I enter judgment for the plaintiff for £250 and order the defendants to pay the costs of the action.

Judgment for the plaintiff.

HEBRON and THOMPSON v. CHELLARAM

West African Court of Appeal (Kingdon, C.J. (Nig.), Yates, J. (G.C.) and Macquarrie, J. (Sierra Leone)): March 27th, 1936

[1] **Civil Procedure — appeals — appeals by case stated — appeal on point of law — trial judge may state case for opinion of appeal court at any stage of proceedings provided that answer will finally decide issue.** The West African Court of Appeal (Civil Cases) Ordinance, 1929, s.4 gives a trial judge the right to state a case on a question of law for the opinion of the Court of Appeal at any stage of the proceedings, whether or not he has proceeded to judgment or reached a decision (*per* Kingdon, C.J. at page 421, lines 19—29; Yates, J. concurring at page 421, line 36—page 422, line 25; Macquarrie, J. dissenting at page 423, lines 14—26) provided that the Court of Appeal's answer will finally decide the issue, since the object of procedure by way of case stated is to ensure the *finality* of a decision (*per* Yates, J. at page 421, lines 34—35).

The Supreme Court stated a case based upon a question of law in an issue before it for decision by the West African Court of Appeal.

The preliminary point for consideration by the West African Court of Appeal was the proper interpretation of s.4 of the West African Court of Appeal (Civil Cases) Ordinance, 1929: did the section empower a trial judge to reserve a question of law, on a case stated by him, for consideration by the Court of Appeal (a) at any stage of the proceedings, (b) at any stage of the proceedings provided that the court's answer would finally decide the issue, or (c) only after he had given a judgment or decision on the case?

The court ruled that the case stated was properly before the court.

Legislation construed:

West African Court of Appeal (Civil Cases) Ordinance, 1929 (No. 9 of 1929), s.4:

The relevant terms of this section are set out at page 421, lines 11—18.

Lightfoot Boston and *Hotobah-During* for the plaintiffs;
C.E. Wright for the defendant.

KINGDON, C.J. (Nig.):

I am of opinion that this case stated is properly before this court, which can and should express its opinion upon the question submitted to it.

It has been suggested that under s.4 of the West African Court of Appeal (Civil Cases) Ordinance, 1929 it is not competent to the lower court to reserve for the consideration of this court, upon a case stated, any question of law unless and until the lower court has given its judgment of decision in the suit or matter before it. The wording of the section is:

> "In addition without prejudice to the right of appeal conferred by this Ordinance, any Judge of the Supreme Court or the Circuit Court may reserve for consideration by the Court of Appeal, on a case to be stated by him, any question of law which may arise on the trial of any suit or matter, and may give any judgment or decision subject to the opinion of the Court of Appeal, and the Court of Appeal shall have power to hear and determine every such question."

This section, in my view, gives an absolute discretion to the judge to reserve a question at any stage of the proceedings before him. He may do so before taking any evidence, or after some evidence has been taken, or after all the evidence has been taken but judgment not given, or he may give his judgment or decision subject to the opinion of this court. I cannot see that there are any words in the section to fetter his discretion, and it is clearly right that this should be so, inasmuch as the course which may be most convenient and economical in one case may be the reverse in another. The case stated is of course the case which comes before this court, *viz.*, the question submitted to it, and not the whole case before the lower court.

YATES, J. (G.C.):

In this particular case I agree with the decision arrived at by the learned President, but for different reasons.

In my view the object of a special case stated is to ensure the *finality* of a decision, in order if possible to avoid future litigation. For this reason power has been given to a trial judge by s.4 of the West African Court of Appeal (Civil Cases) Ordinance 1929 to state a special case to the West African Court of Appeal when (*a*) he has given judgment in the case before him or (*b*) has come to a decision upon what is before him. In my view the effect of this is

that he asks the West African Court of Appeal a question, or questions, of law as the case may be, which will determine the issue before him and *final* judgment will be given in accordance with the decision of the Court of Appeal. It may happen before evidence is given a question will arise of the jurisdiction of the Court which may *finally* decide the issue. It is clear under s.4 that the judge having given his decision may state a case for the consideration of the West African Court of Appeal, whose decision is final. Again, it may happen, after hearing evidence, a question of law arises which will *finally* dispose of the case. Under such circumstances, the judge having given his decision, I think the section again applies, and he can state a case, as the ruling of the Court of Appeal may *finally* dispose of the suit before him.

Again, under the section the judge, after hearing all the evidence, may, in his capacity as a judge, state a special case as to what is the proper *final* judgment to be given on the law upon the facts found — or he may give a final judgment and ask the Court of Appeal whether upon the facts found his judgment is right in law.

The above is, I think, the meaning of the section, and I confess that until I heard counsel I felt a difficulty in this particular case; but I am now satisfied that as the question asked in the case stated, *viz.*, whether or not the Bills of Sale Act, 1878, is a statute of general application applicable to the colony, will *finally* decide the issue between the parties, the case before us is properly stated.

MACQUARRIE, J. (Sierra Leone):

This matter comes before us as a case stated by the Supreme Court of Sierra Leone, presided over by the learned Chief Justice, reserving a question of law arising at a trial by him for the opinion of this court.

A preliminary point has arisen as to whether a judge of the court below has power, under s.4 of the West African Court of Appeal (Civil Cases) Ordinance, 1929, to reserve a question for consideration by this court, without giving any decision or judgment in the suit under trial by him.

This depends upon the meaning to be given to the section, which reads as follows:

> "In addition and without prejudice to the right of appeal conferred by this Ordinance, any Judge of the Supreme Court or the Circuit Court may reserve for consideration by

the Court of Appeal, on a case to be stated by him, any question of law which may arise on the trial of any suit or matter, and may give any judgment or decision subject to the opinion of the Court of Appeal, and the Court of Appeal shall have power to hear and determine every such question."

In my opinion, the answer should be in the negative, *i.e.*, that the judge must give decision or judgment in the suit, subject to the opinion of this court, and that the purported reservation of a question of law for consideration by this court in this case, the court below having given no decision or judgment on the case, is of no effect and this court has no power to hear and determine the question, it also appearing that our opinion on the question would not dispose of the case between the parties.

The section read as a whole does not in my opinion dispense with the ordinary duty of a judge to give decision in the suit before him, but merely empowers him to give his decision in a particular way, namely, "subject to the opinion of the Court of Appeal" upon the question of law which may arise on the trial, which he may reserve for its consideration.

The section provides that the form of reservation is to be by a "case stated" by the judge, not merely "the question to be framed or put" or some similar phrase, but a "case to be stated."

I can give these words no other meaning than that the issues between the parties and the facts found shall be stated, showing how the question of law arises and how the possible alternative answers to the question would finally dispose of the whole suit.

Also, the language of the section is not appropriate, in my opinion, to institute this entirely new procedure, *viz.*, the reservation by a court of trial of a question of law arising during the hearing of a case, for the opinion of the court, *unless that opinion will dispose of the case between the parties.* It seems to me a legitimate criticism that very different language is necessary to express the intention to create such a new power.

If such were the intention it would seem to be unnecessary to require a case to be stated or to make reference to the giving of judgment or decision. It would be sufficient to provide that the judge might put the question and receive an answer whereupon he could proceed with the trial — unless, indeed, another question of law were to arise and he thought fit to reserve it for consideration by this court.

In other words, my view is that the section does no more than provide a possibly more convenient method of bringing a case on

appeal to this court where the answer to the question of law, whatever it might be, would dispose of the case between the parties. The circumstances under which a judge would take such a course are for him to decide.

For these reasons, I have come to the conclusion that as the court below has given no judgment or decision upon the case, and as our opinion would not dispose of the case, this matter is not properly before us, and we have no power to consider the question.

It should therefore, I think, be sent back to the court below for the trial to be continued to its conclusion, *i.e.*, final judgment, or to a stage where the judge may think proper to reserve any question of law in accordance with the principle above expressed.

Ruling that case stated properly before court.

IN THE MATTER OF ZENABAH MUSTAPHA, RIZA MUSTAPHA and MARIAMA MUSTAPHA

Supreme Court (Webber, C.J.): July 27th, 1936

[1] **Family law — custody of children — discretion of court — interests and welfare of children paramount consideration:** The court has absolute discretion in making a custody order; in considering all the circumstances of the case, it should give paramount consideration to the interests and welfare of the children. In the case of young girls who have lived exclusively with their mother for some years, whose earlier happiness was affected by their father's cruelty, and who have a greater love and affection for their mother than for their father, their interests and welfare are best served by giving custody to their mother with access to their father (page 426, lines 4—7; page 427, lines 3—25).

The petitioner petitioned the Supreme Court for custody of the children of his marriage to the respondent.

Eight years after the parties were married relations between them deteriorated and the respondent left the petitioner, taking with her the three children of the marriage, all daughters of the ages of 13 and below. The respondent alleged that the petitioner had turned her and the children out of the house, while the petitioner alleged that the respondent had left of her own accord. The respondent immediately filed a petition for judicial separation on the ground of the petitioner's cruelty, in which she also prayed for custody of the children; the petition was ultimately dismissed