Privy Council Appeal No. 36 *of* 1962

Kok Hoong – – – – – – – – – *Appellant*

v.

Leong Cheong Kweng Mines Limited – – – – – *Respondent*

FROM

THE SUPREME COURT OF THE FEDERATION OF MALAYA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 10TH DECEMBER 1963

Present at the Hearing:

VISCOUNT RADCLIFFE.

LORD MORRIS OF BORTH-Y-GEST.

LORD GUEST.

[*Delivered by* VISCOUNT RADCLIFFE]

The issue raised by this appeal involves a preliminary point of law taken by the appellant in an action pending between him and the respondent company in the High Court of the Federation of Malaya. In that action the appellant is suing the respondent for monies alleged to be due to him and certain other relief, and he has objected to a defence or set of defences put in by the respondent, on the ground that the latter is estopped from raising them by virtue of a previous judgment given in an earlier action between the same parties. It is the validity of this objection that was argued and decided as a preliminary point. In the High Court Ong J. upheld it: his judgment was reversed in the Court of Appeal who decided that there was no estoppel.

The issue is one of law. The relevant facts embrace nothing more than the circumstances of the earlier action, in which was given the judgment that is said to have created the estoppel, and the pleadings in the present action which is now pending.

The former action was instituted as a Civil Suit in the High Court of the Federation on 30th June 1954. The appellant filed a plaint by way of summary procedure, alleging that under an agreement in writing dated 20th June 1952 he had let certain machinery and equipment on hire to the respondent for twelve months from the date of the agreement at an agreed monthly rent, and that on the expiry of the twelve months period the respondent had continued the hiring on the same terms. The respondent was, he claimed, in arrears with the rental payments for the month commencing from the 20th September 1953 and subsequent months, and he asked for judgment accordingly for a stated sum of dollars in respect of rent and a further sum in respect of interest on arrears of rent, as provided in the agreement. Particulars showing the manner in which these sums were computed were annexed to the plaint.

On the 3rd November 1954 the appellant obtained a decree in his suit giving him judgment against the respondent for the sums of money claimed. This judgment was obtained on the respondent's default, the decree reciting that the respondent had not obtained leave to appear and defend.

The present action was begun on the 14th June 1957. It also is a Civil Suit in the High Court and it is between the same parties as before. The appellant has filed a plaint in the suit, and in its amended form paragraphs 2 to 10 inclusive of the plaint run as follows:—

> " 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. 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.".

The plaint then goes on to allege that the appellant has determined the hiring and has claimed the return of the machinery and equipment covered by it, but that the respondent wrongly detains it, and judgment is prayed for unpaid rent and interest, damages for wrongful detention and an order for delivery up of the machinery and equipment.

The respondent's amended defence contains the following eight paragraphs:—

" 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.

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."

To this pleading the appellant delivered a reply, of which paragraphs 2 and 3 ran as follows:—

" 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.

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."

In that state of the pleadings it was agreed that the issue of estoppel should be argued as a preliminary point of law, and on the 28th July 1961 the Court made an order that the point should be set down for hearing and disposed of before the trial of the action. This was done and, as has been said, the High Court (Ong J.) decided in favour of the appellant. On 6th September 1961 that Court made a declaration to the effect of paragraph 3 of the reply, though in rather ampler terms; while the Court of Appeal (Thomson C.J., Hill J.A., Good J.A.) decided in favour of the respondent and by order dated 6th March 1962 allowed its appeal and set aside the order of the High Court.

In their Lordships' opinion the decision of the Court of Appeal was correct. It is entitled to be supported, in their view, on two separate and distinct grounds. One of these, that which formed the basis of the judgment appealed from, concerns the proper limitations of a default judgment as foundation for an estoppel. The other, which did not enter into the consideration of the Court of Appeal, depends on those rules that preclude a Court from allowing an estoppel, if to do so would be to act in the face of a statute and to give recognition through the admission of one of the parties to a state of affairs which the law has positively declared is not to subsist.

Their Lordships turn to the first ground. In their view there is no doubt that by the law of England, which is the law applicable for this purpose, a default judgment is capable of giving rise to an estoppel *per rem judicatam*. The question is not whether there can be such an estoppel, but rather what the judgment prayed in aid should be treated as concluding and for what conclusion it is to stand. For, while from one point of view a default judgment can be looked upon as only another form of a judgment by consent (see *Re South American v. Mexican Co.* [1895] 1 Ch. 37 at 45) and, as such, capable of giving rise to all the consequences of a judgment obtained in a contested action or with the consent or acquiescence of the parties, from another a judgment by default speaks for nothing but the fact that a defendant for unascertained reasons, negligence, ignorance or indifference, has suffered judgment to go against him in the particular suit in question. There is obvious and, indeed, grave danger in permitting such a judgment to preclude the parties from ever reopening before the Court on another occasion, perhaps of very different significance, whatever issues can be discerned as having been involved in the judgment so obtained by default.

It is true that in certain contexts estoppel *per rem judicatam* has been given a very wide operation. The rule laid down by Wigram V.C. in *Henderson v. Henderson* (1843) 3 Hare 100 at 114 has been frequently cited with approval. " 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." This rule was spoken of as " settled law " by Lord Shaw when delivering the opinion of this Board in *Hoystead v. Commissioner of Taxation* [1926] A.C. 155 at 170; and a similar principle, probably based on *Henderson v. Henderson*, was adopted in the Civil Procedure Code of India and from there passed into the Civil Procedure Code of the Federated Malay States (Cap. 7 Laws of the F.M.S. s.6, Explanation III). It should be stated in passing that, since the Civil Procedure Code was repealed with effect from the 1st April 1958 and replaced by the Rules of the Supreme Court, it has been common ground in the argument of this case that the former section has no direct bearing on the rights of the parties and that they are to be determined in accordance with the general law of England as applied in the territory of the Federation.

Their Lordships are satisfied that, where a judgment by default comes in question, it would be wrong to apply the full rigour of any principle as widely formulated as that of *Henderson v. Henderson* supra. It may well be doubted whether the learned Vice-Chancellor had in mind at all the peculiar circumstances of a default judgment and whether such a judgment would not naturally fall into his reservation of " special cases ". In any event it is clear

from what has been said in other authorities more immediately directed to the point that a much more restricted operation must be given to any estoppel arising from a default judgment.

Howlett v. Tarte 10 C.B. (N.S.) 813 is usually referred to as supplying the governing rule in this context. It is at any rate a decision explicitly arising out of a judgment by default. The report of it contains several short and separate opinions, but the effect of them is taken to be that, while such a judgment can give rise to estoppel in subsequent proceedings, the defendant in such proceedings is estopped only from asserting something which, if pleaded in the earlier action, would have amounted to a direct traverse of what was there asserted and founded upon by the party who obtained that judgment. Thus, if what he wishes to set up in the second action would have been matter only for a plea by way of confession and avoidance or, it seems, a special plea in the first action, there is no estoppel.

This formula may be all very well for those who practise or are familiar with the old system of pleading that prevailed in the English Courts of common law in the first half of the nineteenth century. But it is a valid criticism of its utility for the solution of questions of estoppel that arise now or in the future that the formula itself could hardly avoid being conditioned by the special and very complicated rules by which that system was governed (see per Lord Shaw in *Hoystead's* case supra at p.168), and the exercise of imagination that is required in order to translate modern pleadings into the forms of the older ritual becomes progressively harder to achieve for those for whom the work of translation is by now merely an antiquarian exercise.

Fortunately, perhaps, *Howlett v. Tarte* supra has twice been reconsidered in much more recent cases of high authority. One is *Hoystead's* case, to which reference has already been made. There it was spoken of as being essentially the product of the older system of pleading and as involving no derogation from the true general principle that, for the purposes of estoppel, a judgment stands for every point, whether of assumption or admission, which was in substance the ratio of and fundamental to the decision. The other case is the House of Lords decision in *New Brunswick Railway Co. v. British & French Trust Corporation Ltd.* [1939] A.C. 1, in which full consideration was given to the authority of *Howlett v. Tarte* supra and an attempt was made to decide to what extent it represented a principle of general application for the purposes of modern litigation.

In their Lordships' opinion the *New Brunswick Railway Co.* case can be taken as containing an authoritative reinterpretation of the principle of *Howlett v. Tarte* in simpler and less specialised terms. This reinterpretation amounts to saying that default judgments, though capable of giving rise to estoppels, must always be scrutinised with extreme particularity for the purpose of ascertaining the bare essence of what they must necessarily have decided and, to use the words of Lord Maugham L.C. ([1939] A.C. at p. 21), they can estop only for what must " necessarily and with complete precision " have been thereby determined.

What then must the default judgment be taken to have decided in this earlier action? As a decree it adjudges in terms no more than that the appellant is entitled to recover from the respondent a fixed sum of dollars, interest and costs, and it was argued on this appeal that the judgment can estop from nothing more than a denial of that bare fact. That would not cover the respondent's proposed plea that the hiring agreement of 20th June 1952 was in reality only one aspect of a larger transaction which, in truth though not in form, amounted to a moneylending transaction and a bill of sale. Their Lordships however do not think that, where as here the plaint upon which the judgment has been obtained is itself upon and so forms part of the record, there is any valid ground for refusing to notice what case it is that a plaintiff has set up in order to found the order that he claims. The only authority which can be advanced in favour of such an extreme view is the opinion expressed by Fitzgibbon L.J. in the Irish case of *Irish Land Commission v. Ryan* [1900] 2 Ir.R. 565, a case in which judgment had passed after the issue of the writ but without pleading. Even so, his view differs in a material

respect from that expressed by Holmes L.J. in the same case (see p.583 where it is said that the judgment showed the money to be owing " on account of tithe rent charge ") and it seems fairly clear from what was said by O'Brien L.C. and Ronan L.J. in the later Irish case of *Cox v. Dublin City Distillery Co.* [1917] 1 Ir.R. 203 that the opinion of Fitzgibbon L.J. on this point was not that of the Irish Courts. It would not be difficult, their Lordships think, to find several English cases in which the estoppel on a default judgment has been allowed to go further than the mere terms appearing on the face of the judgment, see for instance, *Thomson v. Clarke* 17 T.L.R. 455.

Now what can the judgment of the 3rd November 1954 stand for, taking account of the plaint and the decree obtained upon it? That the plaintiff was entitled to recover from the defendant a sum of money by virtue of a written agreement under which machinery and equipment was let on hire at a monthly rent and a subsequent oral continuation of that agreement. It can be said for the appellant that what the respondent is now seeking to set up as part of his defence to the action based on the third agreement, that now in suit, is that the original agreement, out of which the others were formed, was not in reality a hiring agreement for rent at all, but a form of borrowing money on security. In that sense it might be said that the respondent is seeking to set up something which either expresses or imports a contradiction of the record in the earlier action, to use the words employed by the Court in *Huffer v. Allen* L. R. 2 Ex. 15. It comes near to a traverse. But, in their Lordships' opinion, this proposition would not express the true nature of the respondent's proposed defence. They say nothing as to its ultimate validity as a defence, when the action comes to be tried, or as to the legal analysis of what it is that the respondent is seeking to say; but it seems that it does not deny the fact that it entered into the written agreement founded upon, which speaks of " rent " and " hire ", but rather that it maintains that, when that agreement is read in conjunction with another contemporaneous agreement the obligation to pay the monies claimed will be seen to be part of a transaction the real nature of which was the borrowing of money on the security of goods. That is an issue which was not raised at all by the plaint in the first action. As a defence, it is more like a plea by way of confession and avoidance than a traverse. On the whole their Lordships think it impossible to say that there was anything in the first judgment which " necessarily and with complete precision " decided this issue against the respondent, and they hold consequently that the estoppel claimed cannot be maintained against it.

This is sufficient to dispose of the appeal, and their Lordships' opinion has proceeded on the same lines as those adopted by the Court of Appeal of the Federation and expressed by Thomson C.J. as the judgment of that Court. There is however another ground upon which their Lordships think that this appeal should fail, and, as the issue was fully argued before them and involves a question of some general importance, they think it desirable to state the conclusion that they have come to upon it.

The defence from which the appellant claims that the respondent is estopped is intended to rely on certain provisions of two statutes, the effect of either of which is to render void and unenforceable such contracts as the respondent asserts the agreement sued upon to have been. One of these statutes is the Bills of Sale Ordinance (No. 30 of 1950) and the other is the Moneylenders Ordinance (No. 42 of 1951). Shortly stated, the Bills of Sale Ordinance makes attestation, registration and a true statement of the consideration essential to the validity of a bill of sale as security for goods (section 4) and requires (section 6) a prescribed form, containing certain necessary particulars, under penalty of rendering the bill of sale void if the form is not observed. The Moneylenders Ordinance (section 16) renders moneylending transactions void unless, *inter alia*, a note or memorandum of the contract is supplied to the borrower at the time of the loan and the note includes certain prescribed contents.

The respondent has invoked in support of its defence a principle which appears in our law in many forms, that a party cannot set up an estoppel in the face of a statute. Thus a corporation upon which there is imposed a statutory duty to carry out certain acts in the interest of the public cannot

preclude itself by estoppel in pais from performing its duty and asserting legal rights accordingly. See *Maritime Electric Co. Ltd. v. General Dairies Ltd.* [1937] A.C. 610. *Southend Corporation v. Hodgson* [1962] 1 Q.B.416. Given a " statutory obligation of an unconditional character " it is not open to the Court to allow the party bound by that obligation to be barred from carrying it out by the operation of an estoppel. Similarly, there is, in most cases, no estoppel against a defendant who wishes to set up the statutory invalidity of some contract or transaction upon which he is being sued, despite the fact that by conduct or other means he would otherwise be bound by estoppel; see *In re A Bankruptcy Notice* [1924] 2 Ch. 76, in particular per Atkin L.J. at p.96.

It does not appear to their Lordships that the principle invoked is confined to transactions that have been made the subject of legislation or that, where legislation is in question, the bare prescription that a transaction is to be void or unenforceable is sufficient by itself to justify the principle's application. Thus, on the one hand, the common law may itself prohibit the enforcement of certain contracts, such as those of an infant not for necessaries, and it cannot be supposed that it would any the less refuse to base a judgment on an estoppel against an infant who had so contracted. An infant who has obtained goods from a tradesman by representing himself to be of full age cannot be estopped from setting up his infancy, if sued for the price of the goods. On the other hand, there are statutes which, though declaring transactions to be unenforceable or void, are nevertheless not essentially prohibitory and so do not preclude estoppels. One example of these is the Statute of Frauds (see *Humphries v. Humphries* [1910] 2 K.B. 531, in which it was no doubt considered that, following *Leroux v. Brown* 12 C.B. 801, the statute ought to be treated as regulating procedure, not as striking at essential validity): another is the Stamp Act or Acts in their application to oral contracts of marine insurance, which, according to the decision in *Barrow Mutual Ship Insurance Co. v. Ashburner* 54 L.J.N.S.Q.B.377, are not prohibited so much as penalised.

It has been said that the question whether an estoppel is to be allowed or not depends on whether the enactment or rule of law relied upon is imposed in the public interest or " on grounds of general public policy " (see *In re a Bankruptcy Notice* supra at p.97, per Atkin L.J.). But a principle as widely stated as this might prove to be rather an elusive guide, since there is no statute, at least public general statute, for which this claim might not be made. In their Lordships' opinion a more direct test to apply in any case such as the present, where the laws of money lending or monetary security are involved, is to ask whether the law that confronts the estoppel can be seen to represent a social policy to which the Court must give effect in the interests of the public generally or some section of the public, despite any rules of evidence as between themselves that the parties may have created by their conduct or otherwise. Thus the laws of gaming or usury (*Carter v. James* 13 M. & W.137) override an estoppel: so do the provisions of the Rent Restriction Acts with regard to orders for possession of controlled tenancies (*Welch v. Nagy* [1950] 1 K.B.455).

General social policy does from time to time require the denial of legal validity to certain transactions by certain persons. This may be for their own protection, as in the case of the infant or other category of person enjoying what is to some extent a protected status, or for the protection of others who may come to be engaged in dealings with them, as, for instance, the creditors of a bankrupt. In all such cases there is no room for the application of another general and familiar principle of the law that a man may, if he wishes, disclaim a statutory provision enacted for his benefit, for what is for a man's benefit and what is for his protection are not synonymous terms. Nor is it open to the Court to give its sanction to departures from any law that reflects such a policy, even though the party concerned has himself behaved in such a way as would otherwise tie his hands. See *In re Stapleford Colliery Co.* 14 C.D. 432 at p. 441, per Bacon V.C.

These principles, as their Lordships understand them, would point very directly to the conclusion that there can be no estoppel in face of the Moneylenders Ordinance, since the provisions on which the respondent seeks to rely render him a " protected person " for this purpose, nor any estoppel

in the face of the Bills of Sale Ordinance, the provisions of which, whatever other purposes they may serve, are at least intended for the protection of other creditors who may have dealings with the borrower. The analogy between the latter Ordinance and the Deeds of Arrangement Act 1914, which was the subject of decision in *In re a Bankruptcy Notice* supra, is very close.

It is true, nevertheless, that there have been decisions in England, the effect of which seems to be to allow binding estoppels that preclude reliance on the Bills of Sale Acts, legislation which is for all relevant purposes identical with the Malayan Ordinance. The two decisions that matter on this point are *Roe v. Mutual Loan Fund* 19 Q.B.D.347, a decision of the Court of Appeal, and *O. Comitti v. Maher* 94 L.T.R.158. As the latter case was expressly decided on the authority of the earlier, it is to the principle expressed in *Roe's* case that their Lordships must direct their attention.

They do not think that it is necessary for them to say a great deal about it. What they are concerned with is to interpret the law of England on this subject as applicable to the Federation of Malaya, not to reconcile or adjust all the English decisions that have been given. It is not certain that the principle applied in *Roe's* case is altogether reconcileable with that adopted in *In re a Bankruptcy Notice*—see the remarks of Wright J. in *Huddersfield v. Todd* 42 T.L.R. 52. Having regard to what was said in the later decision of the Court of Appeal (see Atkin L.J. at pp.96/100) it appears to their Lordships that *Roe's* case cannot now be relied upon for any general principle governing estoppel in the face of a statute and that its continuing authority depends on the resort that a Court may feel to be necessary in special circumstances to the general rule forbidding approbation and reprobation on the part of a litigant. Thus, despite the principle that limits estoppels where statutes are infringed, a litigant may be shown to have acted positively in the face of the Court, making an election and procuring from it an order affecting others apart from himself, in such circumstances that the Court has no option but to hold him to his conduct and refuse to start again on the basis that he has abandoned.

It is necessary only to notice the facts to see how large a part such considerations must have played in forming the *Roe* decision. A man had given a bill of sale on his furniture to secure an advance of money. Later, he presented his petition in bankruptcy, showing the lenders as creditors secured by the bill. They seized the furniture, sold it, paid off the debtor's landlord who had put in a distraint, appropriated the balance of the proceeds in part satisfaction of their debt and came in as unsecured creditors for the residue. The bankruptcy proceedings went on, the debtor having notice of all of them and in fact initiating some of them himself. A composition with creditors on the basis of his statement of affairs was proposed, reported on by the official receiver and sanctioned by the Court. To quote from the judgment of Esher M.R. at p. 349, the debtor " knew also that his solicitors had put a receipt before the [lenders] to sign, so that, from beginning to end, he knew that the creditors were acting on the faith of his statement, and that by that means he got a release from all his debts on payment of 2/6d. in the pound to all the creditors on their debts, and to the defendants on the balance due to them after taking credit for the proceeds of sale ".

The debtor then started an action against the lenders, alleging that the bill of sale was invalid and that they had trespassed in seizing his goods. The Court of Appeal upheld the judgment of Pollock B. that the action could not proceed. It is difficult to see how in the circumstances of that case they could have done otherwise. They may have thought that what the debtor had done was to " waive the tort ", as Atkin L.J. suggested in *In re a Bankruptcy Notice* supra at p.100, or they may have proceeded on the wider principle that a person who had gone so far as the debtor had in approbating the seizure and sale of his goods and in implicating the Court and other creditors in the consequences could not on any principle of law be allowed to reprobate them in another action.

It does not appear to their Lordships that any further analysis of *Roe's* case is called for in order to decide the present appeal. The respondent's actions

bear no relation to the proceedings of the debtor in that case. The most that can be said against the respondent here is that it suffered or subjected itself to a judgment by default in the first action. Such a judgment is not incapable of giving rise to an estoppel, but there is nothing in the attendant circumstances which would permit an estoppel based upon it, whatever its range, to exclude a plea based upon the invocation of statutes of such nature as the Moneylenders Ordinance and the Bills of Sale Ordinance.

For these reasons their Lordships will report to the Head of Malaysia their opinion that the appeal should be dismissed with costs.

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In the Privy Council

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v.

LEONG CHEONG KWENG MINES LIMITED

DELIVERED BY
VISCOUNT RADCLIFFE

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