drums, which sales and drums were proved to be completely fictional. He prepared three listing sheets, exhibits 7, 8 and 9, which recorded these fictional sales together with two similarly fictional sales vouched by exhibit 3 and exhibit 4, which were cash sale vouchers prepared by the clerk. The accountant of the Vacuum Oil Company for Kenya gave evidence that it was the appellant's responsibility to fill out credit notes or have them filled out and that no one was entitled to fill out a credit note without his authority and that the credit note book should have been checked by the appellant.

The company's sales representative for the Thomsons Falls area confirmed that a credit note would only be made out on the depot manager's authority and if he were absent it would be his responsibility to check them when he came back. In all the circumstances and particularly the documents to which we have referred which were made out by the appellant himself, there can be no doubt at all but that the appellant was a party to the attempted fraud.

Mr. Patel argued that as the appellant did not make out exhibit 13 the charge did not conform to the facts proved and that the appellant should not have been convicted of making false entries in this credit note. Mr. Patel was, however, forced to admit that the appellant was proved to have been privy to the making of those false entries but he submitted that that was a different offence albeit punishable under the same section.

In our opinion there is no substance in that point. We consider that it is undisputable that the appellant was a party to the fraud, the instigator, in fact, and, therefore, he was punishable as a principle offender as if he had made the false entries himself with the result that he could have been charged either as making the false entries or as being privy to the making of them.

The sentence of fifteen months' imprisonment with hard labour is by no means excessive. We dismiss the appeal.

Appeal dismissed.

For the appellant:
MF Patel
Maini & Patel, Nairobi

For the respondent:
GP Nazareth (Crown Counsel, Kenya)
The Attorney-General, Kenya

Munyao Muu v R
[1957] 1 EA 894 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	5 December 1957
Case Number:	392/1957
Before:	Sir Ronald Sinclair CJ and Connell J
Sourced by:	LawAfrica

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[1] Criminal law – Particulars of offence – Accused found moving maize without permit – Charged with wilfully disobeying a Statute – No averment in particulars of wilful disobedience of prohibited Act – Whether accused's plea constitutes admission of offence charged – Penal Code s. 27 (2) *and s.* 125 (*K.*) *– Defence* (*Control of Maize*) *Regulations* 1944 (*K.*) *– Movement of Maize* (*No.* 2) *Order* 1953 (*K.*).

Editor's Summary

The appellant was found moving twenty bags of maize in a motor vehicle from Machakos to Nairobi

> "without a permit issued by the Maize Controller or by any person authorised in writing by him to issue such permit."

This prohibition of movement of maize is contained in para. 2 of the Movement of Maize (No. 2) Order, 1953, but the Order did not provide that a breach of its provisions should be an offence. The appellant was accordingly charged before a magistrate under s. 125 of the Penal Code of wilfully disobeying a Statute and on his pleading "I admit the charge," was convicted and an order of forfeiture of the maize was made. (The charge and s. 126 of the Penal Code are quoted in full in the judgment). On appeal to the Supreme Court it was argued on behalf of the appellant that as an essential element of the offence created by s. 126 was wilful disobedience of a Statute or Ordinance by doing an act which was forbidden and that as there was no such averment in the particulars of offence the appellant's admission of the charge did not constitute an admission of an offence. The Crown while conceding that the particulars should

have contained such an averment, contended that there was no prejudice to the appellant and that the defect was curable under s. 381 of the Penal Code.

Held–

(i) the charge was defective by reason of the omission of any averment in the particulars of wilful disobedience of the prohibition contained in para. 2 of the Movement of Maize (No. 2) Order.

(ii) the court was not satisfied that the appellant was not prejudiced by the defective charge and therefore could not invoke the provisions of s. 381 of the Penal Code.

(iii) the order of forfeiture was, in any event, illegal.

Appeal allowed. Conviction and order of forfeiture set aside.

Cases referred to:–

(1) *Shedrack Kibai v. R.* (1956), 23 E.A.C.A. 604.

(2) *Sheikhan bin Salim v. R.*, Kenya Supreme Court Criminal Appeal No. 235 of 1957 (unreported).

Judgment

Sir Ronald Sinclair CJ: read the following judgment of the court: The appellant was convicted on his plea of an offence under s. 125 of the Penal Code. The charge reads:

> "Statement of Offence. Wilfully disobeying a Statute by doing an act which it forbids contrary to s. 125 of the Penal Code read with s. 2 of the Movement Maize (No. 2) Order, 1953, G.N. 1451, made under reg. 18 of the Defence Control of Maize, 1944, as amended by G.N. 601 of June 20, 1955.
>
> "Particulars of Offence: Munyao s/o Muu, in that on September 9, 1957, at about 9.00 p.m. at Athi River within Machakos District of the Southern Province,

> you were found moving twenty bags of Maize in motor vehicle No. W. 3334 from Machakos to Nairobi without a permit issued by the Maize Controller or by any person authorised in writing by him to issue such permit."

In answer to this charge the appellant said "I admit the charge."

The main ground of appeal is, in effect, that the charge does not disclose an offence and that a conviction based on a plea of guilty to such a charge is bad. Section 125 of the Penal Code provides:

> "Everyone who wilfully disobeys any Statute or Ordinance by doing any act which it forbids, or by omitting to do any act which it requires to be done, and which concerns the public or any part of the public, is guilty of a misdemeanour, and is liable, unless it appears from the Statute or Ordinance that it was the intention of the legislature to provide some other penalty for such disobedience, to imprisonment for two years."

It was argued that an essential element of the offence created by s. 125 is wilful disobedience of a Statute or Ordinance by doing an act which it forbids, and that as there was no such averment in the particulars of offence the appellant's admission of the charge did not constitute an admission of an offence. For the Crown it was conceded that the particulars should have contained such an averment, but it was contended that as the Statement of offence charged the appellant with

> "Wilfully disobeying a Statute by doing an act which it forbids contrary to s. 125 of the Penal Code read with s. 2 of the Movement of Maize (No. 2) Order, 1953."

there was no prejudice to the appellant and the defect is curable under s. 381 of the Penal Code.

The Movement of Maize (No. 2) Order, 1953, was issued by the Maize Controller under powers conferred upon him by reg. 18 of the Defence (Control of Maize) Regulations, 1944. Para. 2 of that Order provides, *inter alia*, that no maize shall be moved from one place to another by road vehicle except under a permit issued by the Maize Controller or by some person authorised by him in writing for the purpose. There is no provision in the Order that a breach of its provisions shall be an offence. In *Shedrack Kibai v. R.* (1) (1956), 23 E.A.C.A. 604, the Court of Appeal for Eastern Africa held that a breach of the provisions of the order is not an offence under the Defence (Control of Maize) Regulations, 1944, but that a wilful disobedience of its provisions is an offence under s. 125 of the Penal Code. The Court of Appeal observed in that case:

> "An offence under that section (i.e. s. 125 of the Penal Code) should be charged as 'Disobedience of statutory duty contrary to s. 125 of the Penal Code' or 'Breach of statutory prohibition contrary, etc.' and the particulars must allege the statutory prohibition (or duty imposed) and the nature of the breach."

The charge was, therefore, defective by reason of the omission of any averment in the particulars of a wilful disobedience of the prohibition contained in para. 2 of the Movement of Maize (No. 2) Order, 1953, and the question for decision is whether the defect is curable under s. 381 of the Penal Code.

We cannot invoke the provisions of s. 381 unless we are satisfied that the appellant was not prejudiced by the form of the charge. We must be satisfied that he fully understood the substance of the offence with which he was charged and that he admitted every ingredient of that offence. In *Sheikhan bin Salim v. R.* (2) Kenya Supreme Court Criminal Appeal No. 235 of 1957 (unreported), this court held that the word "wilfully" in s. 125 means that the acts complained of must not be casual, accidental or unintentional. It is not inconceivable that in the instant case the movement of the maize was not wilful on the part of the appellant within that meaning.

An accused person normally pleads to the particulars of the offence charged and it is impossible for us to say that the appellant must have understood that he was charged with "wilful disobedience" of the

provisions of the Movement of Maize (No. 2) Order,

1953. If he merely admitted the truth of the particulars of the charge, his admission did not constitute an admission of every ingredient of the offence created by s. 125 and a plea of guilty should not have been entered. We are, therefore, not satisfied that the appellant was not prejudiced by the defective charge and, accordingly, the conviction cannot be allowed to stand.

The appeal is allowed and the conviction and sentence, including the order of forfeiture of the bags of maize, are quashed. We order that the fine, if paid, be refunded to the appellant and that the maize or, if sold, the proceeds of the sale be restored to him.

We would add that it seems quite clear from *Shedrack's* case (1) that the order for forfeiture was, in any event, illegal. Under s. 125 of the Penal Code only imprisonment or, by virtue of the provisions of s. 27 (2) of the Penal Code, a fine can be imposed, unless it appears from the Statute or Ordinance which has been disobeyed that it was the intention of the legislature to provide some other penalty. Reg. 21 of the Defence (Control of Maize) Regulations, 1944, empowers a court to make an order of forfeiture when a person is convicted of an offence in contravention of those Regulations or of any order made thereunder; but, as the Court of Appeal held in *Shedrack's* case (1), a breach of the provisions of the Movement of Maize (No. 2) Order, 1953, is not an offence under these Regulations and, consequently, reg. 21 has no application.

Appeal allowed. Conviction and order of forfeiture set aside.

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For the respondent:
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