[COURT OF APPEAL]

Freetown
July 27,
1962

Ames P.,
Benka-Coker
C.J.,
Dove-Edwin
J.A.

IN THE MATTER OF THE LEGAL PRACTITIONERS DISCIPLINARY COMMITTEE
AND
IN THE MATTER OF A COMPLAINT BY MR. C. A. HOLLIST AGAINST
MR. S. C. BERTHAN MACAULAY

THE LEGAL PRACTITIONERS DISCIPLINARY COMMITTEE . . . . . *Appellant*

v.

SAMUEL C. BERTHAN MACAULAY . . . . . *Respondent*

[Civil Appeal 44/60]

Practice—Costs—Taxation—Taxing master's discretion—Brief to counsel—"Fees paid to counsel"—"Instructions for brief"—Court of Appeal Rules 38 (1), 38 (3)—*Legal Practitioners (Disciplinary Committee) Act, s.* 29 (1).

The Supreme Court ordered respondent to be suspended from practising law for a year because of professional misconduct. On appeal, the Sierra Leone and the Gambia Court of Appeal set aside the order and awarded costs to respondent. The master taxed the costs at £263 2s. 0d. but, when respondent objected, this amount was substantially increased. One of the items allowed was £300 for "brief to counsel," which included the air fare from London to Freetown and return of a barrister whom respondent had retained to represent him as well as the barrister's fee. Among the other items were cables and telephone calls to England and the enrolment fee of the barrister. Appellant committee appealed against the allowance of these and other items.

Held, (1) that the master had acted on a wrong principle in allowing the cost of the cables and telephone calls to England, the barrister's air fare to and from Freetown and his enrolment fee; and

(2) That the entire item of £300 must be disallowed since it was presented under the heading of "brief to counsel," whereas it should have been presented under the heading "fees paid to counsel."

Cases referred to: *Brown* v. *Sewell* (1880) 16 Ch.D. 517; *Boswell* v. *Coaks* (1887) 36 Ch.D. 444; *Pelster* v. *Pelster* [1936] 3 All E.R. 783; *Slingsby* v. *Attorney-General* [1918] P. 236; 119 L.T. 104.

AMES P. I will start by saying how this application comes to be before us.

In August 1960, there was an inquiry under the provisions of the Legal Practitioners (Disciplinary Committee) Act, Cap. 12, into an allegation of professional misconduct made against the respondent. (Another legal practitioner was also involved in the same inquiry.) Counsel appeared for the respondent at the inquiry.

In September 1960, the Committee reported finding that the respondent had done something which the Committee found constituted professional misconduct.

In October 1960, the report was before two judges of the Supreme Court, who, after hearing argument, ordered the respondent to be suspended from practising for a year. They also ordered, presumably under section 29 (1) of the Act, that the respondent and the other legal practitioner "jointly and

severally do pay the costs of and incidental to the proceedings before the Committee and this court" (i.e., the Supreme Court).

The respondent appealed to the Sierra Leone and the Gambia Court of Appeal, which in November 1960, allowed the appeal, and set aside the order of suspension from practice and made the following order as to costs: "Costs are awarded against the Committee to the appellant both here and in the court below and before the Committee."

The respondent presented his bill of costs accordingly, and in January 1962, it was taxed. The registrar of the appeal court, who is the taxing officer of this court, is also the master and registrar of the Supreme Court, who is the taxing master of that court. So there was one bill of costs presented including costs in each court and costs before the Committee, and there was one taxation. The bill totalled £819 8s. 2d. The amount taxed off was £556 6s. 2d., leaving £263 2s. 0d.

The respondent gave notice of objections as to certain items. These had totalled £653 0s. 6d. in the bill and £519 had been taxed off. In February, upon the review, the taxing master found that one of the items in the bill was, by error, too low and amended the total of these items to £677 0s. 6d., and the total amount taxed off was reduced from £518 to £44 6s. 0d.

The applicant has made this application to this court under the provisions of Sierra Leone (Constitution) Order in Council, 1961, which dissolved the Sierra Leone and the Gambia Court of Appeal and established this Court of Appeal and enables this application to be brought before us.

It is made under rule 38 (3) of the rules of this court, the applicant being aggrieved at the order of the taxing officer, made upon review of the taxation as to the costs before the Committee and in the Sierra Leone and the Gambia Court of Appeal. It is not concerned with costs in the Supreme Court, as to which an appeal has been made to that court, so we were told. It asks this court to set aside the amount allowed by the taxing officer upon review and to fix the costs, both for the proceedings before the Committee and in the appeal court. The application must be considered separately (for reasons which will appear) in reference to the Committee, and I will leave that for the moment.

The application uses the word "fix" because that is the word used in rule 38 (1), which is:

> "Where the costs of an appeal are allowed they may either be fixed by the court at the time when the judgment is given or may be ordered to be taxed."

The taxing master has not appeared before us.

There was argument before us as to whether or not costs can be "fixed" at this stage, because "the time when the judgment is given," of rule 38 (1), has passed long since. I do not think it necessary to decide whether or not that could be done, because, in my opinion, I do not think that in this particular case it would be convenient to do so.

Mr. Macaulay, who is the respondent, and argued the matter himself, cited several cases which show what is a well-settled matter that ordinarily the taxing master has a complete discretion as to quantum and that courts will not interfere with his exercise of that discretion, "unless a gross mistake has been made" (Jessel M.R. in *Brown* v. *Sewell* (1880) 16 Ch.D. 517 at p. 520); or "unless the taxing master has not exercised his discretion at all" (Cotton L.J.

in *Boswell* v. *Coaks* (1881) 36 Ch.D. 444 at p. 452); or "unless some question of principle is involved" (Merriman P. in *Pelster* v. *Pelster* [1936] 3 All E.R. 783).

In this last case the learned President quoted and was guided by what he called "the qualification," introduced by Swinfen-Eady L.J., who said in *Slingsby* v. *Attorney-General* [1918] P. 236:

> "The decision of the taxing master is not absolutely final even on a question of quantum. For instance, a large sum might be allowed, but from the very fact of the amount the court might see that the master, in arriving at so large a sum, must have acted on a wrong principle, or have taken something into consideration which he ought not to have done. It doubtless requires an exceptional case to call for the interference of the court, but exceptional cases do occasionally arise."

The very figures in this taxation, a disallowance of £518 in January and the alteration of that figure to £44 6s. 0d. in February, suggest something very wrong in the one month or the other, and call for examination, and so do some of the reasons for the alteration.

In my opinion, the taxing master did err in principle. He noted upon his review in February the following:

> "From the evidence, I am satisfied that this case was of special interest to the appellant as he stood a chance of losing his only means of livelihood and, therefore, he was justified in importing or attempting to import a Queen's Counsel to appear on his behalf."

A few lines earlier he had noted:

> ". . . and as Mr. Foot could not himself come he sent a Mr. Kellock, a leading junior . . . whilst in Sierra Leone, the appellant housed and maintained him and paid his enrolment fee of £10."

In my opinion, both these notes flow from a wrong principle.

Item 31 of the bill is: "Brief of counsel on appeal including air fares London, Freetown, London £300."

£250 was taxed off in January and put back in February.

Members of the English Bar cannot practise here because they are such. They can, of course, be admitted and enrolled, because they are such, to practise here, and when they practise here they do so because of their enrolment here, and not because they are members of the English Bar. Consequently it is wrong in principle, in my opinion, to allow the cost of a passage from England and back again in a party and party taxation, and equally wrong to allow cables and telephone calls to England as the taxing master did in other items of the bill, and equally wrong to allow a fee for time spent waiting for judgment, where such a fee would not be allowable in a party and party taxation, when the legal practitioner is resident here. If these were right in principle in this instance it would be right in any and every case of importance to "import" counsel and make the other party pay, if the case succeeded.

Look at the matter from the other way round.

Suppose a legal practitioner here, a citizen of Sierra Leone resident here, is on holiday in Europe and is wanted here by a client in an important case; the client may arrange for his passage back, but if he wins, can he make the other party pay? Certainly not. I see no difference in principle where a party "imports" a legal practitioner of this court who is resident in England or

"imports" someone resident in England to become a legal practitioner here. I think, with all respect to the learned master, that "import" was an unfortunate word here. From what the respondent said to us, it seems that Mr. Foot was happy to come for little or no fee to the help of the respondent, a friend who had formerly been in his chambers.

As it turned out he could not come: and Mr. Kellock came, and the taxing master noted that the respondent had to pay the £10 fee for his enrolment. This £10 must have swollen by that much one of the items. By what principle is it proper for the enrolment fee of a legal practitioner to be taken into account in a party and party taxation, or even a solicitor and client taxation, in the first matter in which he appears in court. By no principle. Mr. Kellock may not have expected, or intended, to have had any other occasion to practise here. There cannot be any special principle applicable to such a person.

There was argument as to the amounts allowed by the taxing master for travelling from Bo to Freetown and back. The applicant argued that the taxing master should have allowed only the return railway fare, and not more as he did. It appears to have been the practice hitherto to allow only the railway fare, although apparently no one would use the railway because it takes up a whole day and is impracticable. This point has not been argued in a court of appeal until now, so it appears. In my opinion, one must take a realistic view, and where it is proper to allow cost of travel in a party and party taxation, a reasonable amount should be allowed for what is a practicable means of travel, whether road or rail for the particular journey, and it should not be cut down to what is impracticable and what no legal practitioner could reasonably be expected nowadays to do because it is cheaper. If both are practicable for any particular journey, the cheaper should be allowed.

I have had the opportunity of reading the judgment of my brother the learned Chief Justice: and I am in agreement with his statement of principles applicable to instructions for brief.

So much for the costs in the appeal court. I now come to the costs in the proceedings before the Committee. The learned judges of the Supreme Court awarded them to the Committee: and the appeal court reversed that when allowing the appeal and awarded them to the respondent to this application. It is the latter that has to be considered.

It was submitted before us by the applicant that neither court could order costs before the Committee.

Section 29 of the Legal Practitioners (Disciplinary Committee) Act is the only section to deal with costs and the relevant part of it is this: "(1) The costs of and incidental to all proceedings under section 25 or 26 shall be in the discretion of the Supreme Court." (Proceedings under sections 25 and 26 are proceedings in the Supreme Court.)

If section 29 (1) had referred to "costs of all proceedings" under the two sections, it would have been very clear, and the submission would have been beyond dispute. It must be that the two courts made their orders refer also to costs of the proceedings before the disciplinary committee because each court took the additional words "and incidental to" as introducing something more and enabling them to award costs before the Committee. However that may be, the orders were made. Whether or not that made by the court could have been reconsidered, upon a review, had it been made in this court matters not,

because, in my opinion, rule 37 does not empower this court to review the decision of the now-dissolved Sierra Leone and the Gambia Court of Appeal.

I would set aside the whole of the proceedings on review of the taxation and send the bill back for review by another taxing master in the light of our judgments in this court.

BENKA-COKER C.J. I have had the opportunity of reading the judgment delivered by the learned President. I entirely agree, but I wish to say further on the following items:

(1) Item 6—*Instructions for Brief Disciplinary Committee*—£100

On this item the taxing master taxed off £60. On review it was again restored to £100. I was curious to find out what had caused the taxing master to alter on review the amount he had previously awarded, and award the full amount claimed in the bill. I carefully perused the master's reasons and this is what he said: "The appellant in his evidence deposed that he had lived at No. 27, Tikonko Road, Bo, since 1959, and that during the proceedings against him in the Disciplinary Committee he had to travel by car from Bo to Freetown where the Disciplinary Committee met and, of course, he had to return home after each sitting. He said that the case against him was one for which he, as a practising solicitor, could have been struck off the Roll of the Supreme Court and as if to add injury to insult the case was instituted against him six months after he had just married and his wife at the time was pregnant." This is all. All these reasons must have been known and given to the master when he taxed the bill in the first instance and it was the duty of the respondent to have produced all the evidence available at the time. I can see no new evidence adduced before the taxing master as to the proceedings before the Disciplinary Committee. I cannot help feeling that what caused the whole change of attitude of the taxing master was the fact that the appellant had engaged counsel from abroad and later produced a receipt for £300 paid. This is wrong—instructions for brief cover all expenses reasonably incurred in procuring evidence and to compensate for time and labour spent by solicitor in procuring evidence and not for money spent in procuring counsel. I, therefore, think that the sum allowed by the master on review should be struck out and his original taxation restored, i.e., on the sum of £100 claimed—£60 to be taxed off and £40 allowed.

(2) Item 31—*Brief to Counsel on Appeal (including Air Fare, London–Freetown–London)*

This fee was not for drawing brief or brief delivered to counsel; otherwise there would have been a charge per folio of the brief. It appears to have been treated by the taxing master and the solicitor for both parties on taxation as "instructions for brief" and not "drawing brief." On taxation the sum of £250 was disallowed on the amount of £300 claimed. On review of the taxation by the taxing master after hearing further evidence, the master reviewed this item and allowed the full sum of £300 claimed. The further evidence brought before the master was that the respondent engaged a Q.C. from overseas at a special fee of £300 because the case was of special importance to the respondent. This Q.C. could not attend but arranged for a Mr. Kellock to attend, who attended and conducted the case for the respondent on appeal. Even at this later stage on review it is clear from the master's reasons given that the master and all parties still treated the item as "instructions for brief" and not as "fee paid to counsel" and no attempt was made to amend the bill by deleting

" brief to counsel " and surcharging " fee paid to counsel." On the hearing of this appeal before us, Mr. Berthan Macaulay conceded rightly that it was wrong to allow " instruction for brief " on a non-witness appeal, as this was. (See Master's Practice Notes in Annual Practice, 1957, p. 2834, item 19, and also Butterworth on Costs, Vol. 1, p. 190, note on item 81.) Mr. Macaulay then argued that the sum though claimed on this item as " brief to counsel " was meant to be " fees paid to counsel." Even if we allow this item to be now amended and the item treated as fees paid to counsel, it is clear that the master acted on wrong principles when he allowed the whole sum as he considered that the respondent was entitled to all moneys paid to counsel engaged from overseas and expenses incurred therefor whereas the respondent would only have been entitled to a fee as paid to local counsel and nothing more or less. This matter is now before us on appeal from the taxing master's review. He reviewed the item on the basis that it was " instructions for brief " and was wrong in principle in awarding anything at all. We, therefore, order that the whole item of £300 be disallowed.

Freetown
July 27,
1962

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

[COURT OF APPEAL]

BIRROR SAMURA, THALLA BOCKARIE, ISSA SAMURA AND FINAH BOCKARIE *v.* REGINA

[Criminal Appeals 12–15/62]

Criminal Law—Homicide—Murder—Accessory before the fact—Whether judgment unreasonable—Admission of written statements without calling interpreter as witness—Judge's failure to record verdict.

The four appellants were convicted of having murdered one Momodu Samura, a child of two and a half years, in the Sulima Chiefdom in the Koinaduga District. The trial was before a judge and two assessors. All the appellants and the deceased belonged to the same family.

The case against appellants was that, at a meeting convened by the family to discuss who was to succeed the late head chief, they selected the first appellant, the eldest son of the chief. At the same meeting, it was decided that fourth appellant should go to Guinea to consult a soothsayer for advice as to what they should do to ensure that the chieftaincy remained in the family. After returning from Guinea, there was another meeting, and fourth appellant told the family that the soothsayer had said that a human sacrifice should be made and that the one who did the actual killing would be the head chief. All the appellants were at this meeting, at which third appellant suggested that the victim should be Momodu Samura, a brother of first appellant.

After this meeting, it was alleged that first and second appellants went to the village where the child was staying, seized him, took him to a secluded spot and killed him, and that the third and fourth appellants burnt the corpse and collected the ashes to take to Guinea for a " juju " to be made.

When it was noticed the child was missing, search parties were organised. During the investigations all the appellants admitted what they had done, and second appellant made written statements which were admitted in evidence at the trial. The first assessor found first appellant guilty of murder, second appellant guilty as principal in the second degree and third and fourth

appellants guilty as accessories before the fact. The second assessor found first and second appellants guilty and third and fourth appellants guilty as accessories before the fact. The judge did not record any verdict, but said "I accept the opinion of the assessors." He sentenced the appellants to death.

Held, (1) that the evidence against fourth appellant was not sufficient to hold him as an accessory before the fact.

(2) That the conviction of the first, second and third appellants was not unreasonable; and

(3) That, since the assessors found the appellants guilty of murder, the judge's statement that "I accept the opinion of the assessors" was equivalent to the recording of a verdict of guilty of murder.

The court (Dove-Edwin J.A.) said, obiter, that the written statements of second appellant were wrongly admitted in evidence, since the interpreter had not been called as a witness.

Cases referred to: *Rex* v. *Ekpo* (1947) 12 W.A.C.A. 153; *Joseph Lamin Sheriff and another* v. *Reg.* (1959) 16 W.A.C.A. 93.

Claudius Doe-Smith for the first, third and fourth appellants.

E. Livesey Luke for the second appellant.

Nicholas E. Browne-Marke (Acting Solicitor-General) and *Constance Davies* for the respondent.

DOVE-EDWIN J.A. The four appellants were charged with the murder of one, Momodu Samura, on or about January 9, 1962, in the Sulima Chiefdom in the Koinaduga District in the Norther Province of Sierra Leone.

They stood their trial with two others who were found not guilty and acquitted and discharged.

The trial was before an acting puisne judge and two paramount chiefs as assessors. The appellants were all defended by counsel.

All the appellants belong to the same family as was also the deceased, a child of two and a half years.

The case against them was that at a meeting convened by the family to discuss who was to succeed the late head chief, whose death caused a vacancy in the chiefdom, they selected the first appellant, Birror Samura, the eldest son of the deceased chief. At the same meeting it was decided to send the fourth appellant, Finah Bockarie, to Guinea to consult a soothsayer so that he could advise as to what they should do to be sure that the chieftaincy remained in the family. Fourth appellant went and returned and at a meeting convened for the purpose he told them what the soothsayer had said. Among the various things they should get for the purpose was that a human sacrifice was to be made and the one who did the actual killing would be the head chief.

First, second and third appellants were at this meeting and it was the third appellant who suggested who the victim should be; he named the deceased child, Momodu Samura, a brother of the first appellant and son of the late chief; he said he was ugly.

After this meeting, it was alleged the first and second appellants went to the village where the boy was staying with an aunt. His mother had gone away and had left him with the aunt, and whilst there was no other person about, the first appellant seized the child, tucked him under his gown, brought him to where the second appellant was and they both took the child to a secluded spot, where with second appellant holding his hands and first appellant covering his mouth he cut the child's throat and stuck the knife into his throat to hide it.

The corpse was moved and hidden and it transpired later that the third and fourth appellants went and found it and burnt it, collecting the ashes, as was suggested, to take to Guinea for the juju to be made.

When it was noticed that the child was missing, people started to look for him and search parties were organised. The appellants helped in the search and first appellant actually informed the police about his loss. Investigations started and no trace of the child was found.

During the investigations the first and second appellants admitted what they had done, in the presence of the regent chief. Quite apart from their statements the two appellants took the police to where the child was killed and where the corpse was hidden. The third appellant made a statement after caution, which is in evidence, admitting his part in the murder. In fact he made three statements but in Exhibit "A" he not only admitted that he suggested the deceased child should be the sacrifice, but also that he collected his ashes and sent them to be made into a juju.

The fourth appellant made no incriminating statement about the killing but admitted that he had been sent to Guinea and that he returned and handed the message to first appellant. He had made one which was tendered and rejected. After the close of the case for the prosecution the defence decided not to put the appellants in the witness-box and called no evidence and closed the case for the defence.

The two assessors gave their verdict thus:

First assessor, Paramount Chief Kandeh Bangura, as follows: First accused guilty, second accused guilty as principal in the second degree, third, fourth, fifth and sixth accused guilty as accessories before the fact.

The second assessor, Paramount Chief Bai Sebora Kamal II, as follows: First and second accused guilty of murder, third and fourth accused guilty as accessories before the fact, fifth and sixth accused not guilty.

The learned trial judge agreed with the conviction of the first, second, third and fourth accused and with the second assessor and found the fifth and sixth accused not guilty and acquitted them.

The four accused found guilty were sentenced to death.

Against the verdict passed on the appellants they have appealed to this court.

The original grounds filed by each appellant were abandoned by counsel who appeared for them and other grounds substituted.

It is convenient to deal with the appeal of the fourth appellant first. He, as well as the first and third appellants, was represented by Mr. Doe-Smith, who had also appeared for them in the court below throughout.

The most important ground, in our view, is that the judgment was unwarranted and unreasonable having regard to the weight of evidence.

In cases like this involving several people where meetings are held it is always best to treat each accused separately and find out what they did at any time to bring them within the definition of principals or accessories.

In the case of the fourth appellant, he certainly was at the two important meetings and accepted the mission to go to Guinea and consult the soothsayer. He also returned and told the meeting what was to be done, including the human sacrifice. He was present when the victim was named, but there is no evidence that he agreed that it should be carried out, nor was it suggested he was present at the killing. He certainly helped to dispose of the corpse but, whilst this is a

serious offence, we do not think it could be used to prove the case against him and bring him in as an accessory before the fact.

We have read the record and we find that we cannot support the verdict or sentence against him and he must be acquitted and discharged. The verdict and sentence of death passed on the fourth accused is set aside.

It is now convenient to deal with the other three appellants. As to the first appellant there was ample evidence against him not only in his statement after caution but his verbal admissions before the chief and other members of his family. The shirt he was wearing when he killed the boy had bloodstains on it. The sixth prosecution witness, Foday Bockari Turay, President, Sulima Chiefdom, gives a full account of what the first appellant said and the question he asked quite apart from his statements, which were produced and admitted, confessing his guilt.

Mr. Doe-Smith, who represented the first appellant, submitted in all seven grounds of appeal, all of which in our view have no real substance. The case against the first appellant was strong and corroborated in every respect. We think he was rightly found guilty of murder.

The second appellant is in a slightly different position, in that his written statements were wrongly admitted in evidence. The persons who were supposed to interpret Exhibits " B " and " G " were not called to give evidence and one, Foday Koroma, denied interpreting to second appellant. These statements should have been rejected; the prosecution should know by now how important it is for the man who interprets a statement to be called as a witness; his signature on the statement is not enough. We have disregarded these statements and have looked into the record to see if apart from the second appellant's so-called confession there was sufficient evidence on which he could have been convicted and we found that there was. The 11th prosecution witness, Fassineh Samura, gave this evidence: " Second accused said all the other accused persons were not present when he and first appellant killed the child."

The sixth witness, the President of the Sulima Chiefdom, also said that he was present when the second appellant pointed out the spot where the child was buried. The clothes he wore on the day of the murder and which he produced had bloodstains on them, and we find that, ignoring his statements (Exhibits " B " and " G "), his verbal statements in the presence of his own people and the different places he pointed out to the police supplied such evidence that we feel his conviction was right.

I would like to deal, with respect to the second appellant, with important points raised by Mr. Luke in his submission; he urged that there was no recorded verdict and that the learned trial judge merely said: " I accept the opinion of the assessors." Mr. Luke stressed that this was not enough and that there should have been a finding.

The assessors found the second appellant guilty. One said he was guilty in the second degree but the other said he was guilty of murder. The learned trial judge said he agreed with the assessors with respect to the first, second, third and fourth appellants. This, on the face of it, is not satisfactory and very offhand and a judge should know of the importance of his verdict and record it. However, the learned trial judge's recording that he agreed with the assessors is tantamount to a recording of conviction of murder; *Rex* v. *Ekpo* (1947) 12 W.A.C.A. 153; also the learned judge might have borne in mind the decision in *John Lamin Sheriff and another* v. *Reg.* (1959) 16 W.A.C.A. 93.

As to the third appellant, he was present at both the important family meetings in which the successor to the late chief was convened. He it was who suggested who the victim should be. He said the deceased child was ugly and he should be sacrificed. After his murder he collected and helped to burn the corpse and after this collected the ashes and sent by a messenger to the soothsayer so that some medicine could be made out of it to enhance the chances of the chiefdom returning to their house. We think he was rightly convicted and sentenced.

The appeal by the first, second and third appellants is dismissed.

Freetown
Nov. 12,
1962

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

[COURT OF APPEAL]

ENITOR THOMAS AND OTHERS . . . . . *Appellants*

v.

SONNIE SAHR KPEHO AND ANOTHER . . . . . *Respondents*

[Civil Appeal 11/62]

Claim for an Account—Affidavit by first defendant that plaintiffs not entitled to account—No appearance by second defendant—Proper course for judge to follow—Supreme Court Rules (Sierra Leone Subsidiary Legislation, Cap. 7), Ord. 3, r. 8, Ord. 45, r. 1 (c) and (d)—Rules of the Supreme Court (England), Ord. 15, r. 1.

Defendants were the executors of the estate of Joe Thomas (the testator), who died in 1956. On January 22, 1962, plaintiffs issued an indorsed writ against defendants claiming an account of all moneys and securities left by testator, an account of rents and profits and payment to plaintiffs of their respective legacies under testator's will. The writ was issued pursuant to Order 3, r. 8, of the Supreme Court Rules. On February 21, first defendant entered an appearance. Second defendant never entered one. On April 25, plaintiffs applied for an order in terms of the indorsed writ pursuant to Order 15, r. 1, of the English Supreme Court Rules. On May 16, first defendant swore to an affidavit in which he stated that plaintiffs were not entitled to an account. On May 17, the trial judge ruled that there must be an affidavit satisfying him that there was a preliminary question to be tried, and he adjourned the proceeding to May 23 so that the necessary affidavit could be filed. On May 21, third plaintiff swore to an affidavit showing his interest in the estate. At the hearing on May 23, counsel for first defendant argued that the plaintiffs should have proceeded by way of an originating summons pursuant to Order 45, r. 1 (*c*) and (*d*), of the Supreme Court Rules. The judge dismissed plaintiffs' application on the grounds that (1) plaintiffs' affidavits did not state that first defendant had failed to satisfy the judge that there was a preliminary question to be tried, and (2) second defendant had not filed an appearance. Plaintiffs appealed.

Held, allowing the appeal, (1) that the judge, after reading first defendant's affidavit, should have ruled that there was a preliminary question to be tried, and should have proceeded to try it; and

(2) That, if the judge had decided that first defendant was an accounting party, it would have been proper for him to order an account from the second