PRIVY COUNCIL.

KANHYA LAL
v.
THE NATIONAL BANK OF INDIA.

*P.C.** 1910 *March 9.*

[On appeal from the Chief Court of the Punjab, at Lahore.]

Appeal—Appeal from order dismissing suit under s. 102, Civil Procedure Code (Act XIV of 1882)—Suit in which two distinct claims were made—Claim to recover money paid to release attachment disallowed—Claim for damages for wrongful attachment withdrawn—Non-appearance of plaintiff—Improper procedure in dismissing suit for default—Remand.

The plaintiff (appellant) made two claims, one for money paid into Court to release from attachment property which he alleged he had purchased, but which had been attached as belonging to the Delhi Cotton Mills Company against which the defendant (respondent) held a decree; and the other for damages for the wrongful attachment. As to the former claim, the District Judge ruled "that the payment was entirely voluntary and for plaintiff's own interests, and that his remedy is under sections 69 and 70 of the Contract Act against the Delhi Cotton Mills, and I dismiss the case for recovery with costs. The case will proceed on the question of damages for illegal attachment." Evidence was proceeded with on the claim for damages, and after unsuccessfully petitioning that a decree might be drawn up in respect of the dismissal of his claim to the money paid into Court, and for leave to withdraw his claim for damages under section 373 of the Civil Procedure Code (Act XIV of 1882), with liberty to bring a fresh suit, the plaintiff unconditionally withdrew from the claim for damages, but not from the claim to the recovery of the money paid. Subsequently, the defendant proceeded to give evidence upon the issues raised in the case, and eventually, the plaintiff not appearing, the District Judge dismissed the whole case for default under section 102 of the Code. On appeal to the Chief Court, the majority of a Full Bench of that Court decided that no appeal lay from an order dismissing a suit under section 102, and the appeal was consequently dismissed:

Held, by the Judicial Committee, that after the decision of the District Judge adverse to the plaintiff on the claim to recover the money paid, which left no question as to that claim open in the Court of first instance, and the abandonment by the plaintiff of the claim to damages, there remained nothing in substance to be tried; and that the case was one not proper to be dealt with under section 102. Without deciding (as being, therefore, unnecessary) the question whether an appeal would lie against a dismissal regularly made under that section, their Lordships remanded the case to the Chief Court to decide the appeal on its merits.

* *Present:* LORD MACNAGHTEN, LORD COLLINS and SIR ARTHUR WILSON.

APPEAL from a judgment and decree (16th March 1907) of the Chief Court of the Punjab, which affirmed an order and decree (26th May 1903) of the District Judge of Delhi.

The plaintiff was appellant to His Majesty in Council.

The facts out of which this appeal arose were that on 21st April 1902, in a suit of the National Bank of India *v.* The Delhi Cotton Mills Company, the Chief Court of the Punjab on appeal made a money decree in favour of the Bank for Rs. 97,506-12-2 with interest thereon at the rate of 6 per cent. per annum from the date of suit till payment. On 25th June 1902 the premises and Mills of the Delhi Cotton Mills Company were purchased as a going concern by the present appellant at public auction for Rs. 5,02,000. On 15th August 1902 the Bank, in execution of their decree, applied to the Court of the District Judge, Delhi, for and obtained a warrant of attachment of the premises of the Cotton Mills Company (purchased as above mentioned by the appellant) and in compliance with the warrant, the bailiff accompanied by the Manager of the Bank, notwithstanding the objections and protests of the appellant's servants, entered upon and took possession of the said premises and mills on or about the 20th August 1902.

On 27th August 1902 the appellant filed a petition in the District Court, Delhi, setting out that he was the owner of the premises and mills attached, that that attachment was wrongful, that by such attachment he had been prevented from making the necessary arrangements for working the mills, and that such attachment "has caused him, and is likely to cause him, considerable loss which he will be quite unable to prove to its full extent, and is compelled to pay the balance of the decree of the Bank against the Delhi Cotton Mills Company, and he hereby produces the money for such purpose under protest" The appellant thereupon paid the money, Rs. 83,005, into Court, obtaining at the same time an order from the District Judge releasing the property from attachment.

On the next day, the 28th August 1902, the appellant instituted the suit out of which the present appeal arose against the Bank. In the plaint, after setting out the facts, the plaintiff

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prayed for a decree (*a*) for the return of the sum of Rs. 83,005 he had paid into Court, together with Rs. 27-8-3 interest for one day at 12 per cent., in all Rs. 83,032-8-3 with interest thereon at the same rate till realization from the Bank, and (*b*) for Rs. 10,000 damages for trespass and wrongful attachment.

The defendant Bank filed preliminary and further pleas to the effect that the suit as framed would not lie; that the plaint disclosed no cause of action against the Bank; that the plaint disclosed no coercion in respect of the payment of the amount alleged; and that, if the suit could proceed, the Cotton Mills Company ought to be joined as a party. The Bank denied that the plaintiff was the proprietor of the premises attached, or that he was so to the Bank's knowledge; they denied that the attachment was wrongful, and also that at the time of the attachment the Bank knew that the Cotton Mills Company had no right to the premises, the fact being that the Bank believed that the Company had a good title thereto. The Bank further denied that the plaintiff had suffered any damage in consequence of the action of the Bank, or that, if he had, the Bank was liable therefor, or that he had been compelled to pay any sum due to the Bank, the fact being that if he did make such payment he did so on behalf of the Cotton Mills Company and for his own convenience and advantage; and, finally, it was denied that the plaintiff was entitled to the remedies he claimed.

Thereupon the following preliminary issues were framed:

1. Will the suit as framed not lie?

2. Is there no such privity between the plaintiff and the defendant as to give the former a cause of action against the defendant?

3. Does the payment, accepting the statement that, as a matter of fact, the payment was made by the plaintiff to protect his own property, amount at law, since the payment was in an execution of a decree, to a payment on behalf of the judgment-debtor, and if so, has the plaintiff no remedy against the defendant?

4. Do the circumstances of the payment, accepting the plaintiff's statement as true, not entitle the plaintiff to recover?

5. Is there misjoinder of causes of action in the claim to recover money and damages?

After hearing argument on these issues and considering the law on the subject, the District Judge, on the 18th November

1902, held, as to the plaintiff's right to recover the money paid to satisfy the Bank's decree,

"That the payment was entirely voluntary and for the plaintiff's own interests, and that his remedy is under ss. 69 and 70 of the Contract Act against the Delhi Cotton Mills Company, and I dismiss the case for recovery with costs. The case will proceed on the question of damages for illegal attachment."

On the claim for damages the plaintiff traversed and joined issue on the defendant Bank's further pleas, and on 28th November 1902 the District Judge decided that there was no necessity to add the Cotton Mills Company as a party to the suit, and that the main question being as to the plaintiff's title, he should make a full disclosure thereof with liberty to the Bank to interrogate.

On 3rd December the plaintiff applied by petition that a decree should be drawn up as to the Court's judgment of the 18th November 1902, dismissing the plaintiff's claim to a refund of the money paid to the defendant Bank. On 20th December the District Judge dismissed the petition on the ground that that course was unnecessary, "as the final order in the case is the one on which the decree will be based, and the meaning of the order passed is that the claim for recovery is disallowed with costs rather than that the case is dismissed."

The plaintiff afterwards applied for a review of the order of 18th November 1902, on the ground that the District Judge's view as to the plaintiff's right to recover the money was erroneous. The application was heard on 21st March 1903, and was dismissed as being more a matter for appeal when a final decree was made on the whole case, than for review of the order of 18th November 1902. The District Judge said :—

"What that order was meant to lay down was that the Court on the allegations contained in the plaint, which at the time, for the sake of argument, it assumed to be correct, held that there had been an illegal attachment for which a suit for damages might be brought, but that the defendants were not detainers in the sense of detention as defined in s. 15 of the Contract Act. That is to say, that the assumed illegal attachment was not coercion in the sense of that section.....But the order was far from laying down that the plaintiff could not sue for damages for illegal attachment."

On the same day issues were framed by the Judge as to the plaintiff's right to recover damages, which came on for hearing

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on 16th and 17th April, when oral and documentary evidence was given on behalf of both parties.

On 25th May the plaintiff filed a petition praying that he might be permitted to withdraw his claim for damages under section 373 of the Civil Procedure Code with liberty to bring a fresh suit, and that a decree might be made on the part of the claim dismissed by the order of the Court on 18th November 1902, but the petition was rejected by the District Judge.

Thereupon the plaintiff's pleader stated to the Court that the plaintiff withdrew from the claim for damages, but not from the claim for the recovery of the money paid, which he maintained had been decided by the Court and was not then under trial. He closed his case by stating that, with reference to the issues not yet decided, he did not think any finding on them necessary.

Counsel for the defendant Bank then claimed to be allowed to call his witnesses and give evidence on all the remaining issues, so that the Court might come to a decision under section 204 of the Civil Procedure Code on the issues raised. On that the Court held that the defendant was entitled to call his evidence and to have a finding on the issues.

The plaintiff's pleader thereupon stated that he ceased to appear further for the plaintiff. The plaintiff also, who was present in Court, stated that he appeared only as a witness, not as a plaintiff, and that he was aware that the consequences of his not appearing as plaintiff would be that the case must be dismissed in default. The District Judge then adjourned the case until the next day, informing the plaintiff at the same time that if he wished to continue the case the next day he would be allowed to do so.

On the next day, the 26th May, the plaintiff was absent, and his pleader, though present, said he had no instructions to appear, and the defendant appearing the Judge made the following order:—

"I regret that I have no option in the case but to dismiss the case under section 102, Code of Civil Procedure, with costs in defendant's favour. I would merely note here finally that no application for a further adjournment has been made to me, though it was yesterday indicated to the plaintiff in my

order that such an application would be considered, and the case was adjourned till to-day expressly to give him time to consider the position he had chosen to take up."

From this decision the plaintiff appealed to the Chief Court, and on the hearing of the appeal by Mr. Justice Johnstone and Mr. Justice Rattigan, it was referred to a Full Bench of five Judges for decision of the question whether or not an appeal lay from an order under section 102 of the Civil Procedure Code.

On 8th June 1906, the Full Bench, by a majority of three to two (Mr. Justice Reid and Mr. Justice Chatterjee, the two senior Judges, dissenting), ruled that no appeal lay (1).

On the case being returned to the Division Bench, the plaintiff applied to the Court to treat the memorandum of appeal as a petition for revision under section 70 of the Punjab Courts Act (XVIII of 1884), inasmuch as it had been filed on the authority of a previous judgment of a Full Bench of the Chief Court (Punjab Record 1897, case No. 60,) deciding that an appeal did lie in such a case. The grounds stated for the exercise of the revisional jurisdiction were (*a*) that "the facts showed no default;" and (*b*) that "the plaintiff having withdrawn from the undisposed portion of the case, the District Judge was bound to have disposed of it on the application of withdrawal."

The Division Bench, however, declined to treat the memorandum of appeal as a petition for revision and dismissed the appeal with costs. After stating the facts, their judgment proceeded as follows:—

"These being the facts, are there any grounds upon which this Court is justified in revision in interfering with the order of the District Judge? We confess that we are unable to find any. Mr. Kirkpatrick argues that the claim for the recovery of Rs. 83,005 had been finally disposed of by the order of the 18th November 1902, and that consequently, when the plaintiff abandoned his claim as regards the Rs. 10,000 damages, the Court was bound to close the case and to pass a decree.

"In other words, that as soon as the plaintiff stated, on the 25th May 1903, that he withdrew from the claim *quoad* the Rs. 10,000, the Court had no jurisdiction to continue the hearing of the case. No doubt when a plaintiff withdraws absolutely from his suit, and gives it up entirely, the Court cannot

(1) (1906) Punjab Record.

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proceed with the further hearing of it. But this is not what happened in this case. The District Judge had, by a preliminary order, decided that part of plaintiff's claim must fail, but, as he was careful to explain in two subsequent orders, which must have been thoroughly understood by the plaintiff and his advisers, the meaning of that order was not that plaintiff's suit was dismissed even in part, and that the Court's intention was merely that to the extent of that claim its finding on the preliminary issue, which was one of law, was against plaintiff. After that order was passed plaintiff went on with his case, and produced evidence on the other issues framed. When he had done so, and after defendant had called *part* of his evidence, plaintiff suddenly decided to abandon the second part of his claim, at the same time expressly stating that he did not withdraw from the other part. Under these circumstances, what was the proper course for the Court to adopt? The plaintiff had *not* withdrawn from the suit. He had, no doubt, abandoned part of his claim, but we know of no authority which lays it down as a principle of law that in a case where a plaintiff abandons part of his claim the Court is thereby debarred from continuing the hearing of the suit, even though as regards the other part of the claim it may have held, on a preliminary issue, that the plaintiff must fail. The Court's view on this preliminary issue may prove to be erroneous, and it is surely within its competency, especially if the defendant so desires, to go on with the case and to give a finding on the other issues in order to avoid the necessity of a remand. Section 204 of the Code provides that 'in suits in which issues have been framed the Court shall state its finding or decision, with the reasons thereof upon each separate issue, unless the finding upon any one or more of the issues be sufficient for the decision of the suit.' In *Devarakonda Narasamma* v. *Devarakonda Kanaya* (1), it was held that there was nothing in this section to prevent the Court from deciding all the issues raised in a case, and in *Tarakant Banerjee* v. *Puddomoney Dossee* (2) their Lordships of the Privy Council remarked—'It is much to be desired that in all appealable cases the Courts below should, as far as may be practicable, pronounce the opinions on all the important points in order to avoid the possibility of a remand. To a like effect is the *dictum* in *Shib Charan Lal* v. *Raghu Nath* (3), and though the decisions of the High Court of Calcutta relied upon by Mr. Kirkpatrick [*Barhamdeo Narain Singh* v. *Mackenzie* (4) and *Nanda Lal Rai* v. *Bonomali Lahiri* (5)] may not be quite reconcilable with this view, we cannot hold that a Court acts without jurisdiction or with material irregularity if, in the exercise of its discretion, it proceeds to give a decision on all the issues framed by it, though its finding on any particular issue may be sufficient for the disposal of the case so far as that Court itself is concerned. In the present case the mere facts that plaintiff abandoned part of his claim and that as regards the other part of the claim the Court had decided on a preliminary issue of law, that the plaintiff must fail, did not preclude the Court, in our opinion, from giving its findings on the other issues of fact, especially in view of the fact that, after the passing of the order of the 18th

(1) (1881) I. L. R. 4 Mad. 134.
(2) (1866) 10 Moo. I. A. 476, 488; 5 W. R. (P. C.) 62, 66.
(3) (1895) I. L. R. 17 All. 174, 195.
(4) (1884) I. L. R. 10 Calc. 1095.
(5) (1885) I. L. R. 11 Calc. 544.

November 1902, and the framing of the other issues, the plaintiff had elected to give evidence in support of his case. But even if we must assume that it was under the circumstances of the case unnecessary for the Court to decide the other issues, we cannot on that account hold that the Court, in deciding that it ought to give findings upon those other issues, acted either with material irregularity or in excess of its jurisdiction, or without jurisdiction. The Court obviously thought that some, at all events, of the other issues were concerned with the part of the claim which, it had held upon a preliminary point of law, could not be established, and it accordingly decided to give a finding upon these issues. In so deciding it may have been wrong, but (without holding that its decision was wrong) are we to hold that its decision, even if erroneous, is open to revision? We cannot think so. At most all that can be urged is that the Court erred in law, but such error would not *per se* afford ground for this Court interfering on the revision side.

"Moreover, the course adopted by the plaintiff in this case puts him out of Court at once. Assuming that the Court was wrong in taking the course it did, it would have been open to the plaintiff to protest against its procedure, and to have thereafter made it a ground of appeal when (in the event of the decision of the Court upon the whole suit being against him) he had to prefer an appeal to the superior Court. The plaintiff, however, contumaciously declined to accept the ruling of the Court and refused to put in any further appearance in the case, with the inevitable result that his suit as a whole had to be dismissed in default.

"Upon a review of the facts we find ourselves unable to hold that this is a case in which we should be justified in interfering on the revision side, and we accordingly decline to entertain the memorandum of appeal as a petition for revision."

On this appeal.

Sir R. Finlay, K.C., DeGruyther, K.C., and *G. C. O'Gorman,* for the appellant, contended that the Chief Court was in error in dismissing the appellant's appeal. The appellant in his plaint made two claims,—one for a refund of money paid, and the other for damages,—which claims, though arising out of the same facts, were entirely distinct and separate and in no way dependent on one another. The first claim was finally disposed of by an order of the District Judge of 18th November 1902, and had a decree been passed in accordance with that order, the appellant would have had an undoubted right of appeal to the Chief Court from that decree. It was submitted, therefore, that when, on 25th May 1903, the appellant withdrew from his claim for damages, which alone was at the time before the Court, and at the same time reserved

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his rights in his claim for recovery of the money, the District Judge should have merely dismissed the suit. The fact that the appellant abstained from attending the taking of evidence on behalf of the respondent in a claim from which he, the appellant, had withdrawn, did not constitute such a non-appearance of the appellant as to justify the District Judge in dismissing the whole suit under section 102 of the Civil Procedure Code (Act XIV of 1882). The suit should have been dismissed, not for default under section 102, but on the merits, from which decree an appeal could have been brought as of right.

It was contended also that, even as the case stood, an appeal would lie from the order dismissing the suit for default under section 102 of the Code. On that point the High Courts in India had taken different views; but as regards the Punjab, a Full Bench of the Chief Court had, it was supposed, finally determined the question in the affirmative in case No. 60 reported in the Punjab Record for 1897. The question depended upon the meaning of the word "decree" in section 2 of the Civil Procedure Code. Reference was made to Civil Procedure Code, sections 2, 146, 154 and 373. The District Judge, moreover, had erroneously determined that the appellant had no right to recover the money paid. It was submitted that it was not a voluntary payment, but a compulsory one, made in order to release the appellants' property from a wrongful attachment in execution of a decree. Reference was made to the Contract Act (IX of 1872), sections 69, 70 and 72; *Fatima Khatun Chowdhrani* v. *Mahomed Jan Chowdhry* (1); *Dulichand* v. *Ramkishen Singh* (2); and clause (*b*) of section 72 of the Contract Act was referred to as being precisely applicable to the present case. When the case came before it, therefore, the Chief Court should have considered the appeal on its merits, having regard to section 70 of the Punjab Court's Act (XVIII of 1884) as amended by Act XXV of 1899, section 70 B; but it wrongly dismissed the appeal, and declined to act as a Court of Revision

Levett, K.C., and *A. M. Dunne*, for the respondent Bank, contended that the order of 26th May 1903, dismissing the suit

(1) (1868) 12 Moo. I. A. 65, 78. (2) (1881) I. L. R. 7 Calc. 648.

under section 102 of the Civil Procedure Code, was under the circumstances correct, and that no appeal lay from that order. An order made under section 102 is not a determination of the case; it is a penalty on the plaintiff for not appearing, and is made to avoid a determination. It could not be a *res judicata*. It was not a "decree," but an order, and as such order was not one of those mentioned in section 588, there was no appeal from it; and under the circumstances the Judge could have done nothing else than what he did. Reference was made to Civil Procedure Code (Act XIV of 1882), sections 2, 102, 154, 157, 540 and 588. There was no prejudice to any one by the Judge's hearing the evidence on and deciding the other issues: it had in fact been laid down that that ought to be done in all cases: see *Tarakant Banerjee* v. *Puddomoney Dossee* (1), decided on a section of the Civil Procedure Code of 1859, similar to section 204 of the Code of 1882. The District Judge's order of 18th November 1902 was not a "decree," and no appeal lay from that order; he could not have drawn up a "decree" after it, nothing in the Code of Civil Procedure authorising him to do so. In two subsequent orders he stated that that order was not intended to be a determination of the case. He held that there was no "coercion" and that the payment was voluntary and could not be recovered from the respondent, and his decision, it was submitted, was not erroneous. Reference was made to the Contract Act, sections 15 and 72. There were no facts before the Chief Court entitling it to exercise its revisional jurisdiction, nor was any proper application made on which it could have exercised such jurisdiction, and the Chief Court was justified therefore in refusing to exercise its revisional jurisdiction.

Sir R. Finlay, K.C., replied.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. This appeal has been brought against a judgment and decree of the Chief Court of the Punjab which affirmed the decision of the District Judge of Delhi.

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(1) (1866) 10 Moo. I. A. 476; 5 W. R. (P. C) 63.

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The circumstances out of which the appeal arises can be briefly stated, and, as in their Lordships' opinion, the case must go back to the Chief Court for further consideration, their Lordships think it desirable to say nothing about the case which is not absolutely necessary.

In the year 1902 a case was pending, in which the National Bank of India was plaintiff and the Delhi Cotton Mills Company, Limited, defendant, and on the 21st April of that year the Chief Court, on appeal, made a money decree in favour of the Bank for a sum of over Rs. 97,000 and interest. On the 25th June in the same year the premises and mills of the Cotton Mills Company were purchased, as a going concern, by the present plaintiff, at public auction, for a sum very much larger than the amount of the Bank's decree. On the 15th August in the same year the Bank, in execution of their decree, obtained an attachment of the premises purchased by the plaintiff, and possession was taken under that attachment. In the same month of August the present plaintiff filed a petition in the District Court alleging that the attachment was wrongful, and that he was compelled to pay the balance due under the Bank's decree. He paid into Court accordingly and thus released the property from the attachment. On the following day the now plaintiff filed a plaint against the Bank in the District Court, in which plaint he asked for two things—*first*, for a decree for the amount which he had paid to release the property from attachment; and, *secondly*, for damages on the ground of the illegality of the attachment.

It is unnecessary to follow in detail the proceedings in the case. It is enough to say that on the 18th November 1902 the District Court made an order deciding that the principal claim of the plaintiff, namely, that relating to the sum paid to release the attachment, was unsustainable in law. The learned Judge thus expressed himself:

"I therefore rule that the payment was entirely voluntary, and for plaintiff's own interests, and that his remedy is under sections 69 and 70 of the Contract Act against the Delhi Cotton Mills, and I dismiss the case for recovery with costs. The case will proceed on the question of damages for illegal attachment."

Their Lordships are of opinion that, so far as concerns the recovery of the money paid to discharge the attachment, this order of the District Court was a full determination, adverse to the plaintiff, of his claim in that respect.

On the 3rd December 1902 the plaintiff petitioned that a decree might be drawn up embodying the dismissal of his claim for the money paid into Court. This petition was dismissed.

The claim for damages still remained, and evidence bearing upon it was proceeded with. On the 25th May 1903 the plaintiff asked to be allowed to withdraw his claim for damages under section 373 of the Civil Procedure Code (that is to say with liberty to sue again), and again asked that a decree should be drawn up with reference to the claim dismissed. These applications were refused; and thereupon the plaintiff absolutely withdrew from the claim for damages, but not from that for the recovery of the money paid.

After that the defendant proceeded to give evidence upon all the issues which had been raised, the plaintiff not appearing. In the result, the District Judge dismissed the whole case for default under section 102 of the Civil Procedure Code.

On appeal to the Chief Court, the majority of the learned Judges of that Court held that the suit having been dismissed under section 102 of the Civil Procedure Code, no appeal lay, and against that decision the present appeal has been brought.

Their Lordships are of opinion that the case should not be allowed to stand as it does now. As to the principal claim of the plaintiff, that relating to the money paid to release the attachment, there was in substance a clear decision of the District Judge adverse to the plaintiff; after which, in substance, no question as to that claim remained open in the Court of first instance.

As to the second claim, that for damages, the plaintiff having unconditionally abandoned his claim, there remained nothing in substance to be tried.

The case in their Lordships' opinion was one not proper to be dealt with under section 102 of the Civil Procedure Code.

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Their Lordships are of opinion that it is unnecessary to decide whether an appeal lies against a dismissal regularly made under section 102, because they think that that section was not applicable to the present case. They think it necessary that the case should go back to the Chief Court to decide the appeal upon its merits. In the course of the argument, several minor points were raised which it seems desirable to notice. One was with reference to the evidence already taken in the case, and the use to be made of that evidence. A second point was with reference to the refusal of the first Court to issue a commission. The third was with reference to the refusal of the Court to allow the cross-examination of a learned gentleman who had appeared as counsel in the earlier stages of the case. These are matters upon which it appears undesirable for their Lordships to express any opinion. Such matters can be dealt with by the Chief Court when considering the case on the merits.

Their Lordships will humbly advise His Majesty that the decree of the Chief Court should be discharged with costs, and that the case should be remitted to that Court in order that the appeal to that Court may be heard and decided on its merits, and that the costs incurred in the District Court should abide the result of such appeal.

The respondents must pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: *T. L. Wilson & Co.*

Solicitors for the respondents: *Sanderson, Adkin, Lee & Eddis.*

J. V. W.