jury is not governed by the rules applicable to a motion for a new trial after a verdict of a jury. In such a case it is the duty of the Court of Appeal to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of witnesses comes into question, but with full liberty to draw its own inference from the facts proved or admitted, and to decide accordingly."

This case turned partly on credibility and partly on inferences. The learned judge accepted the evidence of the respondents: in my opinion their evidence does not provide a standard of proof commensurate with the allegation of fraud. Moreover it included a passage of hearsay adverse to the appellant, which it should not have included. As to the inferences, in my opinion the learned judge drew from some facts inferences adverse to the appellant without taking into consideration other facts which were relevant and either not necessarily adverse to him or favourable to him and in one instance irrelevant.

I would allow the appeal, and reverse the judgment by entering judgment dismissing the respondents' claim.

BANKOLE JONES, C.J. and DOVE-EDWIN, J.A. concurred.

Appeal allowed.

THOMAS *v.* THOMAS

COURT OF APPEAL (Ames, P., Bankole Jones, C.J. and Dove-Edwin, J.A.): March 18th, 1965
(Civil App. No. 15/64)

[1] **Courts—magistrates' courts—procedure—summons—criminal summons issued in civil proceedings—not fatal if defendant not misled:** It is not a fatal defect in a magistrate's court summons that it is headed and numbered as a criminal summons though issued in proceedings which are not criminal, if at the hearing the defendant raises no objection and knows he is not charged with an offence (page 231, lines 27–36; page 232, lines 6–7).

[2] **Courts—magistrates' courts—procedure—summons—material particular not stated—defect cured when defendant has actual notice of particulars:** The omission of a material particular from a magistrate's court summons will be cured if it is stated in the application for the summons so that the defendant knows what the allegation against him is (page 231, lines 37–41; page 232, lines 5–7).

[3] Criminal Procedure — summonses — maintenance—maintenance summonses not criminal proceedings: A summons under the Married Women's Maintenance Act (*cap.* 100) is not a criminal proceeding and the defendant's plea need not be taken as in a criminal case (page 231, lines 27–34).

[4] Family Law—maintenance—maintenance orders—effective date—date may be made later than date of order where applicant dilatory: Where there has been delay in applying for a summons under the Married Women's Maintenance Act (*cap.* 100) the court, in granting a maintenance order, may make it effective from a date later than the date of the order (page 232, line 33—page 233, line 4).

[5] Family Law—maintenance—summons for maintenance—contents of summons—must allege wilful refusal and neglect to maintain: A summons under the Married Women's Maintenance Act (*cap.* 100) must allege that the husband has wilfully refused and neglected to maintain the wife (page 231, line 37—page 232, line 7).

[6] Family Law—maintenance—summons for maintenance—not criminal proceeding: See [3] above.

The respondent summonsed the appellant, her husband, before a magistrate for an order for the maintenance of their child and herself under the Married Women's Maintenance Act (*cap.* 100).

Having deserted the respondent, the appellant paid a monthly sum for the support of their child, but not of the respondent, from June 1962 to March 1963. Application for the summons was made in September 1963.

The summons issued was headed "Criminal Summons" and numbered "Charge 1004 of 1963," but the appellant's plea was not taken as it would have been in a criminal case. The appellant knew, however, that he was not charged with an offence and his counsel raised no objection at the hearing.

The word "wilfully" was not used in the summons, but the application for the summons stated that the appellant had deserted his wife and wilfully refused and neglected to maintain her. Order III, r.2 of the Magistrates' Courts Rules (*cap.* 7) requires a copy of the particulars set out in the application for a summons to be attached to the summons. The appellant knew what the allegation against him was.

On June 10th, 1964, the magistrate made an order for the maintenance of the respondent and the child as from April 1st, 1963. The appellant appealed to the Supreme Court, which dismissed the appeal.

On further appeal, the appellant contended that the judge was wrong in not deciding the question whether maintenance ought to have been fixed retrospectively from April 1st, 1963, and that the proceedings before the magistrate were a nullity because no plea was taken though the summons was headed and numbered as a criminal summons and because the word "wilfully" was not used in the summons.

Case referred to:

(1) *Jones (B.)* v. *Jones (M. E.)* (1929), 142 L.T. 168; 94 J.P. 31, distinguished.

Statute construed:

Married Women's Maintenance Act (Laws of Sierra Leone, 1960, *cap.* 100), s.3:

"A summons under this Act shall be applied for and granted and served in the same manner as summonses are now applied for, granted and served in cases of assault, or in such other manner as the said Magistrate shall direct. . . ."

S. B. Davies for the appellant;
R. E. A. Harding for the respondent.

DOVE-EDWIN, J.A., delivering the judgment of the court:

On September 11th, 1963, the respondent Gladys Victoria Efua Sogie Thomas by her solicitor applied to the Police Magistrate for maintenance for "their child and herself" under the Married Women's Maintenance Act (*cap.* 100). The marriage was in 1960. On September 16th the Police Magistrate issued a criminal summons to the appellant Robert Balogun Sogie Thomas to appear in person before the court on Monday September 23rd, 1963 and he appeared in court on that day. On October 3rd, the respondent was heard and the appellant was represented by counsel. The matter was adjourned and continued on October 11th, 1963 when the respondent concluded her evidence.

There were further adjournments and it was not till April 16th, 1964 that a witness for the respondent was heard. On April 24th the matter was resumed and the appellant gave his evidence which he concluded on May 11th after an adjournment. The matter was finally decided by the magistrate when he gave his judgment on June 10th, 1964, when he ordered the appellant to pay £15 per

month to the respondent his wife as maintenance for herself and child with effect from April 1st, 1963.

Against this order the appellant appealed to the judge and his appeal was dismissed on November 25th, 1964 and against the learned judge's judgment he has now appealed to this court on several grounds which were so linked together that counsel said he would argue all together. The main points of his argument were (a) that the summons on which the whole proceedings were based was defective and that the whole proceedings before the magistrate were a nullity and he relied on the case of *Jones (B.)* v. *Jones (M. E.)* (1) to support his contention. This forms the substance of counsel's grounds 1 to 8 of the grounds of appeal; (b) that constructive desertion was not proved and that the learned judge was wrong in law in holding that it had been proved; that there was no corroboration of the respondent's allegations; (c) that the learned judge was wrong in not deciding the question whether the learned magistrate was right in fixing maintenance retrospectively from April 1st, 1963 and that instead of that he said that if the appellant considered the amount awarded excessive he should go again to the magistrate to vary it; (d) that the magistrate and the judge on appeal failed to consider fully the means of the respondent in fixing the quantum of maintenance as required by law.

To deal with ground (a) first: Section 3 of the Married Women's Maintenance Act (*cap.* 100) deals with how an application for a summons for maintenance should be applied for. This was done by the respondent through her solicitor and it is at p.2 of the record of appeal. Counsel for the appellant submits that at p.1 of the record of appeal the summons ordering the appellant to appear was headed "Criminal Summons" and was Charge 1004 of 1963 and this made the whole proceedings criminal. He submits further that there was no plea as in criminal cases. With respect the summons was brought by the magistrate under the Married Women's Maintenance Act and the parties, especially the appellant, knew that he was not charged criminally with an offence. He was defended by counsel and no objection whatsoever was taken all through the rather long and protracted hearing. It was first raised on appeal before the judge. Another submission under ground (a) was that the word "wilfully" was not used and on this point counsel relied on *Jones (B.)* v. *Jones (M. E.)* (1). The application made under the Act states quite clearly—"that he deserted his wife and wilfully refused and neglected to maintain her." The appellant knew quite well what

the allegation against him was. In *Jones (B.)* v. *Jones (M. E.)* the wife had taken her husband to court after court to answer unfounded charges and the summons which was concerned in the appeal did not mention "wilful"; it said "neglect to provide reasonable maintenance." The instant case does not conflict in any way with the decision in *Jones (B.)* v. *Jones (M. E.)* and I think this ground must fail.

To deal with constructive desertion and corroboration: The learned magistrate who saw and heard the parties said he believed the wife and did not consider the appellant, the husband, a witness of truth. He was the judge of the facts and he found that "the husband practically drove the wife away from the matrimonial home. His conduct supports this." What are the facts? The wife gave evidence of beatings and abortion. It is true she did not call the doctor concerned, which might have strengthened her case, but it is true that when she had their baby and she sent to tell the appellant he did not reply or show any sign that he was pleased at the arrival of a child. He packed the wife's furniture in the house away (she had partly furnished it) and bought new furniture of his own. He told her that she would leave the house: "When I give you bad treatment you will leave the house." He saw her leaving and made no attempt to stop her and no attempt to get her back and in my view to show that he was well rid of her he formed an association with another woman and installed her in the matrimonial home as his wife. This woman, Nurse Jones, has had a child by him. The only time the appellant said he wanted his wife back was when he was asked under cross-examination but, as soon as he was asked whether he wanted his wife to go and live in the same house with his Miss Jones, he did not reply. In my view the conduct of the husband and his attitude all along is corroboration enough to maintain constructive desertion. There was the *factum* and the *animus*.

As to the order for maintenance dated from April 1st, 1963, I think the appellant has some cause for complaint here. From April 1963 the respondent did not do anything to claim maintenance from the husband. She did not take any action until September 11th, 1963. I do not think she is entitled to maintenance from April 1963. The appellant admits that he supported his child, not the wife, from June 1962 until March 1963, at £5 per month. I would think that he ought to be made to pay the arrears for the child but again no action was taken. On the whole of the facts of the case, taking

into consideration that no action was taken until 1963, I think the order of maintenance should be varied by deleting "April 1st, 1963" and substituting "from June 30th, 1964 and at the end of each month thereafter." Subject to this, I think the appeal should be dismissed.

Order accordingly.

GARBER *v.* REGINAM

COURT OF APPEAL (Ames, P., Bankole Jones, C.J. and Dove-Edwin, J.A.): March 18th, 1965
(Cr. App. No. 49/64)

[1] **Criminal Law—embezzlement—property in subject-matter—subject-matter intended to become property of offender's employer:** The subject-matter of the offence of embezzlement under s.17(1) of the Larceny Act, 1916 is property which was meant to become the property of the offender's employer but did not do so because of the embezzlement (page 238, lines 35–40).

[2] **Criminal Law — embezzlement—storekeeper taking employer's goods from store commits larceny by servant not embezzlement:** Where a storekeeper, having received his employer's goods into the store of which he is in charge, removes the goods from the store *animo furandi*, he commits larceny by a servant and not embezzlement or fraudulent disposal of property (page 238, line 40—page 239, line 4).

[3] **Criminal Law—fraudulent disposal of property—property in subject-matter—subject-matter intended to become property of Crown:** The subject-matter of the offence of fraudulent disposal of property under s.17(2) of the Larceny Act, 1916 is property which was meant to become the property of the Crown but did not do so because of the fraudulent disposal (page 238, lines 35–40).

[4] **Criminal Law—fraudulent disposal of property—storekeeper in public service taking employer's goods from store commits larceny by servant not fraudulent disposal of property:** See [2] above.

[5] **Criminal Law—larceny—larceny by servant—storekeeper taking employer's goods from store commits larceny by servant:** See [2] above.