purchaser without notice should not be prejudiced. In the latter case the law makes it obligatory to enquire who the principal is when rents are paid to an agent. In this case, although there were visible occupants, the second defendant did all that was reasonable to discover any incumbrances. I believe the plaintiff was interviewed by the second defendant and their discussion proceeded along the lines set out. I believe that as a result the second defendant was left in no doubt that the plaintiff had sold 2 Hagan Street.

The plaintiff gave evidence that he was illiterate in English. I do not believe him. The second defendant gave evidence which I accept. He referred to a letter which he gave to the plaintiff himself and the reply the plaintiff gave in relation to one paragraph contained in the letter. Incidentally, Coker let it out that he had had several dealings with the plaintiff and he knew he was literate in English. I do not believe that Bai Kamara was ever present in connection with any portion of this arrangement.

I am satisfied that the counterclaim has been proved and order the plaintiff to pay the respective sums of Le114 and Le288 to the first and second defendants. I hold that the plaintiff's case has failed and I dismiss his action with costs.

Judgment for the defendants.

KESSEBEH *v.* COKER

SUPREME COURT (Davies, Ag. J.): June 2nd, 1967
(Civil Case No. 108/66)

[1] **Evidence—burden of proof—negligence—burden of proof where res ipsa loquitur on party against whom presumption of negligence raised:** Where the fact of an accident raises a presumption of negligence against one of the parties involved the burden of proving that he was not negligent is upon that party (page 181, lines 12–16).

[2] **Evidence—burden of proof—standard of proof—negligence—inferences drawn from proved facts must be reasonable deductions and beyond mere conjecture:** In order to prove negligence by inference the facts proved must be such as to put the matter beyond a mere surmise or conjecture; they must lead to an inference which is a reasonable deduction from the facts actually observed (page 180, lines 16–27).

[3] **Evidence—presumptions—presumption of law—res ipsa loquitur—burden of proof where res ipsa loquitur on party against whom presumption of negligence raised:** See [1] above.

[4] **Tort—damages—measure of damages—torts affecting the person—personal injuries awards assessed by reference to comparable English cases:** In awarding damages for personal injuries, a court may be guided by comparable English cases, bearing in mind that damages should not be disproportionate to the injuries or the resultant disability and that damages awarded in Africa for personal injuries are usually less than those awarded in England (page 181, lines 28–34).

[5] **Tort—damages—mitigation of damages—plaintiff's duty to minimise or reduce damages by acting reasonably—not entitled to increase claim by voluntary act:** A person aggrieved by an injury is not entitled to increase his claim for damages by a voluntary act but can recover only those damages which he has incurred while acting reasonably, and if by acting reasonably he could have minimised or reduced the damage sustained to a smaller amount then it is only the smaller amount that he can recover (page 181, line 39—page 182, line 4).

[6] **Tort—negligence—contributory negligence—matters to be proved—failure of plaintiff to take ordinary care for himself—fact that failure to take care was contributory cause:** In order to establish the defence of contributory negligence the defendant must prove, first, that the plaintiff failed to take ordinary care for himself, *i.e.*, such care as a reasonable man would take for his own safety and, secondly, that his failure to take care was a contributory cause of the accident (page 181, lines 2–7).

[7] **Tort—negligence—evidence—burden of proof—res ipsa loquitur—burden of proof on party against whom presumption raised:** See [1] above.

[8] **Tort—negligence—evidence—direct evidence not essential—indirect or circumstantial evidence raising inference may be sufficient:** It is not necessary for the plaintiff in a negligence case to give direct evidence of negligence; he may prove his case by indirect or circumstantial evidence or by proving facts from which an inference of negligence by the defendant may be reasonably arrived at (page 180, lines 16–21).

[9] **Tort—negligence—evidence—standard of proof—inferences drawn from proven facts must be reasonable deductions and beyond mere conjecture:** See [2] above.

The plaintiff brought an action against the defendant to recover damages in respect of a road accident in which both were involved.

The plaintiff alleged that he was driving his car well to the left of the road when the defendant's car, travelling fast and erratically in the opposite direction, overtook a lorry and struck the plaintiff's car on the offside. The defendant alleged that he was driving normally when he saw the plaintiff's car approaching him at high

speed and zig-zagging in the middle of the road. He said that he braked on the left but that the plaintiff's car veered to the right, hit his and rebounded. There was evidence to support the plaintiff's contention that the collision occurred on the plaintiff's side of the road. As a result of the collision the plaintiff's wrist was broken. The defendant counterclaimed for damages for personal injury and loss due to the negligence of the plaintiff.

Cases referred to:

(1) *Jones* v. *Great W. Ry. Co.* (1930), 47 T.L.R. 39, *dictum* of Lord Buckmaster applied.

(2) *Lewis* v. *Denyé*, [1939] 1 K.B. 540; [1939] 1 All E.R. 310; on appeal, [1940] A.C. 921; [1940] 3 All E.R. 299, *dictum* of du Parcq, L.J. applied.

(3) *McCarthy* v. *Coldair, Ltd.*, [1951] 2 T.L.R. 1226; [1951] W.N. 590, applied.

Golaga-King for the plaintiff;
Coker for the defendant.

DAVIES, Ag. J.:

The plaintiff's claim is for damages for personal injuries and loss suffered by him through the negligent driving of the defendant's motor car.

The facts are these: The plaintiff was driving his car on November 28th, 1965 at about 1.30 a.m. from Kissy Low Cost Housing Estate to his place of residence at 61 Bass Street, Brookfields. He alleged that when he got to the Mobil petrol station opposite the Freetown Secondary School for Girls he saw a lorry approaching from the opposite direction; the defendant's car was behind the lorry. The defendant's car, which was being driven very fast and in a zig-zag manner, suddenly overtook the lorry. Seeing this, the plaintiff kept dead left and braked. The defendant's car then left its own side of the road, came to the plaintiff's side of the road and hit the plaintiff's car on the offside.

The defendant's story is that on November 28th, 1965 at about 1.45 a.m. the defendant was driving his car along Brookfields Road from west to east. When he got to the petrol station which is in front of the Freetown Secondary School for Girls he saw a vehicle (the plaintiff's car) approaching from the opposite direction at a high speed in the middle of the road and zig-zagging. The

defendant then braked on the near left of his own lane. The approaching vehicle veered sharply towards its right, hit the defendant's right front wheel and rebounded. The defendant counterclaimed for damages for personal injuries and loss due to the negligent driving of the plaintiff.

As is usual in cases of this type, there is a conflict in the evidence as given by the plaintiff on the one hand and by the defendant on the other hand. It is, however, agreed by both parties that the accident took place at about 1.30 in the morning of November 28th, 1965, when all Freetown was asleep. There was, therefore, no eye-witness to the accident. It now remains for me to decide whether I should believe the plaintiff's or the defendant's story. My function is to determine what was the cause or what were the causes of the accident which took place at Brookfields Road in the morning of November 28th, 1965.

I should say at once it is not necessary for a plaintiff to give direct evidence of negligence. He may prove his case partly by direct and partly by indirect or circumstantial evidence. In some cases, as in this case, the facts of an accident are unknown and the plaintiff to succeed must then prove facts from which an inference of negligence on the part of the defendant may be reasonably inferred. "It is a mistake to think that because an event is unseen its cause cannot reasonably be inferred." (Per Lord Buckmaster in *Jones* v. *Great W. Ry. Co.* (1) (47 T.L.R. at 41). The facts, however, must be such as to put the matter beyond a mere surmise or conjecture; they must lead to an inference which is a reasonable deduction from the facts actually observed and proved.

In order to enable me to arrive at a conclusion as to who was the negligent party, I must rely on the evidence of the independent witness, Cpl. Seisay, who was a traffic officer at the material time. His evidence is of paramount importance in this case.

[The learned acting judge then reviewed the evidence of this witness, which tended to show that the plaintiff's account of the accident was the correct one and that the plaintiff's car was in its own lane when it was struck by the defendant's car. He then considered the evidence of a medical officer who examined both parties shortly after the accident and took samples of their blood to be analysed for alcohol content. This witness's evidence was disregarded on the ground that he was biased in favour of the defendant and had shown the plaintiff's medical report to the defendant in contravention of medical ethics. The learned acting judge then continued:]

The defendant has counterclaimed for damages for personal injuries and loss due to the negligence of the plaintiff. In order to establish the defence of contributory negligence, the defendant must prove, first, that the plaintiff failed to take "ordinary care" for himself or, in other words, such care as a reasonable man would take for his own safety, and secondly, that his failure to take care was a contributory cause of the accident: see *Lewis* v. *Denyé* (2) ([1939] 1 K.B. at 554; [1939] 1 All E.R. at 316–317). In this case the defendant has made no attempt to prove contributory negligence on the part of the plaintiff. There is no evidence whatsoever before this court that the plaintiff was contributorily negligent.

In the circumstances here I am of the opinion that the fact of the accident raises a presumption of negligence for which the defendant is responsible and that if there were any facts inconsistent with negligence, or with negligence for which he could be held responsible, it was for the defendant to prove them. This he has failed to do.

It follows that the plaintiff must succeed and the counterclaim must fail. I accordingly give judgment for the plaintiff with costs to be taxed. The counterclaim is dismissed with costs to be taxed.

As regards damages, the plaintiff has claimed for injuries to his left wrist. Dr. Benjamin said that the plaintiff had a fracture on the lower end of his left radius. He said that the plaintiff may develop osteoarthritis which can be permanent, and that the plaintiff has a deformity as a result of the fracture which, in his opinion, is permanent. The plaintiff is a storekeeper and Dr. Benjamin is of the opinion that he may be able to lift light weights although if he exerts extra strain he would feel pain. Acting on the principle laid down in *McCarthy* v. *Coldair, Ltd.* (3) ([1951] 2 T.L.R. at 1229, 1231), and because this is Africa where, by some curious reasoning, damages awarded for injuries of this type are less than those awarded in England, I award three-quarters of the amount awarded by the Court of Appeal in *McCarthy's* case, *i.e.*, $\frac{3}{4}$ of £1,250 = £937. 10s. 0d. = Le1875.00.

As regards loss of use of plaintiff's car, the accident took place on the morning of November 28th, 1965; the writ was issued on April 14th, 1966, and the case was concluded on May 22nd, 1967. This means that the plaintiff was deprived of the use of his car for about 17 months. The general rule undoubtedly is that no person aggrieved by an injury is entitled to increase his claim for damages by a voluntary act. A person is entitled to recover only those

damages which he has incurred while acting reasonably, and if by acting reasonably he could have minimised or reduced the damages that he has sustained to a smaller amount, it is only the smaller amount that he can recover. I think, however, that in considering that proposition in regard to such a case as this, one must in estimating the standard of reasonableness take into account the circumstances affecting the plaintiff. My view is that the plaintiff could have repaired his car whilst litigation was pending and by so doing he could have minimised the damages. I therefore award the plaintiff for loss of use of his car the sum of Le2.00 a day for two months, *i.e.*, Le120.00. As regards general damages, I award the plaintiff the sum of Le200.00.

As regards extra nourishment, both counsel during the trial agreed that this item should be struck out.

Summary

Personal injuries	-	Le1,875.00
Loss of use of car	-	Le 120.00
General damages	-	Le 200.00

There is therefore judgment for the plaintiff for the sum of Le2,195.00 with costs to be taxed.

Judgment for the plaintiff.

PHILLIPS *v.* PHILLIPS, PHILLIPS, PHILLIPS and COKER

SUPREME COURT (Browne-Marke, J.): June 3rd, 1967
(Civil Case No. 440/65)

[1] **Contract—duress and undue influence—illegal agreement—equitable relief available on proof of duress or undue influence:** In order to obtain equitable relief in respect of an illegal transaction, a plaintiff must prove not only the illegality itself but also that his consent was procured under duress or undue influence (page 188, lines 17–21).

[2] **Contract—duress and undue influence—undue influence—burden of proof—if influential relationship, burden on donee to prove donor's independent will:** Where the relations between a donor and donee raise a presumption that the donee had influence over the donor, the burden of proof is on the donee to establish that it was the donor's spontaneous act in circumstances which enabled him to exercise an independent will (page 188, lines 25–30).

[3] **Contract—duress and undue influence—undue influence—meaning and effect of undue influence:** Where two persons stand in such a