~~GM 4-62~~ (36), 1963

IN THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL

No.36 of 1962

ON APPEAL
FROM THE SUPREME COURT OF THE
FEDERATION OF MALAYA
IN THE COURT OF APPEAL AT KUALA LUMPUR

B E T W E E N:-

KOK HOONG (Plaintiff) Appellant

- and -

LEONG CHEONG KWENG
MINES LIMITED (Defendant) Respondent

RECORD OF PROCEEDINGS

GRAHAM PAGE & CO.,
41, Whitehall,
London, S.W.1.
Appellant's Solicitors.

BULCRAIG & DAVIS,
Amberley House,
Norfolk Street,
Strand,
London, W.C.2.
Respondent's Solicitors.

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LEONG CHEONG KWEONG
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RECORD OF PROCEEDINGS

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EXHIBITS

IN THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL

No.36 of 1962

ON APPEAL
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KOK HOONG (Plaintiff) Appellant

- and -

LEONG CHEONG KWENG MINES LIMITED (Defendant) Respondent

RECORD OF PROCEEDINGS

No. 1.

AMENDED PLAINT

In the High Court at Kuala Lumpur.

No. 1.

Amended Plaint.

14th June, 1957.

IN THE SUPREME COURT OF THE
FEDERATION OF MALAYA
IN THE HIGH COURT AT KUALA LUMPUR
Civil Suit No.178 of 1956

Kok Hoong
of 209 Circular Road, Kuala Lumpur Plaintiff

versus

Leong Cheong Kweng Mines Limited
of 170, High Street (first floor)
Kuala Lumpur Defendant

AMENDED PLAINT

The Plaintiff above named states as follows:-

1. That the Plaintiff is a landowner and resides at 209, Circular Road, Kuala Lumpur. That the Defendant is a company registered and incorporated in the Federation of Malaya, having its registered office at 188, High Street (first floor), Kuala Lumpur, and carrying on the business of miners. Premises No.188 High Street is now known as No.170 High Street.

2. That under an agreement in writing dated the

In the High Court at Kuala Lumpur.

No. 1.

Amended Plaint.

14th June, 1957 - continued.

20th day of June 1952 the Plaintiff let certain machinery and equipment on hire to the Defendant for the term of twelve months from the 20th day of June, 1952 at $2,500/- (dollars two thousand five hundred only) per month, the first of such payments to be made on the 19th July, 1952 and each subsequent payment on the 19th day of each succeeding month. A copy of the said agreement is attached hereto and marked "A".

3. That on the expiry of the term of twelve months aforesaid the Defendant continued hiring the said machinery and equipment on the terms and conditions contained in the said agreement.

4. By arrangement with the Defendant the Plaintiff re-took possession of two items of the said machinery and equipment in May 1955 and it was agreed between the Plaintiff and the Defendant that the Defendant was to continue hiring the remainder of the said machinery and equipment, which are in the Defendant's possession, on the terms and conditions contained in the said agreement subject to the following variations thereof, namely:-

(a) The hiring to commence from the 20th day of April, 1955

(b) The rent for the hire to be $2,000/- (dollars two thousand only) with first payment on the 19th day of May and subsequent payments on the 19th day of each succeeding month

(c) That insurance to be in the sum of $80,000/- (dollars eighty thousand only).

5. The particulars of the two items hereinbefore mentioned of which possession was re-taken are as follows :-

(a) one 260 BHP diesel engine

(b) one 130 BHP diesel engine

6. That the Defendant has failed and neglected to pay rent for the said machinery and equipment for the month commencing from 20th April 1955 and subsequent months.

7. That by Clause 7 (seven) of the said agreement the Defendant agreed, inter alia, to pay interest on all arrears of rent at the rate of 12% (twelve per centum) per annum until the time of payment.

8. That, as per statement annexed hereto and marked "B", the following sums of money are due and owing by the Defendant to the Plaintiff, namely:-

$16,000/- being rent for the period 20-4-55 to 19-12-55 (eight months)

$560/- being interest on arrears of rent up to 18-12-55.

9. That the Defendant has failed to pay the aforesaid sums or any part thereof though demanded.

10. By the said agreement it was provided, inter alia, that if the Defendant shall make default in punctual payment of the monthly sums to be paid by him for the hire of the said machinery and equipment the Plaintiff may without any notice determine the hiring and it shall thereupon be lawful for the owner to re-take possession of the said machinery and equipment and for that purpose to enter into or upon any premises where the same may be and that such determination should not affect the right of the Plaintiff to recover from the Defendant any moneys due to the Plaintiff under the said agreement or damages for breach thereof.

11. By a letter dated the 25th November, 1955 the Plaintiff determined the hiring on the 19th December, 1955 and demanded from the Defendant the return of the said machinery and equipment and the sum of $14,420/- being the amount then due and owing by the Defendant to the Plaintiff in respect of the hiring. A copy of the said letter is annexed hereto and marked "C". The Defendant failed to return the said machinery and equipment and to pay the said sum of $14,420/-.

12. By a further letter dated the 28th March, 1956 the Plaintiff notified the Defendant that the Plaintiff's representatives would on behalf of the Plaintiff retake possession of the said machinery and equipment and for that purpose would enter the premises of Hin Fatt No.2 Mining Kongsi at 3½ mile Sungei Besi Road where the said machinery and equipment is now situate. A copy of the said letter is annexed hereto and marked "D". The Defendant by its reply dated the 11th April, 1956 informed the Plaintiff that it would not permit the removal of the said machinery and equipment. A copy of the Defendant's said letter is annexed hereto and marked "E".

13. The Defendant has failed and refused and still

In the High Court at Kuala Lumpur.

No. 1.

Amended Plaint.

14th June, 1957 - continued.

fails and refuses to return the said machinery and equipment to the Plaintiff.

14. The Defendant has further failed and refused and still fails and refuses to permit the Plaintiff to retake possession of the said machinery and equipment.

The Plaintiff prays judgment for -

(a) the sum of $16,000/- together with interest thereon at 12% per annum from 19-12-55 till realisation;

(b) the sum of $560/- together with interest thereon at 6% per annum from date of suit till realisation;

(c) damages for wrongful detention;

(d) an order for delivery up or for possession of the said machinery and equipment;

(e) costs of suit.

~~Sgd. Sen & Lim~~
~~Plaintiff's Solicitor.~~

~~Kok Hoong~~
~~by his Attorney~~

~~Sgd. C.B.Cheong~~
~~Plaintiff's Signature~~

Sgd. Sen & Lim
Plaintiff's Solicitors.

Sgd. Kok Hoong
in Chinese.
Plaintiff's Signature

~~I, Cheong Chee Bun of 101 High Street, Kuala Lumpur, the attorney of the Plaintiff above-named do hereby declare that the foregoing state is true to my knowledge except as to matters stated on information and belief, and as to those matters, I believe the same to be true.~~

~~Dated this 15th day of May, 1956.~~

~~Sgd. C.B.Cheong~~
~~Signature.~~

I Kok Hoong of 209, Circular Road, Kuala Lumpur the Plaintiff above-named do hereby declare that the foregoing amended statement is true to my knowledge except as to those matters I believe the same to be true.

Dated this 14th day of June, 1957.

Sgd. Kok Hoong
in Chinese
Signature.

No. 2.

In the High Court at Kuala Lumpur.

No. 2.

Amended Defence.

22nd July, 1961.

AMENDED DEFENCE

1. The Plaintiff is and was at the material times a moneylender within the meaning of Section 3 of the Moneylenders Ordinance, 1951.

2. At the time of the making of the two agreements hereinafter mentioned, that is by June 20th 1952, the Plaintiff had advanced the sum of $90,000-00 on loan to the Defendant and the Defendant had repaid by way of principal and interest the sum of $16,710-00. On the 26th June 1952 the Plaintiff made two further advances by way of loan to the Defendant totalling $22,000-00.

3. The Defendant admits the execution of the written agreement referred to in paragraph 2 of the Statement of Plaint. This agreement (hereinafter referred to "as the agreement of hire") was complementary to a written agreement of even date between the Plaintiff and the Defendant (hereinafter referred to as "the agreement of sale") under which the Defendant purported to sell the machinery and equipment therein referred to (which is also the subject matter of the agreement of hire) to the Plaintiff. The two agreements are to be read together and form part of the same continuous transaction the purpose and effect of which was to make the Defendant's said machinery and equipment security for the money advanced to the Defendant and interest thereon.

4. The agreement of hire is on a true construction thereof and having regard to all the surrounding circumstances (including the agreement of sale) a Bill of Sale and being neither in the form required by the Bills of Sale Enactment nor registered under the provisions of that Enactment it is void and unenforceable and the hire charges reserved in it (which in fact are charges by way of interest) are not recoverable in law. The agreement of sale being ancillary to the agreement of hire and part of a void transaction is also void and unenforceable and in the premises the Plaintiff has acquired neither the title to the said machinery and equipment nor the right to possession thereof.

5. Without prejudice to the contentions set forth in the preceding paragraphs the Defendant admits the variations in the agreement of hire set forth in paragraphs 4 and 5 of the Statement of Plaint.

In the High Court at Kuala Lumpur.

No. 2.

Amended Defence.

22nd July, 1961 - continued.

6. In regard to paragraphs 10, 11, 12 and 13 of the Statement of Plaint the Defendant says that the alleged right of the Plaintiff to retake possession of the said machinery and equipment is part of an agreement and transaction which is void and unenforceable and is therefore of no effect. The Defendant further says that the ownership of the said machinery and equipment remains and always has remained in the Defendant.

7. Further and in the alternative, in so far as the Statement of Plaint seeks to recover hire charges which the Defendant says are really charges by way of interest the Defendant will rely on the provisions of the Moneylenders' Ordinance, and says that the Plaintiff not having furnished any note or memorandum of the contract complying with Section 10(1) of the said Ordinance to the Defendant before the making of the said loan or loans, the said loans and any interest thereon are not recoverable in law.

8. Save and in so far as is expressly admitted herein the Defendant denies each and every allegation in the Statement of Plaint as though the same has been specifically set out and traversed.

(Signed) Lovelace & Hastings.

Delivered this 22nd day of July 1961, by Messrs. Lovelace & Hastings, Solicitors for the Defendant.

Amended 22nd day of July 1961, pursuant to order of Court dated the 21st day of July, 1961.

No. 3.

Reply.

24th July, 1961.

No. 3.

REPLY.

The Plaintiff as to the amended defence says that -

1. The Plaintiff joins issue with the Defendant on its amended defence.

2. The Plaintiff denies that he is a moneylender or that the transaction was or is a moneylending transaction or that the document or documents therein referred to are bills of sale or that they or any of them are or is void under the Bills of Sale Enactment or otherwise.

No. 3.

Reply.

24th July, 1961 - continued.

3. The Defendant is estopped by judgment dated the 3rd November, 1954 in Kuala Lumpur High Court Civil Suit No.272 of 1954 between the Plaintiff and the Defendant (wherein the Plaintiff recovered judgment against the Defendant for 9 months outstanding hire from 20-9-53 to 19-6-54 on the hire agreement being also the subject matter of those proceedings) from contending either that the Plaintiff is a moneylender or that the transaction in question was a moneylending transaction or that the documents are other than what they purport to be or that they or either of them are or is void or that the Plaintiff is not entitled to the reliefs claimed.

Sgd. T.K. Sen & Co.,

Plaintiff's Solicitors.

Delivered the 24th day of July, 1961, by Messrs. T.K. Sen & Co., of 18 Old Market Square, first floor, Kuala Lumpur, Plaintiff's Solicitors.

No. 4.

Order for Trial of Preliminary Point.

28th July, 1961.

No. 4.

ORDER FOR TRIAL OF PRELIMINARY POINT

The application of the Plaintiff by way of Summons in Chambers (No.40) dated the 17th day of July, 1961 .....

(Here follow Recitals and Orders concerning amendment of Pleadings)

AND this summons coming on for further hearing this day in the presence of Counsel for the Plaintiff and the Defendant.

AND UPON READING the amended Plaint, the amended defence dated the 22nd day of July, 1961 and the Reply to the amended defence dated the 24th day of July, 1961.

THIS COURT DOTH BY CONSENT ORDER that the point of law raised by the Reply of the Plaintiff in this action that is to say that the Defendant is estopped by judgment dated the 3rd day of November, 1954, in Kuala Lumpur High Court Civil Suit No.272 of 1954 between the Plaintiff and the Defendant from contending either that the Plaintiff is a moneylender or that the transaction in question in the pleadings mentioned was a moneylending transaction or that the documents are

In the High Court of Kuala Lumpur.

No. 4.

Order for Trial of Preliminary Point.

28th July, 1961 - continued.

other than what they purport to be or that they or either of them are or is void or that the Plaintiff is not entitled to the reliefs claimed be set down for hearing and disposed of as a preliminary point of law before the trial pursuant to Order 25 Rule 2 of the Rules of the Supreme Court.

AND IT IS ORDERED that until such point of law shall have been disposed of all proceedings in this action except for the determination of such question be stayed

AND IT IS FURTHER ORDERED that the costs of this application be costs in the action.

GIVEN under my hand and the seal of the Court this 28th day of July, 1961.

Sgd. ?

Senior Assistant Registrar,
High Court, Kuala Lumpur.

No. 5.

Judge's Notes of Argument.

28th July, 1961.

No. 5.

JUDGE'S NOTES OF ARGUMENT

B.K. Das with T.K. Sen for Plaintiff.

N.A. Marjoribanks for Defendant.

Das:- Order of 28.7.

Original record in C.S. 272/54 produced.
Point in issue is whether the judgment in C.S. 272/54 raises estoppel.
Default judgment.
Refs: Plaint in C.S. 272/54 - para.2 - hiring agreement of 20.6.1952.
Para 3 - continuation
Para 4 - failure to pay for a period.
Para 5 - interest at 12% on arrears of rent.
Judgment entered on 3.11.1954.
Amended plaint in C.S.178/56 - para. 2,3.
Amended defence (En. 41).
Old C.P.C. - applied not only to C.S.272/54 but also 178/56 when started.
S.6 of Cap.7 - Explanation I, III.

Morrison Rose & Partners v. Hillman
(1961) 3 W.L.R. 301, 306
Ord. 19, Rule 15 R.S.C.

Bell v. Holmes, (1956) 3 A.E.R. 449 @ 452(I), 454(E), 455.

Duedu v. Yiboe, (1961) 1 W.L.R. 1040, 1045-6

Humphries v. Humphries, (1910) 2 K.B. 531, 534 (Farwell L.J.) 535.

Cooke v. Rickman, (1911) 2 K.B. 1125, 1128 (bottom), 1130.

In re S. American & Mexican Co. v. Exparte Bank of England, (1895) 1 Ch.37 p.42 (V. Williams, J.)

P.45 (Judgment by consent or default raises estoppel).
P.49 (Lord Herschell, L.C.).

Kinch v. Welcott, (1929) A.C. 482 (P.C.) - consent order - estoppel, at p.493.

Shib Chandra Talukdar v. Lakhi Priva Guha A.I.R. (1925) Cal. 427, 428, 430.

Hoystead's Case, (1926) A.C. 147 @ 165-166, 170. Also (1926) A.C. p.94, 100.

Society of M.O. of Health v. Hope, (1960) A.C. 551, 563, 566.

Caffoor v. C.I. Tax, (1961) 2 W.L.R. 794, 800, 802.

Shoe Machinery Co. v. Cutlan, (1896) 1 Ch. 667, 670-1.

Bindeswari Charan Singh v. Bageshwari, 63 I.A. 53, 59.

Marjoribanks:

Plaintiff claims return of the chattels - that's why the issue is now raised.
In earlier case Defendant admitted a sum was due to Plaintiff.
Defendant might - but not bound to - raise defence of Moneylenders Ordinance.
Is Defendant to suffer loss by reason of his own honesty?
Two contemporaneous documents.
1st suit only for recovery of money - agreement mentioned only by reason of requirements of Civil P. Code.
Present suit is for return of chattels - and issue had never been adjudicated on.

Refers: Humphries v. Humphries - distinguishable Judgment not by default.

In the High Court of Kuala Lumpur.

No. 5.

Judge's Notes of Argument.

28th July, 1961 - continued.

There must be on adjudication - not merely default judgment - to raise an estoppel.

Cooke v. Rickman - distinguishable - in that Defendant was represented in that case (inference from p.1125).

In that case there was an admission.

New Brunswick Rly. Co. v. British & French Trust Corporation, (1939) A.C.1. @ 19 (bottom), 21, 37 - 38.

I decide in favour of the Plaintiff.

Hold that the matter is res judicata.

Costs in the cause.

(Sgd.) H.T Ong.

No. 6.

Order.

6th September, 1961.

No. 6.

ORDER.

BEFORE THE HONOURABLE MR. JUSTICE ONG

IN OPEN COURT THIS 6th DAY OF SEPTEMBER, 1961

The Point of law raised by the Reply of the Plaintiff and by the Order dated the 28th day of July, 1961 directed to be set down to be argued before the Court coming on this day to be argued in the presence of Counsel for the Plaintiff and for the Defendant and upon reading the said order dated the 28th day of July, 1961, the pleadings in this action and the record of proceedings in Kuala Lumpur High Court Civil Suit No.272 of 1954 and upon hearing what was alleged by Counsel for the Plaintiff and for the Defendant.

This Court doth declare that the Defendant is estopped by judgment dated the 3rd day of November 1954 in Kuala Lumpur High Court Civil Suit No. 272 of 1954 between the Plaintiff and the Defendant from contending in this action that the Plaintiff is a moneylender or that the transaction in question in the Pleadings mentioned was a moneylending transaction or is void or unenforceable under the Moneylender's Ordinance, 1951 or otherwise or that the documents in the Pleadings mentioned are other than what they purport to be or that they or either of them are or is a bill of sale or void or unenforceable under the Bills of Sale Enactment or otherwise.

The costs of the hearing of the said point of law are to be costs in the action.

Given under my hand and the seal of the Court this 6th day of September, 1961.

Sgd. A.W. Au.

Senior Assistant Registrar,
Supreme Court,
Kuala Lumpur.

In the High Court at Kuala Lumpur.

No. 6.

Order.

6th September, 1961 - continued.

No. 7.

No. 7.

Grounds of Judgment.

19th October, 1961.

GROUNDS OF JUDGMENT

By consent of the parties the point of law raised by the Plaintiff's Reply in this action was set down for trial as a preliminary issue, pursuant to the provisions of Order 25 Rule 2 of the Rules of the Supreme Court. The question for determination is whether the principle of estoppel per rem judicatam applies so that the Defendant, against whom a default judgment had previously been entered for a sum alleged to be arrears of rent of machinery hired to him by the Plaintiff as owner, is debarred in a subsequent action on the same hiring agreement from disputing the validity of the agreement and the Plaintiff's claim for return of the machinery and further arrears of rent accrued since the previous judgment.

On June 30, 1954 Kuala Lumpur High Court Civil Suit No.272 of 1954 was commenced by a summons in a summary suit for debt, under Chapter XXXIX of the former Civil Procedure Code. In paragraph 2 of the Plaint it was stated that, under an agreement in writing dated June 20, 1952, the Plaintiff let certain machinery and equipment on hire to the Defendant for the term of 12 months at $2,500/- per month; in paragraph 3, that on the expiry of the term of 12 months the hiring was continued on the terms and conditions of the original agreement; in paragraph 4, that default in payment of rent was made from September 20, 1953; and in paragraph 5, that pursuant to Clause 7 of the hiring agreement the Defendant was liable to pay interest on all arrears of rent at the rate of 12 per cent per annum. On November 3, 1954, judgment was entered

In the High Court at Kuala Lumpur.

No. 7.

Grounds of Judgment.

19th October, 1961 - continued.

against the Defendant for the sum of $22,500/- with interest at the agreed rate, and costs, by reason of the Defendant not having obtained leave to appear and defend the suit.

The present action was commenced by summons issued on May 15, 1956 under the Civil Procedure Code then still in force. Paragraphs 2 and 3 of the Plaint reproduce exactly paragraphs 2 and 3 of the earlier suit. In paragraphs 4 and 5 it was stated that, by arrangement with the Defendant, the Plaintiff retook possession of two diesel engines, while the remainder continued to be hired to the Defendant on the terms and conditions of the original agreement, except that the amount of the monthly rent was reduced to $2,000/-, and the machinery remaining on hire were to be insured by the Defendant for $80,000 only. The subsequent paragraphs recited the Defendant's default in payment of rent from April 20, 1955, the Defendant's liability under Clause 7 of the hiring agreement for interest on arrears of rent, the determination of the hiring on December 19, 1955 by notice in writing, the demand for the return of the machinery and equipment and payment of all rents in arrear with interest, and the Defendant's non-compliance with such notice. Finally the Plaintiff claims the amount of rent in arrears, interest thereon, damages for wrongful detention, return of the machinery and costs.

By its amended defence the Defendant alleges in paragraph 1 that the Plaintiff is and was at the material times a moneylender within the meaning of Section 3 of the Moneylenders Ordinance, 1951. In the subsequent paragraphs the Defendant sets out the circumstances under which the hiring agreement came to be made contemporaneously with a written agreement of sale of the same machinery by the Defendant to the Plaintiff, and the Defendant contends, first, that the two agreements read together formed part of a single transaction having as its object the providing of security for money lent and interest thereon; secondly, that the agreements offended against the provisions of the Bills of Sale Enactment, and being void, passed neither title to nor right to possession of the machinery to the Plaintiff; and, thirdly, that the claim for rent being in reality for interest, is unenforceable by reason of the Moneylenders Ordinance.

By his reply, joining issue, the Plaintiff

denies that he was a moneylender, or that the documents were Bills of Sale avoided by the Moneylenders Ordinance or otherwise, and he further pleads that the Defendant is estopped by the judgment dated November 3, 1954, in Kuala Lumpur High Court Civil Suit No.272 of 1954 between the Plaintiff and the Defendant, from contending either that the Plaintiff is a moneylender, or that the transaction in question in the pleadings mentioned was a moneylending transaction, or that the documents are other than what they purport to be, or that they or either of them are or is void or that the Plaintiff is entitled to the reliefs claimed.

As the default judgment was entered while the Civil Procedure Code was in force, it is interesting to note that the principles relating to res judicata were set cut in express terms in section 6 of that Code, the relevant provisions being as follows :-

> "6. No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.
>
> Explanation I: The expression 'former suit' denotes a suit which has been decided prior to the suit in question, whether or not it was instituted prior thereto.
>
> Explanation II: The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly by the other.
>
> Explanation III: Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit".

In actual fact this enunciation of the doctrine of res judicata is indistinguishable from the English law. McNair J. in Bell v. Holmes(1) has said: "Much valuable guidance on the topic of res judicata is to be found in the classic judgment of

In the High Court at Kuala Lumpur.

No. 7.

Grounds of Judgment.

19th October, 1961 - continued.

Lush J. in Ord. v. Ord.(2) "which case was considered also by Holroyd Pearce L.J. recently in Morrison Rose & Partners v. Hillman(3) Lush J. in his judgment said :

> "The words 'res judicata' explain themselves. If the res - the thing actually and directly in dispute - has been already adjudicated upon, of course by a competent Court, it cannot be litigated again. There is a wider principle, to which I will refer in a moment, often treated as covered by the plea of res judicata, that prevents a litigant from relying on a claim or defence which he had an opportunity of putting before the Court in the earlier proceedings and which he chose not to put forward, but I am dealing for the moment with res judicata in its strict sense. As is said in the notes to the Duchess of Kingston's Case, if the truth has been ascertained, the party against whom it has been ascertained is taken as admitting it. This is what the learned author says: 'An estoppel, therefore, is an admission; or something which the law treats as equivalent to an admission, of an extremely high and conclusive nature - so high and so conclusive, that the party whom it affects is not permitted to aver against it or offer evidence to controvert it'. The litigant must admit that which has been judicially declared to be the truth with regard to the dispute that he raised. In order to see what the fact is that he must admit the truth of one has always to see what is the precise question, the precise fact that has been disputed and decided. This has constantly been stated to be the law".

There is again the statement of principle in the judgment of Somervell L.J. in Greenhalgh v. Mallard(4) where he said :-

(1) (1956) 3 A.E.R. 449, 454. (2) (1923) 2 K.B. 432, 439. (3) (1961) 3 W.L.R. 301.
(4) (1947) 2 A.E.R. 255, 257.

> "I think that on the authorities to which I will refer it would be accurate to say that res judicata for this purpose is not confined to the issues which the Court is actually asked to decide, but that it covers issues or facts which are so clearly part of the

subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them. In Green v. Weatherill(5) Maugham J. quoted some observations by Wigram V.C., in Henderson v. Henderson:(6) 'I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time".

As to the application of the principle to the present case, it is an admitted fact that in both proceedings the Plaintiff was suing on the same hiring contract of June 20, 1952. But, whereas in the earlier action his claim was confined to rents in arrear and interest thereon, in the present action he claims the return of his machinery and damages for wrongful detention, in addition to rents in arrear and interest. The simple explanation of course is that the hiring had not been determined until some thirteen months after the first judgment had been entered. On this account, however, it is argued by Counsel for the Defendant that, because the previous action was for a simple debt, whereas the present one is for the return of chattels, there never was an aedem quaestio, and consequently no res which could be said to be judicata. He contends that the claim to the machinery is a new issue now raised for the first time,

(5) (1929) 2 Ch. 213, 221
(6) (1843) 3 Hare 100, 114.

In the High Court at Kuala Lumpur.

No. 7.

Grounds of Judgment.

19th October, 1961 - continued.

to which the Defendant could not formerly have pleaded, so that the latter was not then bound to raise his defence under the Moneylenders Ordinance, even if he might have done so. Counsel says further that the issue involving the chattels had never in fact been adjudicated upon by reason of the judgment having been entered by default; in other words, that a default judgment does not create an estoppel per rem judicatam. With the greatest respect to Counsel, I regret that I am unable to agree with this argument because it seems to me to be setting up a distinction without any difference. The truth of the matter is that a judgment for the Plaintiff in Civil Suit No.272/54 was not a judgment for him for a sum of $22,500/- at large; it was a judgment for him on a claim for that sum being rents in arrear under a hiring agreement of machinery of which the Plaintiff was the owner. What I have just said is a paraphrase of an excerpt from the judgment of Lord Herschell L.C., In re South American and Mexican Co., Ex parte Bank of England(7) In that case Vaughan Williams J., said, at page 45:-

> "It has always been the law that a judgment by consent or by default raises an estoppel just in the same way as a judgment after the Court has exercised a judicial discretion in the matter. The basis of the estoppel is that, when parties have once litigated a matter, it is in the interest of the estate that litigation should come to an end; and if they agree upon a result, or upon a verdict, or upon a judgment, or upon a verdict and judgment, as the case may be, an estoppel is raised as to all the matters in respect of which an estoppel would have been raised by judgment if the case had been fought out to the bitter end".

Upon appeal from that judgment, Lord Herschell said, at page 50:

> "The truth is, a judgment by consent is intended to put a stop to litigation between the parties just as much as is a judgment which results from the decision of the Court after the matter has been fought out to the end. And I think it would be very mischievous if one were not to give a fair and reasonable interpretation to such judgment, and

were to allow questions that were really involved in the action to be fought over again in a subsequent action".

It seems to me clear beyond dispute that a judgment for rent claimed by the Plaintiff as owner of chattels hired necessarily and directly involves, where there was no dispute, a declaration as to their ownership. The root of the Plaintiff's title to the rent is his ownership. In an action for rent, as in Civil Suit No.272/54, I am of opinion that, when the hiring agreement was specifically pleaded, any question as to its validity was concluded once judgment had been entered for the rent claimed thereunder. That judgment not having been set aside still stands.

In support of his argument, Counsel for the Defendant cites certain dicta of the House of Lords in New Brunswick Railway Co., vs. British and French Trust Corporation Ltd.(8) That case involved the construction of the gold clause obligation contained in certain mortgage bonds issued by the Appellants. In a previous action by the Respondents against the Appellants upon a single bond, the Appellants did not enter appearance and judgment was obtained against them by default. In a subsequent action on 992 bonds of the same series, it was held that such a judgment did not operate an estoppel to prevent the Appellants raising as a defence to the second action questions as to the construction of the bonds, though these were couched in the same terms as the bond upon which judgment was obtained by default.

Mr. Marjoribanks relied in particular on the following passages in the judgment of Lord Maugham L.C. and of Lord Wright. At page 19, Lord Maugham said:

"The doctrine of estoppel is one founded on considerations of justice and good sense. If an issue has been distinctly raised and decided in an action, in which both parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them; but in my view the doctrine cannot be made to extend to presumptions or probabilities as to issues in a second action which may be, and yet cannot be asserted

(7) (1895) 1 Ch. 37, 45, 50.
(8) (1939) A.C.1.

In the High Court at Kuala Lumpur.

No. 7.

Grounds of Judgment.

19th October, 1961 - continued.

beyond all possible doubt to be, identical with those raised in the previous action".

Then at page 21 he continued:

"I do not think it necessary to express an opinion as to whether the alleged estoppel would have succeeded if the Appellants had appeared in and contested the first action. But the judgment in that action limited in form to a single bond was pronounced in default of appearance by the Defendants. In my view not all estoppels are 'odious'; but the adjective might well be applicable if a Defendant, particularly if he is sued for a small sum in a country distant from his own, is held to be estopped not merely in respect of the actual judgment obtained against him, but from defending himself against a claim for a much larger sum on the ground that one of the issues in the first action (issues which he never saw, though they were doubtless filed) had decided as a matter of inference his only defence in the second action ... In my opinion we are at least justified in holding that an estoppel based on a default judgment must be very carefully limited. The true principle in such a case would seem to be that the Defendant is estopped from setting up in a subsequent action a defence which was necessarily, and with complete precision, decided by the previous judgment; in other words, by the res judicata in the accurate sense".

In Lord Wright's judgment there is the following passage at pages 37-38:

"No authority has been produced in which a party has been held to be estopped from raising in a litigation an issue which he might have raised in a previous litigation in which he allowed judgment to go by default and omitted to raise the issue. The nearest analogy is the case of Howlett v. Tarte(9) A Defendant, sued for rent or a periodical payment under a building agreement, failed to plead issuably. His plea was struck out and judgment went against him for default of pleading under the procedure then current. He was sued for another instalment and by way of defence pleaded that the building agreement had been

(9) 10 C.B. (N.S.) 813.

superseded by an agreement for a yearly tenancy which had been determined, so that the rent claimed was not due. It was held that he was not estopped. That decision has been explained as depending on the old system of pleading. But I think it depends on wider principles. I think it implies that default is not to be treated as an admission. Willes J. said that the plea in the second action, which was by way of confession and avoidance, was consistent with the record. He said that the objection was a new device, which he thought should not be introduced. 'Nobody' he added, 'ever heard of a Defendant being precluded from setting up a defence in the second action because he did not avail himself of the opportunity of setting it up in the first action'. It is enough for present purposes to treat this observation as limited to a case where judgment has gone by default, whether of appearance or pleading. In that sense I should accept these observations of Willes J., one of the greatest Common Law Judges. There are grave reasons of convenience why a party should not be held to be bound by every matter of fact or law fundamental to the default judgment. It is, I think too artificial to treat the party in default as bound by every such matter as if by admission. All necessary effect is given to the default judgment by treating it as conclusive of what it directly decides. I should regard any further effect in the way of estoppel as an illegitimate extension of the doctrine, which in the absence of express authority I am not prepared to accept".

I do not think, however, that it would be right to conclude that their Lordships have gone so far as to lay down that a default judgment can in no case create an estoppel per rem judicatam. It is to be observed that Lord Maugham, in the passage quoted from his judgment, made it quite clear that there must be an eadem quaestio for estoppel to arise, and further, that "an estoppel based on a default judgment must be very carefully limited. The true principle in such a case would seem to be that the Defendant is estopped from setting up in a subsequent action a defence which was necessarily, and with complete precision, decided by the previous judgment". Lord Wright, too,

In the High Court at Kuala Lumpur.

No. 7.

Grounds of Judgment.

19th October, 1961 - continued.

has said: "All necessary effect is given to the default judgment by treating it as conclusive of what it directly decides". In fact the decision turned on the unanimous opinion of their Lordships that in the earlier action there was a declaration limited to the single bond, but there was no issue then before the Court as to any or all the 992 bonds which were the subject-matter of the subsequent action, so that "the construction of each or any of these bonds was not a traversable issue in the previous action". In the words of Lord Wright, "The estoppel could not arise in this case. This ground is enough to distinguish the present case from any other case in which an estoppel has been found".

No other authority has been cited in support of the proposition that a judgment by default cannot raise an estoppel per rem judicatam. My own researches in this direction have been unproductive, and I am compelled to conclude that, within the limits laid down by Lord Maugham and Lord Wright, a judgment by default is as good as any other to raise an estoppel. For an Indian decision that an ex parte decree operates as res judicata in a suit for rent, see Shib Chandra Talukdar v. Lakhi Priva Guha.(10) It is therefore not open now to the Defendant to say that a judgment ex facie for rent was in truth a judgment for interest. I accordingly hold that the plea of estoppel is good. Costs in the cause.

(Sgd.) H.T. ONG,
Judge,
Supreme Court,
Federation of Malaya.

Kuala Lumpur
19th October, 1961.

Mr. B.K. Das with T.K. Sen for Plaintiff
Mr. N.A. Marjoribanks for Defendant.

(10) A.I.R. (1925) Cal. 427.

In the Court of Appeal at Kuala Lumpur.

No. 8.

Notice of Appeal.

3rd October, 1961.

No. 8.

NOTICE OF APPEAL

IN THE SUPREME COURT OF THE FEDERATION OF MALAYA

IN THE COURT OF APPEAL AT KUALA LUMPUR

CIVIL APPEAL NO. OF 1961

BETWEEN:- LEONG CHEONG KWENG MINES LIMITED — Appellants

- and -

KOK HOONG — Respondent

(In the Matter of Kuala Lumpur High Court Civil Suit No. 178 of 1956

BETWEEN:- KOK HOONG — Plaintiff

- and -

LEONG CHEONG KWENG MINES LIMITED — Defendant)

TAKE NOTICE that Leong Cheong Kweng Mines Limited the Appellants above named being dissatisfied with the decision of the Honourable Mr.Justice Ong given at the High Court, Kuala Lumpur, on the 6th day of September, 1961 appeal to the Court of Appeal against the whole of the said decision.

Dated this 3rd day of October, 1961.

Sgd. LOVELACE & HASTINGS.

Solicitors for the Appellants.

To:
The Senior Assistant Registrar,
Supreme Court, Kuala Lumpur.

And to:
The Respondent above-named and/or his Solicitors,
Messrs. T.K. Sen & Co.,
No.18, Old Market Square, Kuala Lumpur.

The address for service of the Appellants is care of Messrs. Lovelace & Hastings, No. 57 Klyne Street, Kuala Lumpur.

In the Court of Appeal at Kuala Lumpur.

No. 9.

Memorandum of Appeal.

14th November, 1961.

No. 9.

MEMORANDUM OF APPEAL

Leong Cheong Kweng Mines Limited the above-named Appellants appeal to the Court of Appeal against the whole of the decision of the Honourable Mr. Justice Ong given at Kuala Lumpur on the 6th day of September 1961 declaring that the Appellants are estopped by judgment dated the 3rd day of November, 1954 in Kuala Lumpur High Court Civil Suit No.272 of 1954 between the Plaintiff and the Defendant from contending in this action that the Plaintiff is a moneylender or that the transaction in question in the pleadings mentioned was a moneylending transaction or is void or unenforceable under the Moneylender's Ordinance, 1951 or otherwise or that the documents in the Pleadings mentioned are other than what they purport to be or that they or either of them are or is a bill of sale or void or unenforceable under the Bills of Sale Enactment or otherwise.

1. The decision appealed against is based on the following findings of fact and decisions in law.

(A) That the issues and causes of action in Civil Suit No.272 of 1954 were the same as in Civil Suit No.178 of 1956.

(B) That despite the fact that the first judgment was a default judgment the principle of res judicata applied.

2. The learned Judge should have held:

(A) (i) The issues and causes of action in Civil Suit No.272 of 1954 and Civil Suit No.178 of 1956 not being the same the principle of res judicata did not apply.

(ii) Default should not be treated as an admission.

(iii) There never was an eadem quaestio and consequently no res which could be said to be judicata.

(B) The decision of the House of Lords in the case of New Brunswick Railway Company v. British and French Trust to be conclusive on the question that there was no estoppel on the facts of this case based on the judgment in default.

3. The learned Judge should have found for the Appellants on the point of law submitted to him.

No. 9.

Memorandum of Appeal.

14th November, 1961 - continued.

4. The Appellants pray that the order of the learned Judge be reversed and the appeal be allowed.

Dated this 14th day of November, 1961.

Sgd. Lovelace & Hastings,
Solicitors for the Appellants.

To:
The Senior Assistant Registrar,
Supreme Court, Kuala Lumpur.

And to:
The Respondent above named and/or his
10 Solicitors, Messrs. T.K. Sen & Co.,
No.18, Old Market Square, Kuala Lumpur.

The address for service of the Appellants is care of Messrs. Lovelace & Hastings, No. 57 Klyne Street, Kuala Lumpur.

No. 10.

No.10.

Judge's Notes of Argument. (Thomson, C.J.)

12th December, 1961.

JUDGE'S NOTES OF ARGUMENT (THOMSON, C.J.)

For Appellants: N.A. Marjoribanks.

For Respondent: R. Ramani & T.K. SEN.

Marjoribanks:

20 The two suits are different in substance.

(1) filed in 1952 (46) under Civil Procedure Code. Was for rent. Based on agreement in writing dated 20.6.52.

(2) is on a variation of the agreement of 20.6.52 which I shall submit then is an entirely fresh agreement.

In (1) there was no claim for return of chattels. Judgment was by default. The agreement was never adjudicated upon.

30 We accept principles in:

Ord v. Ord. (1923) 2 K.B. 432, 439.

The first action did not raise any claim for any sort of declaration. The only point in dispute was whether Defendant should pay the amount claimed - 22,000.

Must distinguish between judgment on a specially endorsed writ and judgment on an ordinary writ where Defendant does not appear.

In the Court of Appeal at Kuala Lumpur.

No.10.

Judge's Notes of Argument (Thomson, C.J.)

12th December, 1961 - continued.

Spira v. Spira, (1939) 3 A.E.R. 924.

Dsane v. Hagan, (1961) 3 W.L.R. 776.

In any event can there be estoppel so as to prevent a statutory defence?

Griffiths v. Davies, (1943) 2 A.E.R.209, 212.

I then come to:

New Brunswick Rly. Co., v. British & French Trust Corporation Ltd. (1939) A.C. 1, 19, 21, 37, 43.

which is authority for the proposition that the order should not have been made.

Where a defence must be specially pleaded and not pleaded it cannot be said to have been adjudicated upon.

Case for Appellants:

Ramani:

This was an action to which Civil Procedure Code applied.

The Code deals with "res judicata" at Sec.6, particularly Explanation III. This provides that there is res judicata as to any matter which might have been made a ground of defence.

Summary Procedure is in S.459.

It is Ss. 4, 6 and 7 we want to get rid of.

The question of moneylender and B/S were brought in question in the original action.

The transaction is not voided by law. The law simply deprives Plaintiff of his remedy.

A default judgment can give rise to res judicata both in England and India.

Kalipada De v. Dwijapada Dos, 1930 A.I.R. P.C. 22.

Shib Chandra Talukdar v. Lakhi Priva Guha, 1925, A.I.R. Cal. 427.

Kameswar Pershad v. Rajkumani Ruttun Koer, 19 I.A. 234, 238.

Gobind Lal v. Rao Baldeo Singh, 1914 A.I.R. Lah. 390.

Mt. Dulari v. Edward Thelwal, 1929 A.I.R. All. 761.

Govindoss Krishnadoss v. Rajah of Karvetnagar, 1929 A.I.R. Mad. 404.

Sooyomonee Dayee v. Suddanund Mohapatter, (1873) Supp. I.A. 212, 218.

Rajaram v. Jagannath, 1949 A.I.R. Bom.274.

Dwijendra Narain Roy v. Joges Chandra De, 1924 A.I.R. Cal. 600.

With regard to effect of repeal the question is difficult. But hitherto the case has been dealt with on the basis of the Civil Procedure Code.

On Indian S.11 -

Ram Kirpal Shukul v. Mussumat Rup Kuari, XI I.A. 37, 41.

Hook v. Adm. Gen. of Bengal, 1921 A.I.R. P.C. 11.

T.B. Ramchandra Rao v. R.N.S. Ramchandra Rao, 1922 A.I.R. P.C.80.

Ramaswami Ayyar v. Vythinatha Ayyar, 26 I.L.R. Mad. 760, 769.

Seth Chasiram Seth Dalchand Palliwal v. Mt. Kundanbai, 1940 A.I.R. Nag. 163, 167.

Law in England as to default judgments see:

Halsbury XV 178 §§ 349.

Huffer v. Allen, L.R. 2 Ex. C. 15.

Cribb v. Freyberger, (1919) W.N. 22.

If you have the opportunity to defend and do not defend then there is res judicata.

Dsane v. Hagan, (1961) 3 W.L.R. 776.

In re South American & Mexican Co. Exparte Bank of England, (1895) 1 Ch. 37.

Humphries v. Humphries, (1910) 2 K.B. 531.

Cooke v. Rickman, (1911) 2 K.B. 1125.

Ord v. Ord. (1923) 2 K.B. 432, 436, 443.

Hoystead v. Comm. of Taxation, (1926) A.C. 155, 165, 168.
(Later disapproved by H.L. & P.C.).

In the Court of Appeal at Kuala Lumpur.

No.10.

Judge's Notes of Argument. (Thomson, C.J.)

12th December, 1961 - continued.

Soc. of Med. Officers of Health v. Hope (1960) A.C. 551.

Mohamed Falil v. Comm. of I.T. Colombo, (1961) 2 W.L.R. 794, 808.

I now come to the last case on the other side.

New Brunswick Rly. Co., v British & French Trust Corpn. Ltd., (1939) A.C. 1, 35, 37.

That case has been much weakened by the 1960 case.

Here the question of moneylending transaction goes to the root of the whole transaction. We say it was a hiring of machinery. They say it was a moneylending transaction.

A recent case -

Yaw Duedu v. Evi Yiboe, (1961) 1 W.L.R. 1040.

As to transaction prohibited by law.-

Halsbury XV 176 §§ 345.

Griffiths v. Davies, (1943) 1 K.B. 618.

Case for Respondent.

Marjoribanks:

The 2 agreements were different (see p.16 of record).

C.A.V.

Intld. J.B.T.
12.12.61.

No.11.

Judge's Notes of Argument. (Hill, J.A.)

12th December, 1961.

No. 11.

JUDGE'S NOTES OF ARGUMENT (HILL, J.A.)

Marjoribanks for Appellants.

Ramani for Respondent.

Marjoribanks:

Appeal only on estoppel. Two suits in fact different - 1st suit p.46 - rent.

2nd claim on a variation i.e. a fresh agreement. § 2 and 3 same. § 4 new agreement set out. Actually 1st agreement terminated and new agreement made in May 1955.

1st suit - judgment by default. No leave obtained to appear or defend. No judgment or order made on the agreement. No admission by Defendant on actual agreement itself.

Defendant admitted owing money for rent.

2nd suit involves return of the chattels - Defendant denies he had the right of return - therefore special defence necessary.

(1923) 2 K.B.D. 432 - Ord v Ord (439 - 40) "precise question" repayment of rent in 1st case - agreement is now in dispute - not decided.

(1939) 3 A.E.R. 924 - Spira v. Spira re "default" - summary procedure - no admission to fail to get leave to defend.

(1961) 3 W.L.R. 776 Dzane v. Hagan. Submits therefore no judgment by default in 1st suit.

"high and exclusive nature of admission".

(1943) 2 A.E.R. 209 - Griffiths v. Davies. Statutory provision cannot be overridden by a judgment.

(1939) A.C.1 - New Brunswick Railway Co. v. British and French Trust Corpn. Ltd.

Where defence must be specially pleaded and is not so pleaded it cannot be said to have been adjudicated on.

Ramani:

Civil procedure code applied to both actions. Code sets out what res judicata means -

Sec. 6 "might and ought" Cap. 7.

Sec.45a - re procedure.

Schedule 161.

1st suit claimed for period of the extension - letter p.15 - position p.20 at time of suit.

Ss 4, 6 and 7 of amended defence are the main defences estopped -

Bills of Sale and Moneylenders Transaction. 2 issues - was Plaintiff owner and entitled to hire and had Defendant defaulted - look on the Pleadings for "might and ought" same agreement sued on. Plaintiff's right can only be avoided if special defences made out. Default or consent judgments are res judicata.

In the Court of Appeal at Kuala Lumpur.

No.11.

Judge's Notes of Argument. (Hill, J.A.)

12th December, 1961 - continued.

5th Edition Vol. 1 Chittaly p.199.

A.I.R. (1930) P.C. p.22 Kalipada De & Others v. Dwijapada Das & Others.
(Section 11 and 6 the same).

(1925) A.I.R. Calcutta 427. Shib Chandra Talukdar and Others v. Lakhi Priva Guha & Others.
L.R. (19) I.A. 234 (237) Kameswar Pershad v. Rajkumari Ruttun Koer & Others.

(1914) A.I.R. Lahore p.390. Gobind Lal v. Rao Baldeo Singh. 10

(1929) A.I.R. Allahabad 761. Mt.Dulari v. Edward Thelwale.

(1929) A.I.R. Madras 404. Khrishnadas v. Rajah of Karvetnagar.

All start from Section 11.

(1873) Sup. to 1A. p. 212 Soorjomonee Dayee v. Suddanund Mahapatter.

(1949) A.I.R. Bombay 274. Rajaram Maniram v. Joganaath

(1924) A.I.R. Calcutta 600 Dwijendra Narain Roy v. Joges Chandra De. 20

Re Section 6 - no assistance from Interpretation and General Clauses Ordinance.

New Rules of Court to apply.

Not considered by Ong J. re distinction - but Section 6 applied.

11 I.A. p.37 Ram Kirpal v. Mussuman.

(1921) A.I.R. P.C. 11 Hook v. Administrator-General

(1922) A.I.R. P.C. 80 - res judicata of general application. Ramachandra v. Ramachandra. I.L.R. 26 Madras 760 Ramaswami Ayyar v. Vythinatha Ayyar. 30

(1940) A.I.R. Nagpur 167. Seth Ghasiram v. Mt. Kundanhai.

English Law and Malayan re res judicata same.
15 3rd Edition § 349 Halsbury 178.

(1919) W.N. Ex. 22. Gribb v. Freyberger Dzane v. Hagan - O. 14 14A.

O.27 r.15 - this case under O. 14.

(1895) 1 Ch. Div. 37 South American and Mexican Co. ex parte Bank of England - essence of this case was the agreement of hire. 40

In the Court of Appeal at Kuala Lumpur.

No.11.

Judge's Notes of Argument. (Hill, J.A.)

12th December, 1961 - continued.

(1910) 2 K.B. 531 Humphries v. Humphries - referred to in Court below.

Cooke v. Rickman (1911) 2 K.B. 1125

(1923) 2 K.B. 432 Ord v. Ord.

Memo debet his vexari.

(1926) A.C.155 - Hoystead v. Commissioner of Taxation.

(1960) A.C. 551 Society of Medical Officers of Health v. Hope.

(1961) 2 W.L.R. 794 - Caffoor & Others v. Income Tax Commissioner, Colombo (803) re New Brunswick case 1939 A.C.1. each Bond a separate contract - p.36 N.B. case.

(1961) 1 W.L.R. 1040. Yaw Duedu v. Evi Yiboe.

15 Hals. 3rd Edition § 345 - p.176.

Marjoribanks:

Letter p.15 - shows there was a new agreement - two different contracts - 19 - C.P.C. 459 (ii) conflicts with Section 6 - rests on New Brunswick case - no case actually on all fours.

C.A.V.

Sgd. R.D.R. Hill.
12.12.1961.

No. 12.

No.12.

JUDGE'S NOTES OF ARGUMENT (GOOD, J.A.)

Judge's Notes of Argument. (Good, J.A.)

12th December, 1961.

Marjoribanks for Appellants.

Ramani (T.K.Sen with him) for Respondents.

Marjoribanks:

The two suits are different in substance. The first suit is at p.46. The claim was merely for rent. It proceeded on an extension of the agreement of 20.6.52.

The present claim is on a variation of the agreement of 20.6.52 which I shall submit amounts to a fresh agreement. The amended plaint is on p.3.

S.4 pleads a new agreement - an oral agreement made in April or May 1955 - terminating the written agreement and substituting a fresh one.

In the Court of Appeal at Kuala Lumpur.

No.12.

Judge's Notes of Argument (Good, J.A.)

12th December, 1961 - continued.

In the first claim there was no prayer for the return of the chattels.

The order on the first claim is at p.49.

Default judgment.

It cannot be said that the agreement on 20.6.52 was ever adjudicated upon. The Defendants were merely ordered to pay a sum of money. The failure to appear and defend was not an admission by Defendants in respect of the written agreement. It is easy to see why Defendants did not defend. In these Courts there are highly technical defences under the Moneylenders Ordinance. In the first suit the Defendants did not seek to avail themselves of such a defence because it was for payment of money which Defendants admitted they owed. It was otherwise in the second suit which was for recovery of chattels, where Defendants were entitled to avail themselves of a special defence under the Moneylenders Ordinance.

Ord v. Ord (1923) 2 K.B. 432 at 439.

We have been using the phrase "judgment by default" loosely.

Here Defendants would have had to obtain leave to appear and defend.

It is important to distinguish the two aspects of "default" judgments: (i) in proceedings commenced by specially endorsed writs; (ii) in other cases. (i) is not a default judgment, therefore not an admission.

Spira v. Spira (1939) 3 A.E.R. 924.

On the summary procedure there is no admission. But where the rules say you must file a defence, if you do not do so and Plaintiff gets judgment, your default may operate as an admission.

Dzane v. Hagan (1961) 3 W.L.R. 776 at 779.

Default occurs where Defendant fails to do something which he is directed by the rules to do. To take an example - Defendant applies for leave to appear and defend, and leave is given on terms that he deposits $22,000/- as security. He cannot find the money. Can it be said that any admission is involved in this "default?"

Griffiths v. Davies (1943) 2 A.E.R. 209.

Party cannot plead estoppel to defeat a statutory requirement.

In the Court of Appeal at Kuala Lumpur.

No.12.

Judge's Notes of Argument (Good, J.A.)

12th December, 1961 - continued.

New Brunswick Railway Co. v. British & French Trust Corporation Ltd. (1939) A.C.1.

If a defence must be specially pleaded it cannot be said to have been adjudicated upon in a case in which it has not been pleaded.

Ramani:

The two essential matters have not been referred to by Marjoribanks.

(1) This was an action brought by summary procedure to which the Civil Procedure Code applied.

(2) On the question of res judicata the Civil Procedure Code has set out what res judicata means and covers - S.6 creates a form of constructive res judicata.

Form 161.

p.p.46 - 47 - compare with p.p. 3 - 4.

It is quite clear the Plaintiff was in the earlier proceedings suing in respect of a period covered by the extension of the agreement and that is exactly the same as in the second proceedings.

Vide letters at p.p.15 ff.

Defence is nothing like confession and avoidance.

When the action was brought the claim was for rent for hire of machinery.

(C.J.: Is the "Moneylender" defence set up in the amended defence? Ramani: - Yes, §7).

The principal defences are §§ 4, 6 and 7.

I want to get rid of them.

Issues in the first suit were:-

(1) Am I the owner entitled to hire the machinery to you?

(2) Have you defaulted in payment?

The second suit was founded on the same issue. The defences now being raised ought to have been raised in the summary procedure action.

(C.J: s.6 Civil Procedure Code "No Court shall try ....." Is not the date of trial the date at which the applicability of the Civil Procedure falls to be determined?)

Chittaly Edition Vol.1, p.199 "Res judicata".

In the Court of Appeal at Kuala Lumpur.

No.12.

Judge's Notes of Argument (Good, J.A.)

12th December, 1961 - continued.

A.I.R. (1930) P.C. 22 Kalipada De & Others v. Dwijapada Dos & Others.

Comparable litigation.

A suit on a bond with interest - where suing for interest only, or a suit for rent.

(1925) A.I.R. Calc. 427. Shib Chandra Talukdar & Others v. Lakhi Priva Guha and Others.

"ought to have"; "might have" defined :

L.R. 19 1 App. 234 & 237 - 238 Kameswar Pershad v. Rajkumari Ruttun Koer & Others.

Gobind Lal v. Rao Baldeo Singh (1914) A.I.R. Lahore 390.

Mt. Dulari v. Edward Thelwal (1929) A.I.R. All 761.

Ex parte decree is as binding as any other decree.

Khrishnadas v. Rajah of Karnetnagar (1929) A.I.R. Mad. 404.

Soorjomonee Dayee v. Suddanund Mohapatter (1873) 1. App. Supt. 212, 218.

"Cause of action" to be construed with regard to the substance rather than the form.

If the decree in the previous suit would have been inconsistent with the defence which ought to have been raised that defence would be deemed to have been raised and finally decided.

Rajaram Maniram v. Jognaath (1949) A.I.R. Bomb. 274. Dwinjendra Narain Roy v. Joges Chandra De (1924) Calc. 600.

If a finding is essential to the judgment that finding is res judicata.

2.30 p.m.

The effect of the repeal. The Civil Procedure Code was repealed with effect from 1st April 1958 by a separate Ordinance and the new Rules were brought into force on that date. Therefore the position must be discovered by reference to the new Rules themselves.

The course of trial suggests that the case proceeded on the footing of the Civil Procedure Code as exemplified by English Law.

Section 11 and its ancestors of 1882, 1873 and 1859:

Ram Kirpal v. Mussuman 11 I.A. 37 & 41.

Hook v. Administrator-General (1921) A.I.R. (P.C.) 11. Ramchandra v. Ramchandra (1922) A.I.R.(P.C.) 80. Ramaswami Ayyar v. Vythinatha Ayyar I.L.R. 26 Mad. 760 & 769.

The law set out in S.6. Civil Procedure Code is not exhaustive of the application of the res judicata principle.

Seth Ghasiram v. Mt. Kundanbai (1940) A.I.R. (Nagpur) 163 and 167.

The law in England as to default judgments and res judicata is no different from the law in this country.

Halsbury III, Vol. XV p.178.

Huffer v. Allen L.R. 2 Ex.15 at 18, Kelly C.B. Gribb v. Freyberger (1919) W.N. 22.

Answers Marjoribanks submission that there is a distinction between ex parte judgments under the summary procedure and judgments by default of appearance or defence.

"Constructive admissions"

Whoever wants to attack the basis of the claim is required to appear and defend. If he lets judgment go against him by default he cannot afterwards attack the basis of the claim. This is a legal consequence of having the opportunity to defend and failing to do so.

Dzane v. Hagan (1961) 3 W.L.R. 776.

There is a vital difference between O.14 and O.14A.

Their Lordships pointed out a distinction between O.27 and O.14A.

An order under O.14A is not a judgment by default for the purposes of O.27 r.15.

In re S. American and Mexican Co. ex parte Bank of England (1895) 1 Ch. D. 37.

N.B. First sentence of 2nd paragraph on p.47 covers the facts of this present case. Lord Herschell at pp.49 - 50.

Humphries v. Humphries (1910) 2 K.B. 531.

Followed in the next year by

Cooke v. Rickman (1911) 2 K.B. 1125.

Ord v. Ord (1923) 2 K.B. 432 & 439.

P.443.

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No.12.

Judge's Notes of Argument. (Good, J.A.)

12th December, 1961 - continued.

Hoystead v. Commissioner of Taxation (1926) A.C.155.

This case has been disapproved by the House of Lords in Society of Medical Officers of Health v. Hope (1960 A.C. 551 at p.566 where Lord Radcliffe deals with Hoystead; and by the Privy Council in Caffoor v. C.I.T. Colombo (1961) 2 W.L.R. 794 @ 802 - 3 in 1960 so far as it is an authority for estoppel in respect of successive years rates. But the exegesis of the law of res judicata in Hoystead has not been disapproved.

Carter v. James 13 M. & W. 137 N.B. p.165 and Howlett v. Tarte 10 C.B. (N.S.) 813 considered at pp. 168 and 170.

New Brunswick Railway Co. v. British and French Trusts Corporation Ltd. 1939 A.C.1.

The present case is distinguishable from the New Brunswick case because these were not two separate agreements - it is one continuing agreement.

N.B. Lord Wright at p.36. The whole passage 37 - 38 is obiter.

Lord Romer at pp. 42 - 43.

(C.J: Any Case of a special defence like Money-Lenders?)

Yaw Duedu v. Evi Yiboe (1961) 1 W.L.R. 1040.

Halsbury XV 176 §345. Marjoribanks said no estoppel per rem judicatam in respect of an act prohibited by Statute.

Note (p).

Griffiths v. Davies (1943) 2 A.E.R. 209.

Marjoribanks in reply.

P.15 of the record - very clear that there was a new agreement dated 20th April 1955. This is the agreement that has now been terminated. "Ex parte judgments" in India (s.11 (iv) Indian Civil Procedure Code ff) mean that Defendant has not appeared.

S.459 (ii) Civil Procedure Code impossible to reconcile with s.6 Civil Procedure Code explanation 2.

I rely on the New Brunswick case.

C.A.V.

Sgd. D.B.W. Good,
12th December, 1961.

No. 13.

JUDGMENT OF THOMSON, C.J.

In the Court of Appeal at Kuala Lumpur.

No.13.

Judgment of Thomson, C.J.

5th March, 1962.

The Plaintiff in this case is a landowner residing in Kuala Lumpur and the Defendants are a limited liability company carrying on the business of mining.

On 20th June, 1952, the parties executed an agreement in writing. That agreement purported to be for the hiring by the Plaintiff to the Defendants of certain specified items of mining machinery. The hiring was to be for a period of twelve months. Rent was payable at the rate of $2,500 a month payable monthly in arrear and there was provision for the payment of interest on rent not paid on the due date. There was provision for the owner to retake possession of the machinery in the event of non-payment of rent or breach of other provisions of the agreement.

On 30th June, 1954, the Plaintiff commenced proceedings against the Defendant in Civil Suit No.272 of 1954. The Plaint related that the Plaintiff was a landowner and that by the agreement of 20th June, 1952, he had let certain machinery on hire to the Defendants for a term of twelve months at a rent of $2,500 a month. That agreement had been continued after the expiration of twelve months and there was now owing under it a sum of about $23,400 for arrears of rent and interest thereon which sum was claimed. Exhibit P."1".

These proceedings were commenced by a Plaint marked "SUMMARY PROCEDURE" issued under Section 459 of the Civil Procedure Code which was then in force. The Defendants made no attempt to obtain leave to defend and on 3rd November, 1954, judgment was entered in favour of the Plaintiff in terms of the prayer in the Plaint for $23,400 and interest from the date of judgment and costs. Exhibit P."2".

On 15th May, 1956, the Plaintiff commenced another suit (No.178 of 1956) against the Defendants. The Plaint was issued under the Civil Procedure Code which was still in force (it remained in force until 31st March, 1958) but was not marked "SUMMARY PROCEDURE". In it the Plaintiff referred to the written agreement of 20th June, 1952. He went on to aver that on the expiration of the period of twelve months for which that agreement endured the Defendants continued hiring

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the machinery on the terms and conditions set out in the agreement. In May, 1955, by arrangement with the Defendants the Plaintiff took back two items of the machinery and the parties came to a fresh agreement, apparently oral, by which the hiring of the remaining machinery was to continue on the terms and conditions of the agreement of 20th June, 1952, subject to certain variations, the only one of these which is of importance being that the rent should be $2,000 instead of $2,500 a month. The rent was not paid and on 25th November, 1955, the Plaintiff determined the hiring as from 19th December and demanded the return of the machinery and the amount of rent owing. The Defendants failed to comply and accordingly the Plaintiff sued for arrears of rent and an order for possession of the machinery.

The Defendants filed a defence which alleged inter alia that the Plaintiff was at all material times a moneylender. In brief, it was said that the agreement of 20th June, 1952, the execution of which was admitted, did not by itself represent the true arrangement made at that time between the parties. It was to be read with another agreement of the same date whereby the Defendants purported to sell the machinery in question to the Plaintiff. The two agreements were to be read together and formed part of a transaction whose object was to make the machinery security for a loan and the agreement of 20th June was in effect a Bill of Sale which, not being in the statutory form and not being registered under the Bills of Sale Enactment, was void. The alleged charges for hire were in truth charges for interest on money lent and the agreement being nothing more than part of a security connected with a moneylending transaction was void by reason of the provisions of the Moneylenders Ordinance, 1951, and was also void as an unregistered Bill of Sale.

In his reply the Plaintiff said that the Defendants were estopped by the judgment of 3rd November, 1954, in Civil Suit No.272 of 1954, from contending either that the Plaintiff was a Moneylender or that the transaction in question was a moneylending transaction or that the agreement of 20th June, 1952, was other than what it purported to be or that it was void.

By an order dated 28th July, 1961, it was ordered by consent that the question of estoppel

should be heard and disposed of as a preliminary point of law prior to trial in accordance with Rule 2 of Order 25.

In due course the matter came for decision before Ong, J., who held that there was an estoppel. That decision was embodied in the following Order dated 6th September, 1961:-

> "This Court doth declare that the Defendant is estopped by judgment dated the 3rd day of November, 1954 in Kuala Lumpur High Court Civil Suit No.272 of 1954 between the Plaintiff and the Defendant from contending in this action that the Plaintiff is a moneylender or that the transaction in question in the pleadings mentioned was a moneylending transaction or is void or unenforceable under the Moneylender's Ordinance, 1951 or otherwise or that the documents in the pleadings mentioned are other than what they purport to be or that they or either of them are or is a bill of sale or void or unenforceable under the Bills of Sale Enactment or otherwise".

Against that decision the Defendants have now appealed.

Before proceeding further I think I should say that whatever Ong, J., decided, the terms of the Order that has been quoted are clearly wrong. The Moneylenders Ordinance and the Bills of Sale Enactment are statutes intended to effect certain matters of public policy and as was said by Atkin, L.J. (as he then was) in the case of In re a Bankruptcy Notice(1):-

> "It seems to me well established that it is impossible in law for a person to allege any kind of principle which precludes him from alleging the invalidity of that which the statute has, on grounds of general public policy, enacted shall be invalid".

And as was said by Lord Greene, M.R., in the case of Griffiths v. Davies(2) "the proposition that, where there is a statutory prohibition or direction, it cannot be overriden or defeated by a previous judgment between the parties" is "a principle which is manifestly right, quote apart

(1) (1924) 2 Ch. 76, 97.
(2) (1943) 2 A.E.R. 209, 212.

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from authority". In the present case there may or may not be an estoppel against pleading facts which will afford a basis for invoking the statutes in question, but that is a different question: there can be no bar to pleading the statutes themselves.

Ong, J., said that the question for determination by him was:-

> "Whether the principle of estoppel per rem judicatam applies so that the Defendant, against whom a default judgment had previously been entered for a sum alleged to be arrears of rent of machinery hired to him by the Plaintiff as owner, is debarred in a subsequent action on the same hiring agreement from disputing the validity of the agreement and the Plaintiff's claim for return of the machinery and further arrears of rent accrued since the previous judgment".

With the greatest respect I think that statement of the question for determination is not quite correct.

In the first place, according to the pleadings, there were three agreements between the parties. First, there was the alleged hiring agreement of 20th June, 1952, which was for a period of twelve months. Then, some time in 1953, there was a second agreement, apparently oral, by which the alleged hiring was continued, apparently indefinitely, on the same terms as those set out in the written agreement of 20th June, 1952. Finally, in May 1955, there was a third agreement which, again, was apparently oral. This purported to be for the hiring of some, but not all, of the chattels mentioned in the 1952 agreement on conditions that were substantially the same as and were stated by reference to the 1952 agreement.

The first action between the parties, that was Civil Suit No.272 of 1954, was on the second of these agreements. The present action is on the third agreement and that is not the same agreement as the second one.

In the second place the question postulated is framed in much too wide terms.

It would have been an available defence in the first action to plead that it was the Defendants who were in truth the owners of the chattels,

that the 1952 agreement was to be read with another agreement between the parties whereby the Defendants purported to sell the chattels to the Plaintiff and that the whole transaction was in reality a moneylending transaction in which the chattels in question were the security and that the Plaintiff was a moneylender. On these facts (if they had been made out) it could have been argued that by reason of the Moneylenders Ordinance and the Bills of Sale Enactment, the Plaintiff could not recover not only on the first agreement on which he did not sue but also on the second agreement which was the one on which he sued.

Similarly, if the Defendants are allowed to plead the same facts in the present case then if these facts are made out and in the absence of anything relevant having occurred between the first and third agreements it will be open to the Defendants to contend that the Plaintiff is unable to recover on the third agreement, that is to say, the oral agreement made in 1955.

Thus the real question to be decided was not the question posed in wide terms by the trial Judge but the much narrower question of whether the Defendants, not having set up the defences based on the Moneylenders Ordinance and the Bills of Sale Enactment in the first action, are estopped in the second action from averring the facts on which they wish to found these defences. This distinction is not merely dialectical and superficial, on the authorities it is one which goes to the root of the matter.

At this point I would emphasise that the question is in its essence one of estoppel and not one of res judicata. Generally speaking, res judicata is a matter of procedure while estoppel is a matter of evidence. The dichotomy, of course, is not complete in the logical sense. Res judicata, a thing which has been adjudged, may in certain circumstances give rise to an estoppel. Nevertheless, it is of the utmost importance to observe the distinction between the rule of res judicata in the strict sense and estoppel "by matter of record", to use the much quoted phrase of Coke.

Res judicata in the strict sense arises where a matter has been litigated between parties and litigated to a final decision. That decision cannot be questioned and the matters decided cannot

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be re-opened. Where it relates to a debt the debt ceases to exist and becomes merged in the judgment. It is a principle based on the old jurisprudential maxim that no one should be troubled twice for the same cause. It is this rule which is embodied in section 11 of the Indian Code of Civil Procedure and was embodied in Section 6 of our own Civil Procedure Code, until it was repealed in 1958, though, as was pointed out in the case of Munni Bibi v. Tirloki Nath(3), that statement of the rule has been held by the Privy Council on many occasions not to be exhaustive.

Estoppel, on the other hand, is fundamentally a matter of evidence. It is something which in certain circumstances makes certain evidence inadmissible. In this country its statutory basis is to be found in section 115 of the Evidence Ordinance. That section is the same as Section 115 of the Indian Evidence Act and in Sarat Chunder Dey v. Gopal Chunder Laha(4) the Privy Council expressed the view that the terms of the Indian Act did not enact as law in India anything different from the law in England, a view which was reiterated forty-five years later by Their Lordships in the case of Mercantile Bank of India, Ltd. v. Central Bank of India Ltd.(5).

Here it is of importance to observe that estoppel arises from admission. As is said in the following passage from the commentary on the Duchess of Kingston's case in Smith's Leading Cases:-(6).

> "Interest reipublicae ut sit finis litium -- but, if matters which have been once solemnly decided were to be again drawn into controversy, if facts once solemnly affirmed were to be again denied whenever the affirmant saw his opportunity, the end would never be of litigation and confusion. It is wise, therefore, to provide certain means by which a man may be concluded, not from saying the truth, but from saying that that which, by the intervention of himself or his, has once become accredited for truth, is false".

(3) I.A. 158, 165.
(4) 19 I.A. 203, 215.
(5) (1938) A.C. 287, 304.
(6) 2 Smith's L.C. (13 Ed.) 644, 657.

The author then goes on to say, in a passage quoted by Lush, J., in the case of Ord v. Ord(7):-

> "A estoppel, therefore, is an admission, or something which the law treats as equivalent to an admission, of an extremely high and conclusive nature -- so high and so conclusive, that the party whom it affects is not permitted to aver against it or offer evidence to controvert it".

Now, what we are concerned with in the present case is the particular sort of estoppel that arises from previous litigation between the same parties, "estoppel by record", the circumstances in which previous litigation gives rise to admissions evidence to controvert which is inadmissible.

Any enquiry into this subject must inevitably commence from the following well-known passage from the judgment of De Grey, C.J., almost two hundred years ago in the Duchess of Kingston's case (Supra):-

> "From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: first, that the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter, directly in question in another court; secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment".

Much the same thing was said by Henn Collins, J., in the case of Robinson v. Robinson (8). The phrase "res judicata", he said:-

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(7) (1923) 2 K.B. 432.
(8) (1943) P. 43, 44.

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"is used to include two separate states of things. One is where a judgment has been pronounced between parties and findings of fact are involved as a basis for that judgment. All the parties affected by the judgment are then precluded from disputing those facts, as facts, in any subsequent litigation between them. The other aspect of the term arises where a party seeks to set up facts which, if they had been set up in the first suit, would or might have affected the decision".

The same distinction was observed by Lush, J., in the case of Ord v. Ord (Supra) :-

"The words 'res judicata' explain themselves. If the res -- the thing actually and directly in dispute -- has been already adjudicated upon, of course by a competent Court, it cannot be litigated again. There is a wider principle ..... often treated as covered by the plea of res judicata, that prevents a litigant from relying on a claim or defence which he had an opportunity of putting before the Court in the earlier proceedings and which he chose not to put forward".

Each of these statements contains two different parts and there can be no question of the present case coming within the first part of any of them. No Court has ever decided that the Plaintiff is or is not a moneylender and so forth. The question is whether the present case comes within the second part of the statements. It is whether the Plaintiff being a moneylender and so forth were matters more in point in the first action than being "incidentally cognisable", or were "facts which, if they had been set up in the first suit, would or might have affected the decision" or are "defences which the Defendant had an opportunity of putting before the Court and which he chose not to put forward". Were the issue an entirely philosophical one and were it entirely at large the answer to these questions might at first sight be favourable to the Defendant. The issue, however, is to be considered within the framework of our forensic schemes of things and subject to the limits within which the law expects litigants to act as philosophic men and the extent to which they can reasonably be

subjected to the principle that silence involves assent. In other words, the answer is to be found in authority, not in reflection.

Proceeding to consider the authorities, the first case that must be mentioned is the well-known case of Howlett v. Tarte(9) which, somewhat curiously, does not seem to have been cited before Ong, J.

The Plaintiff in that case had previously sued the Defendant for rent due under a building agreement and the Defendant had unsuccessfully attempted to plead payment into Court of a smaller sum and non-performance by the Plaintiff of a condition in the agreement. In later proceedings for rent for a subsequent period the Defendant pleaded that the original agreement had been replaced by a tenancy from year to year which had been terminated by notice. The Plaintiff argued that the Defendant was estopped from setting up this defence by his omission to plead it in the first action. That argument was rejected. Williams, J., said (p.826):-

> "I think it is quite plain that there is no authority expressly in point to sustain the doctrine ..... that, if there had been a previous action between the same parties founded upon the same contract, and the Defendant had suffered judgment by default in that action, he is precluded from setting up in a subsequent action any defence which he could have pleaded in bar to the former, notwithstanding the defence is in confession and avoidance of the agreement which is the foundation for the action. I think it is quite clear upon the authorities to which our attention has been called, and upon principle, that, if the Defendant attempted to put upon the record a plea which was inconsistent with any traversable allegation in the former declaration, there would be an estoppel. But the defence set up here is quite consistent with every allegation in the former action. The plea admits the agreement, but shews by matter ex post facto that it is not binding upon the Defendant".

Willes, J., agreed and went on to say:-

> "The alleged estoppel here comes within

(9) 10 C.B. (N.S.) 813.

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the exception stated in the note to The Duchess of Kingston's case, viz: 'where the thing averred is consistent with the record'. The defence is good, if true. It is quite consistent with the allegations on the record in the former action that this new matter is true. The Defendant omitted to set it up on the former occasion: and the question is, whether, by allowing judgment to go by default, he is estopped as to that matter in every subsequent action at the suit of the Plaintiff. It is an entirely novel proposition".

.....

"It is quite right that a Defendant should be estopped from srtting up in the same action a defence which he might have pleaded but has chosen to let the proper time go by. But nobody ever heard of a Defendant being precluded from setting up a defence in a second action because he did not avail himself of the opportunity of setting it up in the first action".

Byles, J., agreed there was no estoppel but based himself on somewhat different grounds:-

"It was hard enough, in actions at common law, where the Defendant could only plead one plea: but, to extend the rule to the case of an allegation not upon the record would increase the hardship tenfold. Suppose an action of covenant: the Defendant had two defences, -- performance and release: he could not plead both: he elected to plead performance. Suppose that plea found against him. He could not in a subsequent action plead non est factum. But, what authority is there for saying that he could not plead the release".

In the case of Humphries v. Humphries(10) it was held that the Defendant who had not raised a defence of non-compliance with the Statute of Frauds in a previous action for arrears of rent was estopped from raising it in another action in respect of subsequent arrears of rent under the same lease. Farwell, L.J., quoted (p.534) the following portion of the judgment of Williams, J.,

(10) (1910) 2 K.B. 531.

in Howlett v. Tarte (which has already been quoted here):-

> "If the Defendant" (to a second action) "attempted to put on record a plea which was inconsistent with any traversible allegation in the former declaration" (i.e., in the first action) "there would be an estoppel".

He then went on to point out on the authority of Leaf v. Tuton(11) that a plea of the Statute of Frauds was demurrable under the old law, the general issue being "itself a denial that the requisites of the Statute of Frauds had been complied with" and that the "abolition of demurrers is a mere matter of pleading which does not affect the principle". He continued (p.535):-

> "The rule laid down in Howlett v. Tarte is confined to allegations which the Defendant could have traversed, and does not extend to pleas which confessed and avoided, or to matters which were not raisable by traverse but by special plea, necessitating proof on the part of the Defendant, such as fraud, gaming, release, or infancy, allegations which do not amount to denial, but to confession and avoidance of the contract".

Here the reference to the "rule laid down in Howlett v. Tarte" is a reference to the statement from the judgment of Williams, J., already quoted, that is the statement that there is an estoppel against setting up in a second action a plea inconsistent with a traversable allegation in a former action, and the reference to fraud and gaming and so forth makes it clear that His Lordship did not regard failure to set up a plea which was not a traverse as creating any estoppel. Later, the point was put in different words (p.536):-

> "estoppel is merely a rule of evidence, and if the Plaintiff can object to the reception of evidence on a particular fact because it is an issue which was properly raised by him and was or could have been traversed by the Defendant in a former action, and has been determined in the Plaintiff's favour in such action, there is no reason for disallowing the objection; but if there was no such definite issue, then the objection will fail".

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(11) 10 M. & W. 393.

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In other words, the converse of the rule is a correct statement of the law though not directly to be deduced from it in terms of formal logic.

Similar views were expressed the following year in the case of Cooke v. Rickman(12) where it was held that a Defendant was estopped from setting up a defence of no consideration which she could have set up but did not set up in a previous action. Bray, J., quoted the passage from the judgment of Farwell, L.J., in Humphries v. Humphries which has already been quoted regarding "the rule laid down in Howlett v. Tarte" and went on to say (p.1129):-

> "the effect of the decision in Humphries v. Humphries is that it is only in the special circumstances mentioned in the judgment that the exception to the rule of estoppel prevails.
>
> .....
>
> Humphries v. Humphries shews that to avoid the estoppel the matter must be such as requires a special plea or a plea necessitating proof by the Defendant".

In the case of Hoystead v. Commissioner of Taxation(13) the subject matter was a Tax assessment in Australia and the question was whether the Australian Commissioner of Taxation was estopped by a decision of his own regarding a previous assessment. In the course of his speech Lord Shaw expressed the view that the ratio decidendi of Howlett v. Tarte was to be found in the strictness of the rules of pleading in force prior to 1873. Later, however, he quoted the passage from the judgment of Williams, J., where it is said "if the Defendant attempted to put upon the record a plea which was inconsistent with any traversable allegation ..... there would be an estoppel" which passage he said had "been accepted expressly over and over again, as for instance ..... in Humphries v. Humphries". He went on (p.171):-

> "It must, however, be pointed out that Carter v. James and Howlett v. Tarte turned upon default in pleading in the prior proceedings, relied upon as an estoppel; but in

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(12) (1911) 2 K.B. 1125.
(13) (1926) A.C. 155.

a case like the present, where there are no pleadings at all, the main question is whether a prior opportunity of raising the point now foreclosed by estoppel had in substance arisen and been passed by. In short, the present point was one which, if taken, went to the root of the matter on the prior occasion, so that its omission was no mere default in pleading but a real attempt to divide one argument into two and to multiply litigation"

That case has been discussed in the recent case of Society of Medical Officers of Health v. Hope(14) where Lord Radcliffe said that Lord Shaw's opinion was:-

"devoted to considering with weight and learning, and ultimately to rejecting, the proposition ..... that there could be no estoppel because the legal point which had been the subject of the High Court's decision had been conceded by admission and did not therefore embody the Court's own direct judgment".

He went on to say (p.566):-

"The case stands as an authoritative contribution to the rule that in matters of estoppel what might have been said may be as important as what was actually said, and that, as between the parties themselves, law may indeed be formed sub silentio".

Hoystead's case is, of course, binding in this Court. There were, however, as has been seen, no pleadings in the original proceedings with which it was concerned, and the point involved was essentially one of law and not of fact. For myself I cannot find anything in it of binding authority in relation to a case where there are pleadings and there has been no omission to traverse any traversable averment. Indeed in his statement of what their Lordships regarded as settled Lord Shaw concluded (at p.166):-

"the same principle -- namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the Plaintiff and traversable by the Defendant, has not been

(14) (1960) A.C. 551.

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traversed. In that case also a Defensant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken. The same principle of setting parties' rights to rest applies and estoppel occurs".

The last of the English cases which I would mention is the case of New Brunswick Railway Company v. British & French Trust Corporation Ltd.(15) There Lord Maugham, L.C., referred to a passage in the judgment of Willes, J., in Howlett v. Tarte (Supra) which has already been quoted. He said he thought that there was much to be urged in favour of it "though it may have been a little too widely expressed". He went on to say (at p.21):-

> "In my opinion we are at least justified in holding that an estoppel based on a default judgment must be very carefully limited. The true principle in such a case would seem to be that the Defendant is estopped from setting up in a subsequent action a defence which was necessarily, and with complete precision, decided by the previous judgment; in other words, by the res judicata in the accurate sense".

Lord Wright also dealt with the case of Howlett v. Tarte (Supra). What he said was this (at p.37):-

> "that decision has been explained as depending on the old system of pleading. But I think it depends on wider principles. I think it implies that default is not to be treated as an admission.⊠ Willes, J., said that the plea in the second action, which was by way of confession and avoidance, was consistent with the record. He said that the objection was a new device, which he thought should not be introduced. 'Nobody', he added 'ever heard of a Defendant being precluded from setting up a defence in a second action because he did not avail himself of the opportunity of setting it up in the first action'. It is enough for present purposes to treat this observation as limited to a case where judgment has gone by default, whether of appearance or pleading. In that sense I

(15) (1939) A.C.1.
⊠ The Italics are mine.

should accept these observations of Willes, J., one of the greatest Common Law Judges. There are grave reasons of convenience why a party should not be held to be bound by every matter of fact or law fundamental to the default judgment. It is, I think, too artificial to treat the party in default as bound by every such matter as if by admission. All necessary effect is given to the default judgment by treating it as conclusive of what it directly decides. I should regard any further effect in the way of estoppel as an illegitimate extension of the doctrine, which in the absence of express authority I am not prepared to accept".

Finally there is the local case of Sithambaram Chettiar v. Chong Fatt(16). In that case the Plaintiff applied by way of Originating Summons for the sale of certain charged property and in these proceedings the Defendant was served but did not appear. The land was sold in consequence. In a subsequent suit by the Plaintiff for the balance due under the charge the Defendant pleaded that he did not execute the charge or alternatively that at the date of its execution he was an infant. It was objected for the Plaintiff that the Defendant was estopped from raising these defences by reason of the judgment in the Originating Summons. Murray-Aynsley, J., held there was an estoppel which prevented the Defendant pleading that he did not execute the charge but that there was no estoppel in the case of the defence of infancy. What he said was this (at p.142):-

"The leading case on the subject is Howlett v. Tarte. In the case of Hoystead v. Taxation Commissioner, the origin of the rule was explained but it actually had no application to that case and it still holds good. In applying the rule to the present case one would arrive at the following result (actually there were no pleadings but it is necessary to consider what the Plaintiff would have to allege if he had had a pleading). The Defendant is estopped from alleging facts in supporting a plea of non est factum but not from alleging infancy which would have been a matter of confession and avoidance".

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(16) (1938) F.M.S.L.R. 140.

In the Court of Appeal at Kuala Lumpur.

No.13.

Judgment of Thomson, C.J.

5th March, 1962 - continued.

There would thus seem to be ample authority for the proposition that when a Plaintiff in an action makes averments relevant to his action which are not denied the Defendant is estopped in any subsequent proceedings from denying these averments or averring facts inconsistent with them. No such estoppel, however, arises from an omission in the previous proceedings to plead facts which are not inconsistent with those pleaded by the Plaintiff and which go to support a defence by way of confession and avoidance or a special plea in law.

As it is put in Smith's Leading Cases (13th Edition) Volume II p. 679:-

> "The omission by a Defendant to set up a defence in an earlier action does not estop him from setting it up in a later action brought by the same Plaintiff, provided that such defence is not inconsistent with any traversable averment made by the Plaintiff in the earlier action.
>
> .....
>
> If, however, the Defendant to a second action attempts to set up a defence which is inconsistent with any traversable allegation in the earlier action there is an estoppel".

Having arrived at that result I do not think any of the other points raised in argument call for discussion. Out of regard, however, for the carefully reasoned judgment of the learned trial Judge I should mention a dictum of Vaughan Williams, J., in the case of The South American and Mexican Company(17) and certain general observations made by Lord Herschell in the Court of Appeal in the same case. The point can perhaps be best dealt with by quoting the following passage from the judgment of FitzGibbon, L.J., in the Irish case of Irish Land Commission v. Ryan(18):-

> "The only suggestion of estoppel by a judgment by default which I can find in the books is in a dictum of Vaughan Williams, J., in The South American and Mexican Company's Case. He was dealing with a judgment by consent, but he says:- 'It has always been

(17) (1895) 1 Ch. 37.
(18) (1900) 2 I.R. 565, 574.

the law that a judgment by consent, or by default, raises an estoppel just in the same way as a judgment after the Court has exercised a judicial discretion in the matter'. He cites no authority for this proposition, and I can find none. The Judges in the Court of Appeal do not refer to a judgment by default, and it is curious that Vaughan Williams, J., himself, in the immediately preceding sentence, gives a reason which does not apply to such a judgment, for he says:- 'The basis of the estoppel is that when parties have once litigated a matter it is in the interest of the estate that litigation should come to an end, and if they agree upon a result or upon a verdict, or upon a judgment, or upon a verdict and judgment, as the case may be, an estoppel is raised as to all the matters in respect of which an estoppel would have been raised by judgment if the case had been fought out to the bitter end'".

If they had been speaking in 1961 and not in 1895 and 1900 it may well be that both Vaughan Williams, J., and FitzGibbon, L.J., would have expressed themselves in rather more qualified terms. Be that as it may, it is clear that what the former said in relation to judgments by default must be regarded as obiter. In any event, the statement goes no further than saying that a judgment by default stands on no different footing than any other judgment from the point of view of the matter regarding which and the circumstances in which it gives rise to estoppels.

Returning to the present case, the application of the principle which has been stated is abundantly clear. The strict rule of res judicata prevents the Defendants from denying that on 3rd November, 1954, which is the date of the judgment in Civil Suit No.272 of 1954, they owed the Plaintiff $23,400, which is the amount of the judgment in that case. The antecedent debt became merged in the judgment debt and that is irrespective of any question of it being a debt connected with a moneylending transaction (see Cohen v. Jonesco(19) Again, there is an estoppel which prevents the Defendants from denying that they executed the agreement of 20th June, 1952, and indeed they are

(19) 42 T.L.R. 41.

In the Court of Appeal at Kuala Lumpur.

No.13.

Judgment of Thomson, C.J.

5th March, 1962 - continued.

estopped from denying any other averment of fact contained in the Plaint in Civil Suit No.272 of 1954. In my view, however, they are not estopped from averring that the Plaintiff is a moneylender or any of the other facts on which they seek to base their defences under the Moneylenders Ordinance or the Bills of Sale Enactment. Whether or not these defences will succeed is, of course, an entirely different matter.

In all the circumstances, then, I would allow the appeal with costs and set aside the Order of the High Court dated 6th September, 1961. The Defendants should have the costs of the demurrer proceedings in any event.

Sgd. J.B. Thomson,
CHIEF JUSTICE,
FEDERATION OF MALAYA.

Kuala Lumpur,
5th March, 1962.

N.A. Marjoribanks, Esq., for Appellants.
Messrs.R.Ramani and T.K.Sen for Respondent.

No.14.

Order.

6th March, 1962.

No. 14.

ORDER

CORAM: THE HONOURABLE DATO SIR JAMES THOMSON, P.M. N.P.J.K., CHIEF JUSTICE, FEDERATION OF MALAYA.

THE HONOURABLE MR. JUSTICE HILL, B.D.L., JUDGE OF APPEAL

- and -

THE HONOURABLE MR. JUSTICE GOOD, JUDGE OF APPEAL.

IN OPEN COURT THIS 6th DAY OF MARCH, 1962

This appeal from the decision of the Honourable Mr. Justice Ong given at Kuala Lumpur on the 6th day of September, 1961 coming on for hearing on the 12th day of December, 1961 in the presence of Mr. N.A. Marjoribanks of Counsel for the Appellants and Mr. R. Ramani and Mr. T. K. Sen of Counsel for the Respondent AND UPON READING the Record of Appeal filed herein AND UPON HEARING

In the Court of Appeal at Kuala Lumpur.

No.14.

Order.

6th March, 1962 - continued.

Counsel as aforesaid for the parties IT WAS ORDERED that this Appeal do stand adjourned for judgment and the same coming on for judgment on the 6th day of March, 1962 in the presence of Mr. N. A. Marjoribanks of Counsel for the Appellants and Mr.T. K. Sen of Counsel for the Respondent IT IS ORDERED that the Appeal be and is hereby allowed and the Order of the High Court dated 6th day of September 1961 is set aside and IT IS ORDERED that the Respondent do pay the Appellants the costs of this Appeal AND IT IS ORDERED that the Respondent do pay to the Appellants in any event the costs of the demurrer proceedings in the Court below AND IT IS LASTLY ORDERED that the sum of $500.00 (Dollars Five hundred only) lodged in Court as security for the costs of the Appeal be paid out to the Appellants.

Given under my hand and the Seal for the Court this 6th day of March, 1962.

Sgd. Shiv Charan Singh
Assistant Registrar,
Court of Appeal
Kuala Lumpur.

No. 15.

No.15.

Order allowing Final Leave to Appeal.

18th September, 1962.

ORDER ALLOWING FINAL LEAVE TO APPEAL

UPON MOTION made unto this Court this day by Mr. T. K. Sen of Counsel for the above-named Respondent in the presence of Mr. Lall Singh Muker of Counsel for the above named Appellants AND UPON READING the Notice of Motion dated the 11th day of September, 1962 and the Affidavit of Cheong Weng Sun affirmed on the 7th day of September 1962 and filed herein in support of the said Motion AND UPON HEARING Counsel as aforesaid IT IS ORDERED that the Respondent above named be and is hereby granted final leave to appeal to His Majesty the Yang di-Pertuan Agong from the Order of the Court of Appeal dated the 6th day of March, 1962 AND IT IS FURTHER ORDERED that the costs of this Motion be costs in the Appeal.

In the Court of Appeal at Kuala Lumpur.

No.15.

Order allowing Final Leave to Appeal

18th September, 1962 - continued.

Given under my hand and seal of the Court this 18th day of September, 1962.

Sgd. Shiv Charan Singh,

Assistant Registrar
Court of Appeal

L.S.

Federation of Malaya.

E X H I B I T S

Exhibits

P."A" - AGREEMENT BETWEEN RESPONDENT AND APPELLANT

P. "A"

Agreement between Respondent and Appellant.

20th June, 1952.

AN AGREEMENT made the 20th day of June 1952 BETWEEN KOK HOONG, Landowner of 119 High Street, Kuala Lumpur (hereinafter called the owner which expression shall where the context admits include the successors in title of the owner) of the one part and LEONG CHEONG KWENG MINES, LIMITED, a company registered and incorporated under the Companies Ordinances 1940-1946 and having its registered office at 188 High Street (first floor) Kuala Lumpur (hereinafter called the hirer) of the other part.

WHEREBY IT IS AGREED as follows :-

1. THE Owner shall let and the hirer shall take on hire all and singular the machinery and equipment specified in the Schedule hereto annexed (hereinafter referred to as the said machinery and equipment) from the 20th day of June 1952 for the term of 12 months thence next ensuing.

2. THE Hirer shall during the continuance of this Agreement pay to the owner at his address for the time being and without previous demand by way of rent for the hire of the said machinery and equipment the monthly sum of $2,500/- (Dollars Two thousand five hundred only) the first of such payments to be made on the 19th day of July next and each subsequent payment on the 19th day of each succeeding month during the said term.

3. THE Hirer during the continuance of the hiring will not sell or offer for sale assign mortgage pledge underlet lend or otherwise deal with the said machinery and equipment or any part or parts thereof or with any interest therein or in this Agreement but will keep the said machinery and equipment in his own possession and will not remove the same or any part or parts thereof from the places where such machinery and equipment are for the time being situate without the previous consent in writing of the owner and will not allow any lien to be created upon the said machinery and equipment whether for repairs or otherwise and will duly and punctually pay all rents rates taxes charges and impositions payable in respect of the premises thereon the said machinery and equipment shall for the time being be situate and produce all receipts for such payments to the owner on

Exhibits

P."A"

Agreement between Respondent and Appellant.

20th June, 1952 - continued.

demand and will protect the said machinery and equipment against distress execution or seizure and indemnify the owner against all losses costs charges damages and expenses incurred by him by reason or in respect thereof.

4. THE Hirer shall use the said machinery and equipment in a skilful and proper manner and shall at his own expense keep the said machinery and equipment in good and substantial repair and condition (reasonable wear and tear excepted) and keep the said machinery and equipment insured against fire and loss damage or risk from whatever cause arising in the sum of ₱100,000/- (Dollars One hundred thousand only) at least in some insurance office or offices of repute to be approved of in writing from time to time by the owner in the name of the owner and deliver the policy or policies of such insurance to the owner and duly and punctually pay all premiums and other moneys necessary for effectuating and keeping on foot such insurance and produce the receipts for all such payments to the owner on demand and will keep the owner indemnified against all loss of or damage to the said machinery and equipment from whatever cause the same may arise (reasonable wear and tear excepted) and will permit the owner at all reasonable times to have access to the said machinery and equipment and to inspect the state and condition thereof.

5. IF the said machinery and equipment shall be injured or destroyed by fire the hiring hereby created shall cease but without prejudice to the right of the owner to recover from the hirer any moneys due to the owner under this agreement or damages for breach thereof.

6. THE Owner shall be at liberty but not compellable to the rent rates and taxes and other outgoings of the premises wherever the said machinery and equipment shall for the time being be set up or stored and the premiums for insurance and any other debts or claims relating to the said machinery and equipment for which the hirer may be liable and all sums so paid shall be immediately recoverable by the owner from the hirer and shall until payment bear interest at the rate of 12per cent per annum.

7. IF the rent for the said machinery and equipment shall not be paid at the times and in manner aforesaid the hirer shall pay to the owner interest on the arrears at the rate of 12 per cent per

annum until the time of payment or up to and until the owner shall retake or receive possession under Clause 9 hereof whichever of such times shall first arrive and all costs and expenses incurred by the owner in obtaining payment of such arrears or of the sums mentioned in Clause 6 hereof or in obtaining possession and whether or not any action or suit shall have been instituted shall be recoverable from the hirer in addition and without prejudice to his right to damages for breach of this Agreement.

8. THE Hirer may determine the hiring at any time by giving one month's notice in writing to the owner at his address for the time being and by returning the said machinery and equipment to the owner at the Hirer's own risk and expense at 209 Circular Road, Kuala Lumpur and shall thereupon forthwith pay to the owner all moneys then payable to him under this Agreement.

9. IF the Hirer shall make default in punctual payment of the monthly sums so to be paid by him for the hire of the said machinery and equipment or if the Hirer shall enter into compulsory or voluntary liquidation not being a voluntary liquidation only for the purposes of reconstruction or if the Hirer shall fail to observe and perform the terms and conditions of this Agreement on his part to be observed and performed or if the Hirer shall do or cause to be done or permit or suffer any act or thing whereby the owner's rights in the said machinery and equipment may be prejudiced or put in jeopardy the owner may without any notice determine the hiring and it shall thereupon be lawful for the owner to retake possession of the said machinery and equipment and for that purpose to enter into or upon any premises where the same may be And the determination of the hiring under this Clause shall not affect the right of the owner to recover from the hirer any moneys due to the owner under this Agreement or damages for breach thereof.

10. THE Owner may affix or cause to be affixed on the said machinery and equipment or any part or parts thereof such plates or other marks indicating that the said machinery and equipment are the property of the owner as the owner may think fit and the hirer shall allow such plates or marks to remain as affixed and will not obliterate deface or cover up the same and the owner shall at all reasonable times have access to the said machinery and

Exhibits

P."A"

Agreement between Respondent and Appellant.

20th June, 1952 - continued.

equipment for the purpose of affixing such plates or marks and keeping the same in repair.

11. ANY time or other indulgence granted by the owner shall not affect the strict rights of the owner under this Agreement.

AS WITNESS the hand of the said Kok Hoong and the Seal of the said Leong Cheong Kweng Mines, Limited, the day and year first above written.

SIGNED by the said Kok Hoong in the presence of:-

(Sgd.) Tara K. Sen
Advocate & Solicitor,
KUALA LUMPUR.

Kok Hoong
By his Attorneys
Sgd. Cheong Chee Bun
Sgd. Cheong Weng Sun
P/A. 93/50

THE SEAL of the above-named Company was by order of the Board affixed hereto in the presence of:-

SEAL OF
LEONG CHEONG KWENG MINES
LIMITED.

(Sgd.) Leong Cheong Kweng
(in Chinese)
(Leong Cheong Kweng)
26, Imbi Road,
Kuala Lumpur ... Director.

(Sgd.) Leong Siew Cheong
(Leong Siew Cheong)
73, Bukit Bintang Road,
Kuala Lumpur. ... Director.

(Sgd.) Chan Chee Hong
(Chan Chee Hong)
188, High Street,
Kuala Lumpur. ... Secretary.

THE SEAL of the above-named Company was affixed in the presence of Leong Cheong Kweng and Leong Siew Cheong two directors of the said Company and the said Leong Cheong Kweng and Leong Siew Cheong signed and Chan Chee Hong the Secretary of the said Company countersigned this Agreement in the presence of :-

Sgd. M.N. Cumarasami,
Advocate & Solicitor,
Kuala Lumpur.

THE SCHEDULE above referred to

Exhibits

P."A".

Agreement between Respondent and Appellant.

20th June, 1952 - continued.

Description of Machinery and Equipment	Place where Machinery and Equipment is situate
1 - Ruston Bucyrus 19-RB, 5/8 cu.yd. diesel excavator, Maker's No. 251521, Chassis No. 9986	
1 - 260 BHP, "G.M." diesel engine, Maker's Nos. 67130650 and 67190422	Sin Huat Hin Tin Mine Ltd., Pudu Ulu, Kuala Lumpur.
1 - 130 BHP, "G.M." diesel engine, Maker's No. 67111221.	
1 - 9" Gravel Pump complete	
1 - 10" x 12" Water Pump complete.	
2 - 130 BHP, "G.M." diesel engines Makers' Nos. 67111898 and 60046689	Hin Loong Tin Mine, 5½ Mile Ampang, Kuala Lumpur.
1 - 8" Gravel Pump complete	
1 - 8" x 10" Water Pump complete	
1 - 260 BHP, "G.M." diesel engine Maker's Nos. 67152549 and 67151646.	
1 - 130 BHP, "G.M." diesel engine Maker's No. 67155849.	Hin Lee Tin Mine, 3½ Mile Cheras, Kuala Lumpur.
1 - 8" Gravel Pump complete	
1 - 8" x 10" Water Pump complete	
1 - Magnetic Separator, with Motor/Generator Set.	
1 - Rotary Granulator, Maker's No. 489.	Hin Fatt No.2 Tin Mining Kongsi, 3½ Mile Sungei, Road, Kuala Lumpur.
1 - 92 BHP, "G.M." diesel engine, Maker's No. 4A550, Chasis No.4030.	
1 - 150 H.P. H.M.G. diesel engine Maker's No.5943	
1 - 120 H.P. Fairbanks Morse diesel engine, Engine No.638134.	

Exhibits

P."B".

Statement of Rent and Interest.

19th December, 1955.

P."B" - STATEMENT OF RENT AND INTEREST

Statement of rent and interest due as on 19-12-55

Period	Rent	Interest on Rent at 12% per annum.
For month ending 19-5-55	$ 2,000-00	
From 19-5-55 to 18-12-55 (7 months)		$ 140-00
For month ending 19-6-55	$ 2,000-00	
From 19-6-55 to 18-12-55 (6 months)		$ 120-00
For month ending 19-7-55	$ 2,000-00	
From 19-7-55 to 18-12-55 (5 months)		$ 100-00
For month ending 19-8-55	$ 2,000-00	
From 19-8-55 to 18-12-55 (4 months)		$ 80-00
For month ending 19-9-55	$ 2,000-00	
From 19-9-55 to 18-12-55 (3 months)		$ 60-00
For month ending 19-10-55	$ 2,000-00	
From 19-10-55 to 18-12-55 (2 months)		$ 40-00
For month ending 19-11-55	$ 2,000-00	
From 19-11-55 to 18-12-55 (1 month)		$ 20-00
For month ending 19-12-55	$ 2,000-00	
	$16,000-00	$ 560-00

P."C" - LETTER (AND STATEMENT) FROM T.K.SEN TO APPELLANT.

Exhibits

P."C".

Letter (and Statement) from T.K.Sen to Appellant.

25th November, 1955.

A.R. REGISTERED 25th November, 1955

A2436/A5772

Messrs. Leong Cheong Kweng Mines Ltd.,
188, High Street, First Floor,
Kuala Lumpur.

Dear Sirs,

Yourselves and Mr. Kok Hoong

1. I write on the instructions of my client Mr. Kok Hoong of Kuala Lumpur.

2. I am instructed that you took certain machinery and equipment on hire from my client on the terms of the written agreement made the 20th day of June, 1952 between my client and yourselves (hereinafter called the said agreement); that although the letting was in the first instance for the term of twelve months, you continued hiring the said machinery and equipment on the terms and conditions contained in the said agreement. The said machinery and equipment are specified in the Schedule to the said agreement.

3. I am instructed that by arrangement with yourselves in or about the month of April 1955 my client re-took possession (in May 1955) of one 260 B H P diesel engine and one 130 B H P diesel engine from amongst the said machinery and equipment and that it was agreed you were to continue hiring the remainder of the said machinery and equipment on the terms and conditions contained in the said agreement subject to the following variations thereof, namely,

Clause 1. The hiring to commence from the 20th day of April 1955.

Clause 2. The rent for the hire to be $2,000/- (dollars two thousand only) with first payment on the 19th day of May and subsequent payments on the 19th day of each succeeding month

Clause 4. That insurance to be in the sum of $80,000/- (dollars eighty thousand only)

4. I am instructed that you have defaulted in the

Exhibits

P."C".

Letter (and Statement) from T.K.Sen to Appellant.

25th November, 1955.

- continued.

punctual payment of the rent for the hire of the said machinery and equipment and that there is the sum of $14,420/- (Dollars fourteen thousand four hundred and twenty only) due and owing by you to my client as on the 19th day of November 1955 made up as per statement attached hereto.

5. On the instructions of my client I hereby give you notice determining the hiring on the 19th December, 1955 also take notice that my Client requires you to return the said machinery and equipment to him at 209, Circular Road, Kuala Lumpur. My Client also requires you to pay up the said sum of $14,420/- forthwith. If you fail to comply with same, my instructions are to institute appropriate proceedings without further reference to you.

Yours faithfully,
(Sgd.) Tara K. Sen.

TKS/CKW

STATEMENT OF RENT AND INTEREST due as on 19-11-55

Period	Rent	Interest on Rent at 12% per annum
For month ending 19-5-55 From 19-5-55 to 18-11-55 (6 months)	$ 2,000-00	$120-00
For month ending 19-6-55 From 19-6-55 to 18-11-55 (5 months)	$ 2,000-00	$100-00
For month ending 19-7-55 From 19-7-55 to 18-11-55 (4 months)	$ 2,000-00	80-00
For month ending 19-8-55 From 19-8-55 to 18-11-55 (3 months)	$ 2,000-00	60-00
For month ending 19-9-55 From 19-9-55 to 18-11-55 (2 months)	$ 2,000-00	40-00
For month ending 19-10-55 From 19-10-55 to 18-11-55 (1 month)	$ 2,000-00	20-00
For month ending 19-11-55	$ 2,000-00	
	$14,000-00	$420-00

Rent	$14,000-00
Interests	$ 420-00
Total	$14,420-00

P."D" - LETTER FROM T.K.SEN TO APPELLANT

Exhibits

P."D".

Letter from T.K.Sen to Appellant.

28th March, 1956.

A.R.REGISTERED 28th March, 1956

A2594/A5772

Messrs. Leong Cheong Kweng Mines Ltd.,
170, High Street, First Floor,
Kuala Lumpur.

Dear Sirs,

Yourselves and Mr. Kok Hoong

1. I refer to my letter dated the 25th November, 1955, written on the instructions of my client Mr. Kok Hoong of Kuala Lumpur.

2. I have not been favoured with a reply to the said letter.

3. I am instructed that you have not made any payment towards the arrears of rent nor have you returned the said machinery and equipment to my Client.

4. I am instructed that all the said machinery and equipment are now at Hin Fatt No.2 Tin Mining Kongsi, 3½ Mile Sungei Besi Road, Kuala Lumpur.

5. On the instructions of my Client I hereby give you notice that on the 12th day of April 1956 between 10 a.m. and 12 noon my client's representative or representatives will on behalf of my client retake possession of the said machinery and equipment and for that purpose will enter the premises of Hin Fatt No.2 Tin Mining Kongsi aforesaid. You are hereby required to have the said machinery and equipment in a deliverable state so that the re-taking of possession may be readily done.

6. Further, if any of the said machinery and equipment are no longer at Hin Fatt No.2 Tin Mining Kongsi aforesaid, you are hereby required to supply my Client within three days from the receipt hereof a schedule describing each and every item of the said machinery and equipment and specifying the place or places where they can be found on the said 12th day of April, 1956.

Yours faithfully,

(Sgd.) Tara K. Sen.

TKS/CKW.

Exhibits

P "E".

Letter from Appellant to Messrs. Sen & Lim.

11th April, 1956.

P."E" - LETTER FROM APPELLANT TO MESSRS. SEN & LIM

COPY

Leong Cheong kweng Mines, Ltd.
Office: 26, Imbi Road,
Kuala Lumpur.

11th April, 1956.

Messrs. Sen & Lim,
Advocates & Solicitors,
Kuala Lumpur.

Dear Sirs,

Re: Mr. Kok Hoong

In reply to your letter of the 28th March last we beg to inform you that we will not permit your Client, Mr. Kok Hoong, to remove the machinery and equipment referred to in your letter from Hin Fatt No.2, Tin Mining Kongsi.

Yours faithfully,
(Sgd.) (Chinese Characters)
Director.

P.1.

Plaint in Civil Suit No.272 of 1954 and Statement exhibited thereto.

30th June, 1954.

P.1. - PLAINT IN CIVIL SUIT No.272 of 1954 and STATEMENT EXHIBITED THERETO.

IN THE SUPREME COURT OF THE FEDERATION OF MALAYA
IN THE HIGH COURT AT KUALA LUMPUR
Civil Suit No.272 of 1954

Kok Hoong of 209 Circular Road, Kuala Lumpur — Plaintiff

versus

Leong Cheong kweng Mines, Limited of 188, High Street (First floor) Kuala Lumpur — Defendant

SUMMARY PROCEDURE

Sgd. Tara K. Sen
Plaintiff's Solicitor.

Kok Hoong
by his Attorney
Sgd. C.B. Cheong
Plaintiff's Signature

Exhibits

P.1.

Plaint in Civil Suit No.272 of 1954 and Statement exhibited thereto.

30th June, 1954 - continued.

PLAINT

The Plaintiff above-named states as follows:-

1. That the Plaintiff is a landowner and resides at 209, Circular Road, Kuala Lumpur. That the Defendant is a company registered and incorporated in the Federation of Malaya, having its registered office at 188, High Street (first floor), Kuala Lumpur, and carrying on the business of miners.

2. That under an agreement in writing dated the 20th day of June, 1952 the Plaintiff let certain machinery and equipment on hire to the Defendant for the term of twelve months from the 20th day of June, 1952 at $2,500/- (Dollars two thousand five hundred only) per month, the first of such payments to be made on the 19th July, 1952 and each subsequent payment on the 19th day of each succeeding month.

3. That on the expiry of the term of twelve months aforesaid the Defendant continued hiring the said machinery and equipment on the terms and conditions contained in the said agreement.

4. That the Defendant has failed and neglected to pay rent for the said machinery and equipment for the month commencing from 20th September, 1953 and subsequent months.

5. That by Clause 7 (seven) of the said agreement the Defendant agreed, inter alia to pay interest on all arrears of rent at the rate of 12% (twelve per centum) per annum until the time of payment.

6. That, as per statement annexed hereto and marked "A" the following sums of money are due and owing by the Defendant to the Plaintiff, namely,

$22,500/- being rent for the period 20-9-53 to 19-6-54 (nine months),

$ 900/- being interest on arrears of rent up to 18-6-54.

That the Plaintiff prays judgment for -

(a) the sum of $22,500/- together with interest thereon at 12% per annum from 19-6-54 till realisation,

(b) the sum of $900/- together with interest thereon at 6% per annum from date of suit till realisation,

Exhibits

P.1.

Plaint in Civil Suit No.272 of 1954 and Statement exhibited thereto.

30th June, 1954 - continued.

(c) costs of suit.

Kok Hoong
by his attorney
Sgd. C.B. Cheong

Sgd. Tara K. Sen Plaintiff's Signature.

Plaintiff's Solicitor.

I, Cheong Chee Bun of 119, High Street, Kuala Lumpur, the attorney of the Plaintiff above-named do hereby declare that the foregoing statement is true to my knowledge except as to matters stated on information and belief, and as to those matters, I believe the same to be true.

Dated this 30th day of June, 1954.

Sgd. C.B. Cheong
Signature.

STATEMENT OF RENT AND INTEREST due as on 19-6-54

Period	Rent	Interest on Rent at 12% per annum
For month ending 19-10-53	$ 2,500-00	
From 19-10-53 to 18-6-54 (8 months)		$200-00
For month ending 19-11-53	$ 2,500-00	
From 19-11-53 to 18-6-54 (7 months)		$175-00
For month ending 19-12-53	$ 2,500-00	
From 19-12-53 to 18-6-54 (6 months)		$150-00
For month ending 19-1-54	$ 2,500-00	
From 19-1-54 to 18-6-54 (5 months)		$125-00
For month ending 19-2-54	$ 2,500-00	
From 19-2-54 to 18-6-54 (4 months)		$100-00
For month ending 19-3-54	$ 2,500-00	
From 19-3-54 to 18-6-54 (3 months)		$ 75-00

Period	Rent	Interest on Rent at 12% per annum
For month ending 19-4-54	$ 2,500-00	
From 19-4-54 to 18-6-54 (2 months)		$ 50-00
For month ending 19-5-54	$ 2,500-00	
From 19-5-54 to 18-6-54 (1 month)		$ 25-00
For month ending 18-6-54	$ 2,500-00	
	$22,500-00	$900-00

Exhibits

P.1.

Plaint in Civil Suit No.272 of 1954 and Statement exhibited thereto.

30th June, 1954 - continued.

P.2. - DECREE IN CIVIL SUIT No.272 of 1954

P.2.

Decree in Civil Suit No.272 of 1954.

3rd November, 1954.

IN THE SUPREME COURT OF THE FEDERATION OF MALAYA
IN THE HIGH COURT AT KUALA LUMPUR
CIVIL SUIT No.272 of 1954

Kok Hoong of 209, Circular Road, Kuala Lumpur — Plaintiff

versus

Leong Cheong Kweng Mines Limited of 188, High Street (first floor) Kuala Lumpur — Defendants

Before the Senior Assistant Registrar Mr.D.Anthony

IN CHAMBERS This 3rd day of November, 1954

DECREE

The Defendants not having obtained leave to appear and defend this suit IT IS THIS DAY ADJUDGED that the Plaintiff recover against the Defendants the sum of $22,500.00 (Dollars Twenty two thousand and five hundred only) together with interest thereon at 12 per cent per annum from the 19th day of June, 1954 to the date of realisation of the said sum and the sum of $900.00 (Dollars Nine hundred only) with interest thereon at 6 per cent per annum from the 30th of June, 1954 to the date of realisation and the costs of this suit as

Exhibits

P.2.

Decree in Civil Suit No.272 of 1954.

3rd November, 1954 - continued.

apended below:-

COSTS OF SUIT

1.	Stamp for Plaint, Summons, Service and Appointment of Solicitor	$ 55.00
2.	Solicitor's costs	159.38
3.	Stamp for Decree	4.00
4.	Stamp for assessed costs	5.00
		$223.38

Given under my hand and the seal of the Court this 3rd day of November, 1954. 10

Sgd. D. Anthony

Senior Assistant Registrar,
Supreme Court,
Kuala Lumpur.

IN THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL

No.36 of 1962

ON APPEAL
FROM THE SUPREME COURT OF THE
FEDERATION OF MALAYA
IN THE COURT OF APPEAL AT KUALA LUMPUR

B E T W E E N:-

KOK HOONG (Plaintiff) Appellant

- and -

LEONG CHEONG KWENG
MINES LIMITED (Defendant) Respondent

RECORD OF PROCEEDINGS

GRAHAM PAGE & CO.,
41, Whitehall,
London, S.W.1.
Appellant's Solicitors.

BULCRAIG & DAVIS,
Amberley House,
Norfolk Street,
Strand,
London, W.C.2.
Respondent's Solicitors.