"(2) If the respondent fails to comply with this rule the court may refuse to entertain the objection or may adjourn the hearing thereof at the cost of the respondent or may make such other order as it thinks fit."

The one consideration is the argument put to us by Mr. Beccles-Davies, based on rule 21 (1), that the objection ought not to be entertained because it was made with less than three clear days' notice.

The object of the rule is self-evident, namely, to prevent appellants coming to court to argue their appeal, only to be surprised by a preliminary objection, which they have not come prepared to argue.

Now what happened here? Notice of the objection was filed on the 10th. The appeal was put in the hearing list for the 13th, not on the application of either party but on the direction of the court because, other appeals higher up on the list for this session having been disposed of, it was thought that this one would be reached that morning, as indeed it was.

After service on him of the notice of the objection, the appellant filed an affidavit in reply thereto, on the 12th, setting out his factual excuses for the notice of appeal having been filed without the copy of the order. The last paragraph thereof reads:

"7. I make this affidavit in reply to the preliminary objection raised herein so that this honourable court would permit me to proceed with the prosecution of the appeal herein notwithstanding non-compliance with rule 14 (4) of the Court of Appeal Rules."

If there should be less than three clear days' notice, the objection does not necessarily fail. Rule 21 (2) makes that clear. In the circumstances here, I am of opinion that the appellant must be taken to have waived any need for three clear days' notice. He came to court aware of the objection, and prepared to argue why he should be allowed to proceed with the prosecution of the appeal: and he did so argue, although he also argued that the objection should not be listened to for lack of three clear days' notice.

I would uphold the objection and order the appeal to be struck out.

[COURT OF APPEAL]

Freetown
July 19,
1962

J. C. SAMUELS . . . . . *Appellant*

v.

NORTHERN ASSURANCE CO. LTD. . . . . *Respondent*

Ames P.,
Dove-Edwin
J.A.,
Bankole Jones
J.

[Civil Appeal 4/62]

Practice and Procedure—Whether trial judge should allow plaintiff to amend claim at close of case—Rule 1, *Order* 24, *Supreme Court Rules.*

Plaintiff sued the defendant company for the return of certain motor parts or their value. After both plaintiff and defendant had closed their cases, plaintiff asked for leave to amend his complaint. The judge ruled that it was too late to grant the amendment, and gave judgment for defendant. Plaintiff appealed.

Held, allowing the appeal, that the trial judge should have allowed plaintiff to amend his complaint for the purpose of determining the real question in controversy between the parties, since such amendment would not have resulted in injustice to the defendant.

Cases referred to: *Priest Bobo* v. *Anthony* (1931) 1 W.A.C.A. 169; *Kurtz* v. *Spence* (1887) 36 Ch.D. 770; *England* v. *Palmer* (1955) 14 W.A.C.A. 659; *Ababio IV* v. *Quartey and another*, P.C. Appeal No. 94 of 1914; *Ecklin* v. *Little* (1890) 6 T.L.R. 366; *Loutfi* v. *Czarnikow Ltd.* [1952] 2 All E.R. 823.

Cyrus Rogers-Wright for the appellant.
Alfred H. C. Barlatt for the respondent.

DOVE-EDWIN J.A. In this appeal the main point for decision is this: Was the learned trial judge right in refusing the leave asked for by plaintiff to amend the indorsement of the claim or not?

The facts were that the plaintiff sued the defendant company for the return of certain motor parts named in his writ or their value, £400. The defendants in their statement of defence denied liability. The case was heard by the learned trial judge and both the plaintiff and the defendants closed their case. At this stage of the proceedings Mr. Cyrus Rogers-Wright, who appeared for the plaintiff, asked for an adjournment and on the case coming up for trial on the adjourned date asked for leave to amend. His application was as follows:

> "I would like to make the following amendment with your lordship's leave. I ask that the indorsement of claim be amended as follows: in the first line, between the words 'return' and 'of,' insert the words 'in the condition taken.' I wish to delete paragraph 6 of the particulars and insert instead 'the plaintiff therefore inspected the parts and finding that they were useless refused to take them: And the plaintiff therefore claims the value £400 deleting the claim for detention'."

Mr. Dobbs, for the defendants, opposed the amendment and said it should not be allowed if injustice would be done to the defendants. Mr. Dobbs gave other reasons why the amendment should not be allowed.

The learned judge ruled, after considering the application, that in all the circumstances of the case it was too late to grant the amendment as it would virtually be a new action.

After this ruling both counsel said they did not wish to address the court; presumably on the merits.

The learned judge then proceeded to judgment. In his judgment he said, inter alia:

> "This is a claim in detinue. An essential ingredient of demand and refusal has not been established. The evidence, however, points to negligence which the plaintiff was likely to succeed in if his claim had been accurately framed.
>
> "In the circumstances the claim and the action is dismissed accordingly. Each side to bear its own costs."

Against this judgment the plaintiff has appealed to this court on the following grounds:

> "That, having regard to the specific finding of his lordship, the learned trial judge, contained in his judgment dismissing the plaintiff's claim, his

lordship was wrong in law in refusing leave to amend sought by the plaintiff and ought to have granted same in order that substantial justice may be done to the parties."

Order 24, rr. 1 to 12, of the Supreme Court Rules (Cap. 7) deals with amendment, and rule 1 reads as follows:

"1. The court may, at any stage of the proceedings, allow either party to alter or amend his indorsement or 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 questions in controversy between the parties."

It is relevant at this stage to note that although the original claim was in detinue the case was contested as if it was founded on negligence and with this view the learned trial judge seems to agree in his judgment.

Would injustice have been done to the respondent company if this amendment were allowed? I think not, since it was apparent on the evidence that negligence was alleged.

Counsel for appellant quoted the case of *Loutfi* v. *Czarnikow Ltd.* [1952] 2 All E.R. 823. This case sets out in detail when an amendment may be allowed at the close of a case but before judgment.

In the case of *Priest Bobo* v. *Timothy A. Anthony* (1931) 1 W.A.C.A. 169 at p. 174 the case of *Kurtz* v. *Spence* (1887) 36 Ch.D. 770 was mentioned in which Cotton C.J. said at p. 773:

"When by an amendment the real substantial question can be raised between the parties, ought we to refuse to allow the amendment, having regard to the rule, and to the direction in the Judicature Act that as far as possible in any proceeding all questions between the parties shall be decided so as to prevent multiplicity of actions?"

Our rule 1 of Order 24 emphasises that "amendments shall be made as may be necessary *for the purpose of determining the real question in controversy between the parties.*" The amendment sought would, in my view, have settled the real question in controversy between the parties; and, if the amendment had been allowed, the portion in the learned judge's judgment referring to the evidence and what was likely to happen would have been unnecessary.

In the case of *England* v. *Palmer* (1955) 14 W.A.C.A. 659 the case of *Ababio IV* v. *Quartey and anor.* is mentioned where their lordships of the Privy Council laid down that "the court ought to have allowed all the necessary amendments that were required for the purpose of enabling the use of evidence that had been obtained for the purpose of settling the real controversy between the parties." Another case cited was *Ecklin* v. *Little* (1890) 6 T.L.R. 366, where the court (Denman Charles and Vaughan-Williams JJ.) amended the statement of claim in an action to conform with the words proved at the trial, which were not those set out in the statement of claim, although the judge at the trial had offered plaintiff's counsel an amendment of pleadings and it had been refused.

In my view, the amendment sought ought to have been allowed.

I would allow this appeal and set aside the judgement of the court below dismissing the plaintiff's claim and send the case back for the amendment to be allowed and for the trial to be continued.