The Solicitor-General also argued that since the decision in this case was that of the judge, we must look at his judgment and not at his summing-up to the assessors, a proposition with which we are unable to agree. In our view both must be looked at. It by no means follows that because the misdirection in the summing-up is not repeated in the judgment it did not influence the learned trial judge in reaching his own conclusion. Indeed the inference is the other way. Moreover, the assessors are there to advise the presiding judge and although he is not bound to accept their opinions it is his duty to consider them, and it was obviously necessary that they should be properly directed as to the law.

The misdirection in this case was an important one and we are quite unable to say that had the learned trial judge properly directed himself and the assessors on the matter they must have come to the same conclusion. In this connection it is relevant to observe that in spite of the misdirection one of the assessors expressed the opinion that the accused was not guilty.

It follows that, in our view, the appellant is entitled to have his appeal allowed, and we accordingly quash the conviction and direct a judgment and verdict of acquittal to be entered.

Appeal allowed.

YEMEN COMPANY LIMITED *v.* WILKINS

SUPREME COURT (Kingsley, J.): August 10th, 1954
(Civil Case No. 193/54)

[1] **Civil Procedure—judgments and orders—default judgment—must be strict compliance with rules of procedure:** Where a plaintiff proceeds by default, every step in the proceedings must strictly comply with the rules of procedure (page 382, lines 3–5).

[2] **Civil Procedure—judgments and orders—default judgment—on application to set aside, irregularities must be apparent on face of summons or specified in supporting affidavit—applicant confined to irregularities stated therein:** Unless irregularities are apparent on the face of a summons to set aside a default judgment, a supporting affidavit is always necessary; and since, under O.L., r.3 of the Supreme Court Rules, 1947, any objections "shall be stated in the summons or notice of motion," an applicant is confined to the irregularities stated therein (page 379, lines 29–32; page 380, lines 13–35).

[3] **Civil Procedure—judgments and orders—default judgment—on application to set aside, unexplained delay fatal:** Where an application to set aside a default judgment on the ground of irregularities is delayed and the applicant fails to explain the delay, the court may refuse to set aside the judgment even though the applicant properly proves the irregularities (page 383, lines 33–36).

[4] **Civil Procedure—writ of summons—application to set aside default judgment for irregularity—irregularities must be apparent on face of summons or specified in supporting affidavit—applicant confined to irregularities stated therein:** See [2] above.

[5] **Civil Procedure—writ of summons—application to set aside default judgment for irregularity—unexplained delay in taking out summons fatal:** See [3] above.

[6] **Communications—post—deliveries—judicial notice taken of notorious facts about postal services in Protectorate:** They are facts of everyday or common knowledge, of which the court will take judicial notice, that, except at Bo, there is no postal delivery in the Protectorate, and that, also except at Bo, if registered letters are not collected within three months they are duly returned to the Postmaster-General (page 382, lines 30–36).

[7] **Evidence—affidavits—supporting affidavit in application to set aside default judgment—irregularities must be apparent on face of summons or specified in supporting affidavit—applicant confined to irregularities stated therein:** See [2] above.

[8] **Evidence—judicial notice—notorious facts—notice taken of facts of common knowledge about postal services in Protectorate:** See [6] above.

The applicant applied to set aside a judgment in default of appearance of the respondent, and the execution issued upon it.

In an action by the present respondent, the writ of summons was served by registered post on the applicant company at its registered office at Makeni and was duly indorsed by the respondent. The applicant did not enter an appearance and judgment was entered against it in default. After a delay of some months it applied in the present proceedings for the default judgment to be set aside but failed to specify in the summons the irregularities complained of. The summons was adjourned for a supporting affidavit to be submitted which merely stated that service of the respondent's writ of summons had been irregular.

The applicant contended that the irregularities of which he complained were apparent on the face of the summons, and that

service was irregular in that leave of the court was not obtained and the summons was not properly indorsed.

Cases referred to:

(1) *Alexander Korda Film Productions Ltd.* v. *Columbia Pictures Corp. Ltd.*, [1946] Ch. 336; [1946] 2 All E.R. 424.

(2) *Hamp-Adams* v. *Hall*, [1911] 2 K.B. 942; (1911), 105 L.T. 326, *dictum* of Buckley, L.J. applied.

(3) *Petty* v. *Daniel* (1886), 34 Ch.D. 172; 55 L.T. 745, *dictum* of Kay, J. applied.

(4) *White* v. *Land & Water Co.*, [1883] W.N. 174.

Legislation construed:

Interpretation Ordinance (Laws of Sierra Leone, 1946, *cap.* 1), s.39:
The relevant terms of this section are set out at page 382, lines 11–18.

Companies Ordinance (Laws of Sierra Leone, 1946, *cap.* 39), s.311(1):
The relevant terms of this section are set out at page 381, lines 15–17.

Supreme Court Rules, 1947 (P.N. No. 251 of 1947), O.L, r.3:
The relevant terms of this rule are set out at page 380, lines 14–17.

C.B. Rogers-Wright for the applicant;
Miss Wright for the respondent.

KINGSLEY, J.:

This is a summons to set aside a judgment in default of appearance, and the execution issued thereon, on the ground, to quote the actual wording of the summons, that "the service of the writ of summons was irregular and improper." It is commonplace in our law to say that, on a summons of this kind, unless the irregularity be apparent on its face, a supporting affidavit is always necessary. As no irregularity was apparent to me when the summons first came up for hearing, without indicating my opinion in any way I suggested that perhaps the question of a supporting affidavit had been overlooked, and as neither counsel had bothered to look up the point the summons was adjourned for a couple of days to enable them to do so.

On the resumed hearing, Mr. Rogers-Wright for the applicant produced an affidavit, which, without any disrespect to him, was in my view hardly worth the paper upon which it was typed. He said that he did so *ex abundanti cautela*, whatever that meant in the

circumstances. As the affidavit merely repeated the expression "the said service was irregular" without specifying how it was irregular, it seemed to me, and I pointed this out, that the affidavit was quite useless. Mr. Rogers-Wright thereupon in effect abandoned the *abundantia cautelae* with which he had come into chambers, and submitted that the irregularity of which he complained was apparent on the face of the summons, and that therefore no affidavit was necessary. It was on this basis that the summons was then heard.

I pause to interpose that the affidavit mentioned also the question of indorsement, again without specifying what the alleged irregularity in that connection was. In view of the wording of the summons, the question of correct or incorrect indorsement was not of course open to the applicant, as I shall indicate presently. Order L, r.3 of our Supreme Court Rules reads: "Where an application is made to set aside proceedings for irregularity, the several objections intended to be insisted upon shall be stated in the summons or notice of motion." This is a replica of O.LXX, r.3 of the English Rules of the Supreme Court, and in interpretation of that rule it has been held that an applicant is confined to the objections stated. In *Petty* v. *Daniel* (3), Kay, J. said (34 Ch.D at 180; 55 L.T. at 747): ". . . [I]f the notice of motion does not state the several objections to be insisted upon, the applicant cannot rely on them . . . ." And in *Alexander Korda Film Productions Ltd.* v. *Columbia Pictures Corp. Ltd.* (1), Romer, J. said that he believed this to be a correct statement of the law. This, as far as I know, is still good law and is quoted in the 1953 edition of the *Annual Practice* at 1547. Now in the case before me the defendant is a limited company and the summons was served by post, and "service by post" is effected by "properly addressing, prepaying and posting": *vide* the Interpretation Ordinance (*cap.* 1), s.39. The indorsement of the writ is an entirely different question; if both service and indorsement were complained of, then both the alleged irregularities should have been mentioned in the summons; and unless those irregularities were apparent on its face, both should have been clearly specified in the supporting affidavit. The only question therefore which arises for decision on this summons is that of service.

As I have already stated, the applicant is a limited company, whose registered office, it is not in dispute, at the material time was at Makeni. It is further not in dispute that the copy writ was sent in the usual way by registered post, and Mr. Rogers-Wright relied on O.VI, r.2 of the Supreme Court Rules, 1947, submitting that,

before serving his writ as he did, the respondent should have obtained leave of the court to do so. That rule, in my view, has no relevance to the point at issue.

Miss Wright for the respondent relied on O.IX, r.8 of the English Rules of the Supreme Court, which quotes s.38 of the English Companies Act, 1948. This, at any rate, was nearer the mark, but left itself open to the obvious objection, readily taken by Mr. Rogers-Wright, that the English Companies Act of 1948 does not apply to this territory, and then in substance the argument on the question of service ended. Both counsel overlooked, maybe accidentally, maybe hopefully, the fact that we have our own statutory provision in this territory regarding service on limited companies, which no rule of court of course can oust. The Companies Ordinance (*cap.* 39), which by its first section applies to both Colony and Protectorate, reads at s.311(1): "A document may be served on a company by leaving it at or sending it by post to the registered office of the company in Sierra Leone." Even if there were no authority on the point, to ask me to read into this section the words "by leave of the court" would of course be fantastic. There is however clear authority on the point. The section is more or less a replica of s.38 of the English Companies Act, 1948; and a perusal of the notes in the *Annual Practice*, 1953, at 75, shows where in point of fact leave is required, as for example where it is desired to serve a company whose registered office is in Scotland. The section has of course been held to apply to a writ of summons: *vide White* v. *Land & Water Co.* (4). The service in the case before me was in my view perfectly regular, and, as this is the only point complained of in the summons, it follows from what I have said that the summons must be dismissed.

I propose however to deal, if only *obiter*, with the question of indorsement, not only out of respect to Mr. Rogers-Wright's argument, but because our own Supreme Court Rules are so frequently observed more in the breach than anything else. Incidentally, I ought first to say this. In her reply, Miss Wright ignored the question of indorsement, and in view of what I have said above she was in my view perfectly entitled to do so. The question of indorsement is covered by O.VI, r.9 of our Supreme Court Rules which reads, *inter alia*: "The person serving a writ of summons shall within three clear days at most after such service indorse on the writ the day of the month and week of the service thereof . . . ." It should be said at once that this is a rule the observance of which

has been held to be absolutely vital where a party proceeds by default. In *Hamp-Adams* v. *Hall* (2), Buckley, L.J. said ([1911] 2 K.B. at 945; 105 L.T. at 327): "Where a plaintiff proceeds by default every step in the proceedings must strictly comply with the rules; that is a matter of strictissimi juris." This case dealt with the question of indorsement, and our own rule of course is a replica of the English rule. The point I have now to consider is what comprises service, and where service is by post, as in this case, the question is very simply answered by s.39 of the Interpretation Ordinance (*cap.* 1), which reads:

> "Where any Ordinance authorises or requires any document to be served by post, whether the expression 'serve,' 'give,' or 'send' or any other expression is used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

This section, of course, is taken almost word for word from the English Interpretation Acts of 1889 and 1948. In other words, as far as the server is concerned, once he has properly addressed, prepaid and posted the letter containing the document he has effected service, and providing he indorses within three days of such service he has, in my view, complied with the rule. Mr. Lebbie, the clerk of Mr. Dobbs who acted for the respondent, did precisely this and his indorsement was, I hold, perfectly regular. To hold, as Mr. Rogers-Wright suggested, that a plaintiff must wait until he receives the return of the postmaster would be to reduce the law to a farce, because it might mean, in Sierra Leone, that a plaintiff in Freetown posting a writ to the Protectorate could never indorse. I can take judicial notice of facts of everyday or common knowledge, two of which are that, except at Bo, there is no postal delivery in the Protectorate in the ordinary sense; and, secondly, if registered letters, again except at Bo, are not collected by the addressees within three months, they are duly returned to the Postmaster-General in Freetown. The provision in the above-quoted s.39 of the Interpretation Ordinance regarding "when service is deemed to have been effected" can have very little, if any, application in the Protectorate of Sierra Leone, because, except at Bo, there is no "delivery in the ordinary course of post" as one normally understands that expression. As I say, the wording is taken from the English Acts, and, of course, is

meant to cover the case of the unwilling receiver of a letter sent *by ordinary post*, the actual delivery of which it would be difficult, if not impossible, to prove. The average income tax appellant in this part of the world I think might not unfairly, in my experience at any rate, fit the above category of unwilling receiver, because taking advantage of the postal conditions in the Protectorate he is able to say, not untruthfully, that he did not receive an assessment form. He takes good care not to go for it.

The indorsement, in my view, in this case, was correct beyond any criticism, and ordinarily I would leave it at that. But I must say a word about Mr. Rogers-Wright's affidavit, which reads: "Mr. Sahid Mohamed informed me and I verily believe that on or about the 12th day of April 1954 their office received a registered packet which contained...." As the question of the accuracy of this information was immaterial to the decision on this summons, I have not myself enquired into it.

To anybody who had no knowledge of postal conditions in Makeni, this wording would clearly imply that the packet was delivered on or about April 12th. As I have pointed out, there was no delivery. Mr. Sahid Mohamed, whose company has a P.O. box number at Makeni, must have himself sent somebody for it, or maybe somebody else in the company sent for it. But it was not delivered as a delivery of a postal packet is normally understood. And, furthermore, and this is more important still, Mr. Sahid Mohamed signed for that packet on April 7th, which is a vastly different matter from the April 12th on the affidavit. As the question of when this packet was actually delivered in Makeni is not material to the decision on this summons, maybe the mistake is of no account, but it was a matter which could very easily have been checked up. I appreciate that Mr. Rogers-Wright more or less threw the affidavit together at short notice, but an affidavit is not the sort of document with the accuracy of whose contents one should take the slightest risk.

Finally, I feel bound to say this. Even if the alleged irregularities had been properly proved, I should have refused to set aside the judgment in the absence of some explanation regarding the delay in taking out the summons. The writ was issued on April 3rd, 1954, judgment in default was signed on May 19th, 1965, and yet it was not until August 4th that the aforementioned Sahid Mohamed of Makeni even consulted his lawyer. No comment on this sort of delay is, I am sure, necessary. The summons is dismissed with costs.

Summons dismissed.