EXHIBIT 28

[1982] A.C. 529 [1981] 3 W.L.R. 906 [1981] 3 All E.R. 727 (1981) 125 S.J. 829 Times, November 26, 1981 [1982] A.C. 529 [1981] 3 W.L.R. 906 [1981] 3 All E.R. 727 (1981) 125 S.J. 829 Times, November 26, 1981
(Cite as: [1982] A.C. 529)

[1981] 3 W.L.R. 906

***529 Hunter Appellant v Chief Constable of the West Midlands Police and Others Respondents**

House of Lords

Lord Diplock, Lord Russell of Killowen, Lord Keith of Kinkel, Lord Roskill, and Lord Brandon of Oakbrook

1981 Oct. 19, 20, 21; Nov. 19

Practice—Pleadings—Striking out—Judge's decision on voir dire that no assaults by police prior to confessions—Actions for same alleged assaults against police after murder convictions—Whether abuse of process of court—Whether fresh evidence admissible— R.S.C., Ord. 18, r. 19 (1)

After bomb explosions in two Birmingham public houses on November 21, 1974, had killed 21 people and injured 161 others, the appellant and four others, Irish Republican supporters, were arrested by the Lancashire police and taken to Morecambe Police Station. On November 22, members of the Birmingham police interviewed the five men, and one of them made a signed statement. They were then taken to a Birmingham police station, where a sixth man was also taken after his arrest at 10.30 p.m. that night. On November 23, at the Birmingham police station, three more of the men made signed statements and the two others made oral confessions regarding their parts in planting the bombs that had caused the explosions. On November 24, all six men were photographed, and the photograph of one man showed a mark that might have been a bruise under the right eye. On Monday, November 25, the six men appeared before a magistrates' court, and, although three of them complained to the solicitors assigned to them of assaults by the police, no marks were noticed on their faces save in the case of the man with the black eye, which he said had been caused by a fall. After formal evidence, the six men were remanded in custody and taken to Winson Green Prison. When, three days later, on November 28, they again appeared at the magistrates' court, their faces showed injuries that indicated they had been seriously assaulted. They were again remanded in custody, and first the prison governor and then the Home Office held an inquiry as to how their injuries had been sustained. At the trial of the six men on 21 charges of murder, their counsel objected to the admission in evidence of their statements, which were an essential part of the prosecution case, on the ground that they had been induced by violence and threats by the police. After an eight day 'trial within a trial' (voir dire) in the absence of the jury, during which the police officers and the six men gave evidence Bridge J. held that the prosecution had discharged the burden of proving beyond reasonable doubt that the men had not been assaulted by the police and that the statements had been voluntary and should be admitted in evidence. The trial then continued before the jury, and the six men again alleged that ***530** their statements had been induced by violence by the police-Bridge J. warned the jury that, if their allegations were, or might reasonably be true, the statements were worthless. The jury convicted all six and Bridge J. sentenced them to imprisonment for life. Leave to appeal was refused by the Court of Appeal (Criminal Division) on March 30, 1976. The six men issued writs against the **chief constables** of the West Midlands and the Lancashire police and also against the Home Office claiming damages against the police for injuries caused by assaults, which were the same allegations as had been made before Bridge J. at the voir dire and trial, and also against the Home Office in respect of assaults by prison officers and prisoners while they had been in Winson Green Prison. They relied, inter alia, on new medico-forensic evidence as to the photographs taken on November 24, which

were said to reveal that some injuries had been sustained prior to that date, and statements from the three prison officers that the six men had been bruised and injured on their arrival at the prison. The chief constables applied for the statements of claim against them to be struck out under R.S.C., Ord. 18, r. 191 and under the inherent jurisdiction of the court. Cantley J. dismissed the applications, but the Court of Appeal allowed an appeal by the chief constables and ordered that the statements of claim be struck out.

On appeal by the plaintiff by leave of the House of Lords:-

dismissing the appeal, that where a final decision had been made by a criminal court of competent jurisdiction it was a general rule of public policy that the use of a civil action to initiate a collateral attack on that decision was an abuse of the process of the court; and that such fresh evidence as the plaintiff sought to adduce in his civil action fell far short of satisfying the test to be applied in considering whether an exception to that general rule of public policy should be made, which, in the case of a collateral attack in a court of coordinate jurisdiction, was whether the fresh evidence entirely changed the aspect of the case (post, pp. 541H - 542F, 544A-B, 545A, D - 546A).Stephenson v. Garnett [1898] 1 Q.B. 677 , C.A.; Reichel v. Magrath (1889) 14 App.Cas. 665 , H.L.(E.) and Phosphate Sewage Co. Ltd. v. Molleson (1879) 4 App.Cas. 801 , H.L.(Sc.) applied. Ladd v. Marshall [1954] 1 W.L.R. 1489 , C.A. considered. *Per curiam.* It would be best if the use of the description 'issue estoppel' were restricted to that species of estoppel per rem judicatam that may arise in civil actions between the same parties or their privies (post, pp. 540H - 541A).Decision of the Court of Appeal [1980] Q.B. 283; [1980] 2 W.L.R. 689; [1980] 2 All E.R. 227 affirmed.

The following cases are referred to in the opinion of Lord Diplock:

- Hollington v. F. Hewthorn & Co. Ltd. [1943] K.B. 587; [1943] 2 All E.R. 35, C.A.
- Ladd v. Marshall [1954] 1 W.L.R. 1489; [1954] 3 All E.R. 745, C.A.

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- Mills v. Cooper [1967] 2 Q.B. 459; [1967] 2 W.L.R. 1343; [1967] 2 All E.R. 100, D.C.
- Phosphate Sewage Co. Ltd. v. Molleson (1879) 4 App.Cas. 801 , H.L.(Sc).
- Reg. v. Humphrys [1977] A.C. 1; [1976] 2 W.L.R. 857; [1976] 2 All E.R. 497 , H.L.(E.).
- Reg. v. Watson (Campbell) [1980] 1 W.L.R. 991; [1980] 2 All E.R. 293, C.A.
- Reichel v. Magrath (1889) 14 App.Cas. 665 , H.L.(E.).
- Stephenson v. Garnett [1898] 1 Q.B. 677, C.A.

The following additional cases were cited in argument:

- Caine v. Palace Steam Shipping Co. [1907] 1 K.B. 670 , C.A.; [1907] A.C. 386 , H.L.(E.).
- Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 3) [1970] Ch. 506; [1969] 3 W.L.R. 991; [1969] 3 All E.R. 897 .
- Chokolingo v. Attorney-General of Trinidad and Tobago [1981] 1 W.L.R. 106; [1981] 1 All E.R. 244, P.C.
- Flower v. Lloyd (1879) 10 Ch.D. 327, C.A.

- Gleeson v. J. Wippell & Co. Ltd. [1977] 1 W.L.R. 510; [1977] 3 All E.R. 54 .
- Macdougall v. Knight (1890) 25 Q.B.D. 1, C.A.
- Public Prosecutor v. Yuvaraj [1970] A.C. 913; [1970] 2 W.L.R. 226, P.C.
- Saif Ali v. Sydney Mitchell & Co. [1980] A.C. 198; [1978] 3 W.L.R. 849; [1978] 3 All E.R. 1033 , H.L.(E.).
- Stupple v. Royal Insurance Co. Ltd. [1971] 1 Q.B. 50; [1970] 3 W.L.R. 217; [1970] 3 All E.R. 230, C.A.

INTERLOCUTORY APPEAL from the Court of Appeal.

This was an appeal by Robert Gerard **Hunter** by leave of the House of Lords from the decision of the Court of Appeal (Lord Denning M.R., Goff L.J. and Sir George Baker) on January 17, 1980, allowing an appeal by the first and second defendants, the **Chief Constable** of the West Midlands Police and the **Chief Constable** of the Lancashire Police, from an order of Cantley J. on November 22, 1978. By his order, Cantley J. dismissed applications by the first and second defendants for the plaintiff's statement of claim against them to be struck out under R.S.C., Ord. 18, r. 19 and under the inherent jurisdiction of the court. The third defendant to the plaintiff's action was the Home Office. The second defendant was joined as appellant with the first defendant during the appeal to the Court of Appeal, which also involved actions by five other plaintiffs.

The Court of Appeal refused the plaintiff leave to appeal from their decision, but on July 3, 1980, the Appeal Committee of the House of Lords (Lord Diplock, Viscount Dilhorne and Lord Russell of Killowen) allowed a petition by him for leave.

The facts are set out in the opinion of Lord Diplock; see also *per* Lord Denning M.R. [1980] Q.B. 283 , 312-316.

David Turner-Samuels Q.C. and *Stephen Sedley* for the plaintiff.

[LORD DIPLOCK. Two issues arise: issue estoppel and abuse of the ***532** process of the court. It would help their Lordships if the plaintiff dealt with abuse of the process of the court first.]

Phosphate Sewage Co. Ltd. v. Molleson (1879) 4 App.Cas. 801 ; Reichel v. Magrath (1889) 14 App.Cas. 665 (which was a judgment in rem) and Macdougall v. Knight (1890) 25 Q.B.D. 1 show that in each case where a subsequent action has been stayed as an abuse of the process of the court there has been something more than a mere issue that has arisen in previous proceedings. Stephenson v. Garnett [1898] 1 Q.B. 677 would today be regarded as a case of issue estoppel. If there is an issue estoppel, it would also be an abuse of the process of the court to seek to raise the issue again in subsequent proceedings. It is important to determine whether there is an issue estoppel. If it were an abuse of process merely to relitigate in civil proceedings an issue decided in criminal proceedings, Caine v. Palace Steam Shipping Co. [1907] 1 K.B. 670 ; [1907] A.C. 386 would have been decided differently.

Abuse of process would arise in a case where issue estoppel had been found not to exist only in a case in which the action was shown to be unavoidably doomed to fail: see *per* Sir Robert Megarry V.-C. in Gleeson v. J. Wippell & Co. Ltd. [1977] 1 W.L.R. 510 . The mere fact that the issue was substantially the same as that previously litigated was not such as, on the facts of that case, to cause Megarry V.-C. to think that, despite the plaintiff having an uphill task, it would be an abuse of the process of the court for her to litigate it: see also Remmington v. Scoles ([1897] 2 Ch. 1). If it is prima facie an abuse of process to litigate a second time what has been litigated previously, what quality or quantity of fresh evid-

ence will cause the new proceedings not to be an abuse? Five levels have to be considered: (i) (the lowest) new, believable evidence material to the outcome ('new' meaning evidence that was not called, irrespective of its availability); (ii) (higher) new, believable evidence likely to have had a substantial material effect on the outcome; (iii) evidence capable of being believed, for the previous non-use of which a reasonable explanation exists; (iv) the same grounds as that on which evidence would be admitted in the Criminal Division of the Court of Appeal on an appeal; (v) some higher-category ground than the last-mentioned: fraud, etc.

As a matter of logic, (1) the characteristics necessary for the admission of the uncalled evidence should be lower than those necessary for the breaking of an estoppel; otherwise in practice there would be no difference between an estoppel case and one where there was no estoppel. (2) This not being an appeal, and having no legal effect in relation to the voir dire, or, for that matter, to the verdict, the characteristics for the admission of uncalled evidence are not required to be the same as in the case of seeking to call uncalled evidence on an appeal. (3) In the absence of estoppel, and as against a person who was not a party to the earlier proceedings, so that no question of bis vexari arises, the abuse, if there be an abuse, must be the bringing of proceedings that cannot succeed. As to whether the plaintiff should have appealed against Bridge J.'s decision, this is not an attack on Bridge J.'s decision. It is not a *Saif Ali* case [Saif Ali v. Sydney Mitchell & Co. [1980] A.C. 198], because the ***533** issue at trial would not be as to whether Bridge J.'s decision was right or wrong.

This is not a case of bis vexari. Logically to undo the abuse of process alleged here it is sufficient to show that uncalled evidence exists to support the plaintiff's claim which is capable of belief and which, if believed, will result in the claim succeeding. (The plaintiff limits this submission to new and uncalled evidence, even if it was available and could have been called with reasonable diligence.) Section 23 (1) of the Criminal Appeal Act 1968 sets out the substantive provisions regarding the admission of fresh evidence on appeal. The notes in Archbold Criminal Pleading Evidence & Practice, 40th ed. (1979), para. 889 are a correct summary of the law. Cantley J. applied the correct test. [Reference was made to Flower v. Lloyd (1879) 10 Ch.D. 327 and Phosphate Sewage Co. Ltd. v. Molleson, 4 App.Cas. 801, 814, *per* Earl Cairns L.C.]

As to the criteria that the court should have in mind in considering whether to strike out the plaintiff's action, the court ought, first, to consider whether there is in the fresh proceedings a collateral attack on a final decision of another court of competent jurisdiction. This raises two issues: whether it is a collateral attack on that decision, and whether that decision was a final decision. The only relief that could be obtained in these proceedings is damages. That is not an attack on a decision. Nor was Bridge J.'s decision a final decision; it was open to attack in more ways than one. For example, in the course of the proceedings before the jury, the plaintiff would have been entitled to adduce evidence which, if accepted by the jury, would have been at variance with the judge's decision. It was not, therefore, a final and conclusive decision on the merits so far as that issue was concerned. Nothing is really final in the course of criminal proceedings; the judge himself may change his mind: Reg. v. Watson (Campbell) [1980] 1 W.L.R. 991 and see Reg. v. Angeli [1979] 1 W.L.R. 26. The verdict of the jury speaks only on the issue of guilt or no. It was open to the jury to find, and one knows not whether it was their finding, that, although there had been assaults (and, indeed, that but for the assaults there would have been no confession), there had been the confession and the confession was true. The plaintiff accepts that the summing up of Bridge J. on this issue was very strong and that there was no other evidence. In coming to the question of whether the confession

was true or false, whether it was voluntary was clearly a factor, and it might be an important factor, but it was not *the* factor, or the only factor. Finding that the confession was not voluntary would not necessarily have led to an acquittal. One cannot say as a matter of certainty, which is what matters, that the jury held that none of the assaults had taken place at all. It cannot be said as a matter of law that the jury could have convicted only if they agreed with Bridge J.'s view that the confession, if there had been any violence, was worthless. That cannot be said as a matter of logic, either.

It is not an abuse of process to litigate something that might or might not have been decided by the jury, even if it is more probable than not that they so decided. It cannot be said here that Bridge J.'s direction was so overbearing that the jury must have accepted it. In the circumstances of the case, it would have been logical for the jury to say that someone ***534** who might appear tough and trained, although subjected to the abuse and violence alleged, would nevertheless not make a confession that was not true. [Reference was made to Reg. v. Humphrys [1977] A.C. 1 .]

The court should have in mind whether the two sets of proceedings are between the same parties, or their privies.

The court is entitled to have in mind whether the evidence that it is now sought to adduce was available at the time, and whether it was a deliberate choice not to call it. So far as the prison officers are concerned, there clearly was a decision that they should not be called. There was a deliberate choice by or on behalf of the plaintiff not to have this issue raised at the trial. This was not evidence that could have been produced to the Court of Appeal, because it would have been available with reasonable diligence.

The court should also have in mind the plaintiff's chances of success in this action. Where a plaintiff is shown to have no chance of success, it is an abuse of process for him to raise the issue. Where he has a chance of success, he should be entitled to litigate although the chance may not be very great. The question is whether he has some merit or no merit (see Gleeson v. J. Wippell & Co. Ltd. [1977] 1 W.L.R. 510).

As to the cogency of the proposed evidence here, Dr. Paul's evidence is capable of belief.

On the basis of these criteria, it was open to Cantley J. to come to his decision, the discretion being his.

As to the relationship of estoppel to abuse of process, if there is an estoppel here, it must be on the basis that a party is not entitled to make, as against another party, an assertion of fact, or an assertion of the legal consequences of facts, previously put forward in a criminal case: compare *per* Lord Diplock in Mills v. Cooper [1967] 2 Q.B. 459 , 468. The defendant should apply at an early stage to have the action struck out. The grounds on which the action would be struck out are that there is a clear-cut defence, so that it cannot succeed, or that the points in question cannot be asserted by reason of the estoppel resulting from the earlier proceedings. If the court holds that such estoppel does arise, it will strike the action out as an abuse of process if the matter was plain; otherwise it would go to trial. [Reference was made to Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 3) [1970] Ch. 506 .]

As to public policy, see Saif Ali v. Sydney Mitchell & Co. [1980] A.C. 198 . There is a clear distinction between Saif Ali and the present case. In *Saif Ali,* it would have been an issue in the fresh proceedings (indeed, the matter would have had to be expressly or impliedly pleaded) that the decision of the original court was wrong. It would then have had to be expressly or impliedly pleaded (see *per* Lord Diplock, at p. 223) that the reasons why the court was wrong were such and such. It cannot be contrary to public

policy merely to seek to assert facts in civil proceedings that have arisen in earlier criminal proceedings and that must have been decided by the jury in the earlier proceedings in a contrary sense. [Reference was made to the Civil Evidence Act 1968, s. 11 (1) .] It would be highly illogical if a verdict in criminal proceedings which presents absolute certainty as to its content should merely be admissible in evidence and ***535** should merely be taken to establish that the accused had committed the offence unless the contrary was proved but that some fact which arose and was a necessary basis for the conviction could nevertheless be raised to an estoppel. [Reference was made to the Fifteenth Report of the Law Reform Committee (1967) (Cmnd. 3391).] If public policy had dictated that in criminal proceedings a party could not attack that finding collaterally, not only would Hollington v. F. Hewthorn & Co. Ltd. [1943] K.B. 587 have had to be decided differently but the committee's report would have been different. Section 11 (1) of the Act of 1968 shows that merely to have a collateral attack is not regarded by Parliament as contrary to public policy. [Reference was made to Public Prosecutor v. Yuvaraj [1970] A.C. 913 and Stupple v. Royal Insurance Co. Ltd. [1971] 1 Q.B. 50 .] The circumstances in which it would be an abuse are the section 13 circumstances and nothing else. The mere fact of collateral attack does not amount to abuse. In the absence of estoppel, there cannot in the present case be an abuse.

[*Hugh Carlisle Q.C.* appeared at the request of the House to inform it on behalf of the Home Office as to the position regarding the plaintiff's claim against the Home Office.]

Turner-Samuels Q.C., continuing, referred to Chokolingo v. Attorney-General of Trinidad and Tobago [1981] 1 W.L.R. 106 . Accordingly, there are no grounds on which the court could properly strike out the relevant parts of the plaintiff's statement of claim in this case unless there was an estoppel of some kind.

Sedley following. On the question of abuse of process, (1) it is not the entire picture to say that the 'verbals' were the only evidence against the plaintiff. Although without the confessions there could not have been a conviction, they were by no means the totality of the evidence against the accused. This is important with regard to the question of whether the jury concluded that there had been an assault. The jury's verdict cannot conclude the matter regarding assault. (2) There is the prison officers' evidence. (3) As to whether estoppel is simply a narrower version of abuse of process, the plaintiff would not dissent from the suggestion that it is a species of the genus abuse, but he would dissent from the view that abuse encompasses the whole of estoppel and more besides. (4) As to whether there is an abuse of process here, abuse of process is simply the vehicle by which an action that is incapable of succeeding because of estoppel may be stopped in limine. One cannot say that there is no estoppel and then resort to abuse of process on the same facts. (5) As to admissibility, and whether the plaintiff's conviction or any part of the criminal proceedings is admissible at all for the purpose of striking out his civil proceedings, the law is such that the conviction not only as a thing in itself but as part of the entire criminal proceedings cannot be looked at as evidence on which to found an application to strike out. The reason for this is that Hollington v. F. Hewthorn & Co. Ltd. [1943] K.B. 587 (which is enshrined in the Civil Evidence Act 1968) holds all such matter to be irrelevant. (6) As to whether the motives of the plaintiffs have been to upset the convictions rather than recover damages, four different legal aid area committees, on the advice of different ***536** counsel, must have accepted that these were genuine claims for damages, as must Cantley J.

Michael Turner Q.C. and *Patrick Twigg* for the first and second defendants were not called on.

October 21. LORD DIPLOCK

informed the parties that their Lordships were satis-

fied that the plaintiff's statement of claim ought to be struck out as an abuse of the process of the court, for reasons to be given later.

Their Lordships took time for consideration.

November 19.LORD DIPLOCK. My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.

The matter comes before your Lordships by way of an interlocutory appeal in a civil action in the High Court in which the appellant ('**Hunter**') seeks damages for assaults causing him physical injuries which he alleges were inflicted upon him by police officers while he was in their custody between November 22 and 25, 1974. The respondent **chief constables**, who are the first and second defendants to the action, are sued under section 48 of the Police Act 1964 as vicariously liable for the tortious acts of the individual police officers (whom I shall call collectively 'the police') who were members of the West Midlands and Lancashire police forces respectively.

The Home Office is a third defendant to the action as vicariously liable in damages for other assaults causing him additional physical injuries which Hunter alleges were inflicted upon him by prison officers at Winson Green Prison between November 25 and 27, 1974, while he was detained there on remand. Your Lordships are not, however, concerned directly with these later injuries in respect of which the civil action against the Home Office is still continuing. The only question with which your Lordships are concerned is whether Hunter's action *against the police* ought to be struck out as an abuse of the process of the court. Cantley J., before whom the application to strike out was made, declined to do so. On appeal from his refusal, the Court of Appeal (Lord Denning M.R., Goff L.J. and Sir George Baker) were unanimously of opinion that the action was an abuse of the process of the court and that the statement of claim against the first and second defendants ought to be struck out.

Hunter is one of six murderers ('the Birmingham Bombers'), members or supporters of the I.R.A., who were responsible for planting and exploding two bombs in public houses in the centre of Birmingham on ***537** November 21, 1974; as a result 21 people were killed and eight score of other innocent victims injured. For a detailed account of what happened in relation to Hunter and the other Birmingham Bombers after the holocaust until the launching of this action by Hunter and similar actions by those others in November 1977, reference should be made to the judgment of Lord Denning M.R. [1980] Q.B. 283 , 312-316. To paraphrase it would only be to spoil it, to improve upon it I should find impossible. So I shall limit myself to as brief a summary as possible of those salient features in the Master of the Rolls's account to which I find it necessary to refer in order to explain my own reasons for dismissing this appeal.

Hunter and four other of the Birmingham Bombers were arrested on the night of November 21, 1974, at Heysham where they were en route to Belfast. They remained in custody of the police initially at Morecambe and subsequently at Birmingham until the morning of November 25 when they were brought before the magistrate and committed by him to Winson Green Prison on remand until their

next appearance before him on November 27. Photographs of all six Birmingham Bombers, including one of Hunter, were taken before the men left the police station at Birmingham. No facial injury to Hunter was apparent on inspection of these photographs, at any rate by an uninstructed eye; nor (except for a black eye in the case of one defendant which, it was accepted, had been caused accidentally) was any facial injury to any of the Birmingham Bombers observed by any of the many keen observers who were present when they appeared in court on the morning of November 25, or by the duty solicitors who were allotted to them on that occasion and who interviewed them in their cells. On their appearance in court on November 27, however, it was apparent to even the most casual glance that all six men including Hunter had sustained severe and painful facial injuries. It is not disputed, and was not disputed at their trial for murder, that by this time there were present on other parts of their bodies also physical injuries which could not have been self-inflicted; but, for reasons which will become apparent later in connection with Hunter's claim that 'fresh evidence' has become available since the date of his conviction on August 15, 1975, on 21 counts of murder it is only facial injuries that call for specific mention here.

The trial of all six Birmingham Bombers for murder took place jointly before Bridge J. and a jury. The principal evidence against each one of them consisted of confessions made to the police either in writing or in the case of Hunter orally only. Against some, but not against Hunter, there was forensic evidence of faint traces of nitroglycerine being perceptible on their hands or clothing and against the five of them, including Hunter, who were arrested at Heysham there was evidence of conduct after the time at which the bombs must have been planted that, in the absence of any other credible explanation, was capable of arousing suspicion that they had some knowledge of the plot. But all this amounted to suspicion only; unless the confessions were admissible and, if admitted, were accepted by the jury in the case of each defendant as being true then no reasonable jury could be satisfied that the prosecution's case against that defendant was proved beyond a reasonable doubt and it would be their duty to acquit him.

If it were voluntary, Hunter's oral confession, like the confessions of each of his co-defendants, bore the ring of truth; as the jury must have ***538** found when they convicted him. (That they must also have rejected his denial that he ever made it is not germane to the only matters that fall to be decided by your Lordships in this appeal.) So it became of crucial importance to Hunter and to each of the defendants to obtain a ruling from the judge on a voir dire that the confessions were not voluntary and so prevent their being admitted in evidence. This they set out to do by claiming in the 'trial within a trial' before the learned judge in the absence of the jury that the confessions were forced out of them by the infliction of severe physical violence on them by the police and by threats of calamitous consequences of what would happen to them or to their families if they did not make confessions of their guilt in the terms that the police demanded of them. The physical injuries in respect of which Hunter claims damages in the present civil action for assaults by the police are identical with those of which he gave evidence at the trial within a trial as having been inflicted upon him by the police in order to extract from him a confession.

At the trial within a trial the issue which Bridge J. had to determine was whether the prosecution had satisfied him beyond reasonable doubt that the confessions were voluntary; and that involved his being satisfied to this high standard of proof that in the case of each defendant there had been no assault upon him by the police before or in the course of obtaining his confession. Assaults upon any of the defendants by prison officers at Winson Green Prison after the confessions had been made could not affect admissibility; but the fact that all the defendants had unquestionably been subject to severe physical violence by the time of their second ap-

pearance in the magistrates' court on November 27, 1974, provided an added complication to the investigation of the issue that the judge had to determine on the voir dire.

So it is not surprising that the trial within a trial lasted eight days. Each of the police officers who it was claimed had participated in or was present at any of the alleged assaults gave evidence; so did each of the defendants; in addition other witnesses were called and the photographs of the defendants taken on November 24, 1974, to which I have referred were put in evidence. At the conclusion of this evidence the judge ruled that each of the confessions was admissible. Unusually, but very helpfully for the purpose of the instant appeal to your Lordships' House, he gave full and detailed reasons for his ruling. He made it clear that he accepted the evidence of the police as establishing beyond all reasonable doubt that there had been no physical violence or threats by them to the defendants and that in his opinion the evidence taken as a whole showed that there had been what he described as 'gross perjury' on the part of each of the defendants.

The confessions were accordingly admitted and the trial resumed. The same allegations as to physical violence and threats by the police that had been made on the voir dire were repeated before the jury as relevant to the weight which they should attach to the confessions and the whole ground was gone over again in evidence given before them. In the course of what I can only describe as a model and meticulous summing up, of which no criticism has been made by counsel for Hunter in the instant appeal, Bridge J. gave to the jury a firm direction that if they inclined to the view ***539** that the account by any defendant of the circumstances in which his confession was obtained might be true, they should reject the confession as worthless and acquit the defendant, since the other evidence against each of them did no more than raise suspicion and was insufficient to satisfy the burden of proof beyond reasonable doubt that lay upon the prosecution.

Despite this direction the jury convicted Hunter and each of the other Birmingham Bombers on 21 counts of murder. The defendants appealed to the Criminal Division of the Court of Appeal against the convictions. No complaint about the judge's ruling on the voir dire that the confessions were admissible was made in this appeal on behalf of any of the defendants and their appeals were dismissed on March 30, 1976.

To complete the history of the matter it may be added in parenthesis that later in 1976, 14 prison officers from Winson Green Prison were tried before Swanwick J. and a jury on charges of assaulting the Birmingham Bombers. All 14 made unsworn statements from the dock, each denying that he himself was implicated in any violence inflicted on the Birmingham Bombers between November 25 and 27, 1974; and all 14 were acquitted. In the instant civil action by Hunter, however, it is admitted by the Home Office that *some* violence was inflicted upon him by prison officers employed at Winson Green. For this the Home Office accepts civil liability in damages but puts Hunter to proof of the extent and severity of the resulting injuries.

The statement of claim in the present civil action alleging against the police the identical assaults that had been canvassed for eight days before Bridge J. on the voir dire and again before the jury on Hunter's trial for murder was delivered in January 1978. Prompt steps were taken by the police to have the statement of claim against them struck out and the action against them stayed or dismissed under R.S.C., Ord. 18, r. 19 or else under the inherent jurisdiction of the court, on the grounds, inter alia, that it was an abuse of the process of the court.

The summons claiming this relief in the instant case together with summonses claiming similar relief in parallel actions in which the other five Birmingham Bombers were plaintiffs came on for hearing before Cantley J. in November 1978.

At that hearing there were put in evidence statements from prison officers that had not been used although they had been made available to plaintiffs at their trial for murder and a report from an expert, Dr. Paul, upon inferences which he felt able to draw from the photographs of the plaintiffs taken on November 24, 1974, and used at the murder trial, to which reference has already been made. It would appear that in the argument on the summonses counsel for the police sought in the first place to persuade that learned judge that what had happened at the murder trial gave rise to an estoppel per rem judicatam of a kind which in recent years it had been found convenient to describe as 'issue estoppel.' The fact that even if what had happened did not create as against the plaintiff in favour of the police what could be strictly classified as 'issue estoppel' it nevertheless made the initiation of the present civil action against the police an abuse of the process of the court took second place in counsel's argument both chronologically and in plenitude of citation of authority.***540**

Cantley J. in a fully reasoned judgment dismissed the summonses both on the narrow ground that there was no 'issue estoppel' in the strict sense of that term and on the broader ground that he ought not to dismiss the action as an abuse of the process of the court if, in the light of evidence that was not called at the murder trial, even though it had been available then, but which the plaintiffs intended to adduce in the civil action, it was 'reasonably conceivable that another tribunal acting judicially might accept at least part of the plaintiff's case'; and this he, hesitantly, thought was 'reasonably conceivable' if the expert evidence of Dr. Paul (which could have been available to the plaintiffs at the murder trial if they had chosen to call it) were admitted at the hearing of the civil action.

Much the same course was taken in the argument in the Court of Appeal upon the appeal by the police against the dismissal of the summonses. The hearing there took 12 days and involved the citation of 77 authorities including a number of American decisions. All three members of the court were of opinion that Cantley J. was wrong on the broader ground; he had applied the wrong tests as to the previous availability and the degree of cogency of evidence, unadduced at the murder trial but proposed to be adduced in the civil action, that the plaintiffs would need in order to prevent its being an abuse of the process of the court for them to initiate civil proceedings to mount a collateral attack upon the finding of Bridge J. at the murder trial that they had *not* been assaulted by the police.

Lord Denning M.R. and Sir George Baker were also in favour of extending the description 'issue estoppel' to cover the particular example of abuse of process of the court presented by the instant case - a question to which much of the judgment of Lord Denning is addressed. Goff L.J., on the other hand, expressed his own view, which had been shared by Cantley J., that such extension would involve a misuse of that expression. But if what Hunter is seeking to do in initiating this civil action is an abuse of the process of the court, as I understand all your Lordships are satisfied that it is, the question whether it also qualifies to bear the label 'issue estoppel' is a matter not of substance but of semantics. Counsel for the appellant was therefore invited to address this House first upon the broader question of abuse of process and to deal in particular with the reasoning contained in the judgment of Goff L.J. who dealt with the matter more closely than the other members of the court and bases his decision solely on that ground. In the result, counsel for the appellant, Hunter, who argued the case with their accustomed ability and diligence, were quite unable to persuade any of us that there was any error in the reasoning of Goff L.J. in what proved to be the last judgment that he prepared before his much lamented and untimely death. In the result it became unnecessary to call on counsel for the police. So the debate upon semantics did not take place. It could not possibly affect the outcome of the appeal or justify the public expense that would have been involved in prolonging the hear-

ing any further.

Nevertheless it is my own view, which I understand is shared by all your Lordships, that it would be best, in order to avoid confusion, if the use of the description 'issue estoppel' in *English law, at any rate* (it does ***541** not appear to have been adopted in the United States), were restricted to that species of estoppel per rem judicatam that may arise in civil actions between the same parties or their privies, of which the characteristics are stated in a judgment of my own in Mills v. Cooper [1967] 2 Q.B. 459 , 468-469 that was adopted and approved by this House in Reg. v. Humphrys [1977] A.C. 1 , the case in which it was also held that 'issue estoppel' had no place in English criminal law.

The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack Upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.

The proper method of attacking the decision by Bridge J. in the murder trial that Hunter was not assaulted by the police before his oral confession was obtained would have been to make the contention that the judge's ruling that the confession was admissible had been erroneous a ground of his appeal against his conviction to the Criminal Division of the Court of Appeal. This Hunter did not do. Had he or any of his fellow murderers done so, application could have been made on that appeal to tender to the court as 'fresh evidence' all material upon which Hunter would now seek to rely in his civil action against the police for damages for assault, if it were allowed to continue. But since, quite apart from the tenuous character of such evidence, it is not now seriously disputed that it was available to the defendants at the time of the murder trial itself and could have been adduced then had those who were acting for him or any of the other Birmingham Bombers at the trial thought that to do so would help their case, any application for its admission on the appeal to the Court of Appeal (Criminal Division) would have been doomed to failure.

It would call for a degree of credulity too extreme to be expected even from judicial members of your Lordships' House to fail to recognise that the dominant purpose of this action, and the parallel actions brought by the other Birmingham Bombers so far as they are brought against the police, has not been to recover damages but is brought in an endeavour to establish, long after the event when memories have faded and witnesses other than the Birmingham Bombers themselves may be difficult to trace, that the confessions on the evidence on which they were convicted were induced by police violence, with a view to putting pressure on the Home Secretary to release them from the life sentences that they are otherwise likely to continue to serve for many years to come. A significant indication that the recovery of monetary damages is not the principal object of the civil action may be discerned in the manner in which the action has been conducted as against the Home Office. Despite the fact that ever since August 1979, when the Home Office amended their defence by admitting liability for assaults by the prison officers, Hunter has been in a position to obtain judgment against the Home Office on liability and proceed to an assessment of damages, no step has yet been taken on his behalf to do so.

My Lords, collateral attack upon a final decision of a court of competent jurisdiction may take a variety of forms. It is not surprising that no ***542** reported case is to be found in which the facts present a precise parallel with those of the instant case. But the principle applicable is, in my view, simply and clearly stated in those passages from the judgment of A. L. Smith L.J. in Stephenson v. Garnett [1898] 1 Q.B. 677 , 680-681 and the speech of Lord Halsbury L.C. in Reichel v. Magrath (1889) 14 App.Cas.

665 , 668 which are cited by Goff L.J. in his judgment in the instant case. I need only repeat an extract from the passage which he cites from the judgment of A. L. Smith L.J.:

'... the court ought to be slow to strike out a statement of claim or defence, and to dismiss an action as frivolous and vexatious, yet it ought to do so when, as here, it has been shewn that the identical question sought to be raised has been already decided by a competent court.' The passage from Lord Halsbury's speech deserves repetition here in full:

'... I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again.'

In the instant case the relevant final decision by a competent court in which the identical question sought to be raised has been already decided is the ruling of Bridge J., on the voir dire in the murder trial, that Hunter's confession was admissible. Initially his ruling may have been provisional in the limited sense that up to the time that the jury brought in their verdict he had power to reconsider it in the light of any further evidence that might emerge when the whole question of the circumstances in which the confession was obtained was gone into again before the jury on the question of the weight to be attached to it: Reg. v. Watson (Campbell) [1980] 1 W.L.R. 991 . But his ruling became final when the trial ended with the return of the jury's verdict of guilty and the pronouncement by the judge of the mandatory sentence of life imprisonment. Bridge J. thereupon became functus officio. His ruling that the confession was not obtained by the use of violence by the police, as Hunter had alleged, could thereafter only be upset upon appeal to the Court of Appeal (Criminal Division).

The fact that the whole matter of the circumstances in which the confession was obtained was gone into a second time before the jury and that the jury, in view of the judge's direction to them, must clearly also have been satisfied beyond reasonable doubt that Hunter's account of the assaults upon him by the police was a fabrication does not affect the finality of the judge's ruling, though it would exacerbate the public scandal to the administration of justice that would be involved if Hunter, by changing the form of the proceedings to a civil action, were to be permitted to set up in that action the same case that must have been decided against him not only once but twice, even though technically it was only the first of those decisions that eventually qualified as the final decision against him by a competent court upon the very question that he seeks now to raise.

My Lords, this is the first case to be reported in which the final decision against which it is sought to initiate a collateral attack by means of a civil action has been a final decision reached by a court of criminal jurisdiction. ***543**

This raises a possible complication that the onus of proof of facts that lies upon the prosecution in criminal proceedings is higher than that required of parties to civil proceedings who seek in those proceedings to prove facts on which they rely. Thus a decision in a criminal case upon a particular question *in favour* of a defendant, whether by way of acquittal or a ruling on a voir dire, is not inconsistent with the fact that the decision would have been *against* him if all that were required were the civil standard of proof on the balance of probabilities. This is why acquittals were not made admissible in evidence in civil actions by the Civil Evidence Act 1968 . In contrast to this a decision on a particular question against a defendant in a criminal case, such as Bridge J.'s ruling on the voir dire in the murder trial, is reached upon the higher criminal standard of proof beyond all reasonable doubt and is wholly inconsistent with any possibility that the decision would *not* have been against him if the same question had fallen to be decided in civil proceedings instead of criminal. That is why convic-

tions were made admissible in evidence in civil proceedings by the Act of 1968.

That Act and Hollington v. F. Hewthorn & Co. Ltd. [1943] K.B. 587 , which sections 11 and 13 of the Act were passed to overrule, call for some examination at this point. Despite the eminence of those who constituted the members of the Court of Appeal that decided it (Lord Greene M.R., Goddard and du Parcq L.JJ.) that case is generally considered to have been wrongly decided, even in the context of running-down cases brought before the Law Reform (Contributory Negligence) Act 1945 was passed and contributory negligence ceased to be a complete defence; for that is what Hollington v. Hewthorn was about. The judgment of the court delivered by Goddard L.J. concentrates on the great variety of additional issues that would arise in a civil action for damages for negligent driving but which it would not have been necessary to decide in a prosecution for a traffic offence based on the same incident, and on the consequence that it would still be necessary to call in the civil action all the witnesses whose evidence had previously been given in a successful prosecution of the defendant, or a driver for whose tortious acts he was vicariously liable, for careless or dangerous driving, even if evidence of that conviction were admitted. So no question arose in Hollington v. Hewthorn of raising in a civil action the identical question that had already been decided in a criminal court of competent jurisdiction, and the case does not purport to be an authority on that matter.

The occasion for the reference of the decision in Hollington v. Hewthorn that evidence of criminal convictions was not admissible in civil actions to the Lord Chancellor's Law Reform Committee was a notorious libel case in which despite a defence of justification a criminal who had been convicted of serious offences was awarded damages by a jury in a civil action against a newspaper for stating that he had committed the identical offences of which he had been found guilty upon his trial. So here, unlike the case of Hollington v. Hewthorn, the civil action did raise the identical question that had already been decided against the plaintiff by a competent court; yet under the rule in Hollington v. Hewthorn even the fact of his conviction was inadmissible in evidence on the plea of justification in the civil action. This is the mischief, in the initiation of civil proceedings in ***544** a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been reached by a competent court of criminal jurisdiction, that section 13 of the Act of 1968 was designed to cure. It is to be observed that it makes the conviction not merely prima facie evidence of the plaintiff's guilt but conclusive evidence. The provisions of section 13 are thus consistent with and give statutory recognition to the public policy of prohibiting the use of civil actions to initiate a collateral attack on a final decision against the intending plaintiff which has been made by a criminal court of competent jurisdiction.

Section 13 is to be contrasted with section 11. Although section 11 is not in express terms confined to convictions of *defendants* to civil actions or persons for whose tortious acts defendants are vicariously liable, this must in practice inevitably be the case. It is the plaintiff who will want to rely upon a conviction of the defendant or a person for whose tortious acts he is vicariously liable, for a criminal offence which also constitutes the tort for which the plaintiff sues. It is scarcely possible to conceive of a civil action in which a plaintiff could assist his cause by relying upon his own conviction for a criminal offence. So section 11 is not dealing with the use of civil actions by plaintiffs to initiate collateral attacks upon final decisions against them which have been made by a criminal court of competent jurisdiction; and the public policy that treats the use of civil actions for this purpose as an abuse of the process of the court is not involved.

Section 11 makes the conviction prima facie evidence that the person convicted did commit the offence of which he was found guilty; but does not make it conclusive evidence; the defendant is permitted by the statute to prove the contrary if he can. The section covers a wide variety of circumstances; the relevant conviction may be of someone who has not been made a defendant to the civil action and the actual defendant may have had no opportunity of determining what evidence should be called on the occasion of the criminal trial; the conviction, particularly of a traffic offence, may have been entered upon a plea of guilty accompanied by a written explanation in mitigation; fresh evidence, not called on the occasion of his conviction, may have been obtained by the defendant's insurers who were not responsible for the conduct of his defence in the criminal trial, or may only have become available to the defendant himself since the criminal trial. This wide variety of circumstances in which section 11 may be applicable includes some in which justice would require that no fetters should be imposed upon the means by which a defendant may rebut the statutory presumption that a person committed the offence of which he has been convicted by a court of competent jurisdiction. In particular I respectfully find myself unable to agree with Lord Denning M.R. that the only way in which a defendant can do so is by showing that the conviction was obtained by fraud or collusion, or by adducing fresh evidence (which he could not have obtained by reasonable diligence before) which is conclusive of his innocence. The burden of proof of 'the contrary' that lies upon a defendant under section 11 is the ordinary burden in a civil action: proof on a balance of probabilities; although in the face of a conviction after a full hearing this is likely to be an uphill task.***545**

There remains to be considered the circumstances in which the existence at the commencement of the civil action of 'fresh evidence' obtained since the criminal trial and the probative weight of such evidence justify making an exception to the general rule of public policy that the use of civil actions to initiate collateral attacks on final decisions against the intending plaintiff by criminal courts of competent jurisdiction should be treated as an abuse of the process of the court.

I can deal with this very shortly, for I find myself in full agreement with the judgment of Goff L.J. He points out that on this aspect of the case Hunter and the other Birmingham Bombers fail in limine because the so-called 'fresh evidence' on which they seek to rely in the civil action was available at the trial or could by reasonable diligence have been obtained then. He examines also the two suggested tests as to the character of fresh evidence which would justify departing from the general policy by permitting the plaintiff to challenge a previous final decision against him by a court of competent jurisdiction, and he adopts as the proper test that laid down by Earl Cairns L.C. in Phosphate Sewage Co. Ltd. v. Molleson (1879) 4 App.Cas. 801 , 814, namely that the new evidence must be such as 'entirely changes the aspect of the case.' This is perhaps a little stronger than that suggested by Denning L.J. in Ladd v. Marshall [1954] 1 W.L.R. 1489 , 1491 as justifying the reception of fresh evidence by the Court of Appeal in a civil action, viz., that the evidence '... would probably have an important influence on the result of the case, though it need not be decisive; ...'

The latter test, however, is applicable where the proper course to upset the decision of a court of first instance is being taken, that is to say, by appealing to a court with jurisdiction to hear appeals from the first-instance court and whose procedure, like that of the Court of Appeal (Civil Division), is by way of a rehearing. I agree with Goff L.J. that in the case of collateral attack in a court of coordinate jurisdiction the more rigorous test laid down by Earl Cairns is appropriate.

I need not repeat Goff L.J.'s critical examination of the 'fresh evidence' which Hunter sought to adduce in his civil action for assault. It fell far short of satisfying either test.

I would dismiss this appeal.

LORD RUSSELL OF KILLOWEN.

My Lords, I concur with the speech of my noble and learned friend, Lord Diplock, and therefore would dismiss this appeal.

LORD KEITH OF KINKEL.

My Lords, I agree entirely with the speech of my noble and learned friend, Lord Diplock, which I have had the benefit of reading in draft, and would accordingly dismiss the appeal.

LORD ROSKILL.

My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Diplock. For the reasons therein contained I am clearly of the opinion that to allow this action to proceed would indeed be an abuse of the process of the court. I therefore agree that this appeal fails and should be dismissed.***546**

LORD BRANDON OF OAKBROOK.

My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Diplock. I agree with it and would dismiss the appeal accordingly.Appeal dismissed. Appellant's costs in House of Lords to be taxed in accordance with provisions of Schedule 2 to Legal Aid Act 1974. Costs of first and second respondents in House of Lords to be paid out of legal aid fund pursuant to section 13 of Act of 1974, such order to be suspended for four weeks to enable The Law Society to give notice of objection if thought fit. (M. G.)

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1. R.S.C., Ord. 18, r. 19: '(1) The court may ... order to be struck out ... any pleading or the indorsement of any writ ... on the ground that - (a) it discloses no reasonable cause of action ... or (b) it is scandalous, frivolous or vexatious; or ... (d) it is otherwise an abuse of the process of the court; and may order the action to be ... dismissed ...'

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EXHIBIT 29

[1990] 2 Q.B. 338 [1990] 2 W.L.R. 1437 [1990] 2 All E.R. 981 [1990] I.C.R. 485 [1990] I.R.L.R. 283 [1990] 2 Q.B. 338 [1990] 2 W.L.R. 1437 [1990] 2 All E.R. 981 [1990] I.C.R. 485 [1990] I.R.L.R. 283
(Cite as: [1990] 2 Q.B. 338)

[1990] 2 W.L.R. 1437

***338 Ashmore v British Coal Corporation**

Court of Appeal

M.R. Lord Donaldson of Lymington, Stuart-Smith, and Farquharson

1990 Feb. 12, 13; 27

Industrial Relations—Industrial tribunals—Striking out proceedings—Claim for equality of pay—Sample cases selected from numerous similar claims against same employers—Sample claims dismissed by industrial tribunal—Whether claimant able to relitigate issue—Whether claim frivolous, vexatious or abuse of process—Industrial Tribunals (Rules of Procedure) Regulations 1980 (S.I. 1980 No. 884), reg. 3, Sch. 1, r. 12(2)(e)

Practice—Pleadings—Striking out—Abuse of process—Sample cases selected from similar claims for equal pay—Claims dismissed—Unselected claimant seeking to relitigate—Whether contrary to public policy and interests of justice

The applicant, together with some 1,500 other women engaged as colliery canteen workers, complained to an industrial tribunal that she was employed on less favourable terms than certain male comparators contrary to section 1(2)(a) of the Equal Pay Act 1970, as amended. The tribunal ordered that sample cases be selected for trial representing the issues common to all claims, but that the decision in such cases, although persuasive in effect, would not be binding on the other claims. The applicant was kept fully informed of the selection process in which 14 sample cases were chosen. Despite ample opportunity she did not seek to put forward her claim for selection so that together with all other unselected claims her application was stayed pending determination of the sample claims. After investigation of extensive evidence the tribunal found that the applicants in the sample proceedings had not been employed on like work with their chosen comparator, who worked alone on the night shift, and that in any event the employers were entitled to rely on section 1(3) of the Act, because the variation in the rates of pay was due to a material factor which was not the difference of sex. The appeal tribunal upheld their decision. The applicant, who like the male comparator had worked alone on the night shift, sought to proceed with her claim and applied for the stay to be lifted. She resisted the employers' application to strike it out as frivolous or vexatious under rule 12(2)(e) in Schedule 1 to the Industrial Tribunals (Rules of Procedure) Regulations 19801 on the ground that in the absence of res judicata or an agreement to be bound she was entitled to have her claim determined with regard to the section 1(3) issue. The chairman held that although the decision in the sample proceedings was not technically binding on her it would amount to an abuse of the process to relitigate the factual issue raised under section 1(3) and, concluding that the claim was bound to fail, he ordered that it be struck out as vexatious under rule 12(2)(e). The appeal tribunal upheld that decision.

On appeal by the applicant: -***339**

dismissing the appeal, that the categories of conduct rendering a claim frivolous, vexatious or an abuse of the process were not closed but depended on all the relevant circumstances of the particular case, public policy and the interests of justice being very material considerations; that, where sample cases had been selected to enable the tribunal fully to investigate and make findings on all the relevant evidence, relitigation of the same issues, being analogous to a collateral attack on the tribunal's decision, would defeat the purpose of sample selection and be contrary to the interests of justice and public policy unless there were fresh evidence which entirely changed the aspect of the case; that

in the absence of any such evidence, since the applicant had not taken the opportunity of putting forward her claim for selection and since the issues had been fully investigated in the sample proceedings, it would be unfair to other claimants and contrary to the interests of justice to permit her to reopen the issue in respect of the applicability of section 1(3); and that, accordingly, the chairman had properly exercised his discretion in striking out her claim under rule 12(2)(e) (post, pp. 348B-C, H - 349A, 352E-F, 354E-F, H - 355A).Dictum of Lord Cairns L.C. in Phosphate Sewage Co. Ltd. v. Molleson (1879) 4 App. Cas. 801, 814, H.L.(Sc.) and Hunter v. Chief Constable of the West Midlands Police [1982] A.C. 529, H.L.(E.) applied.National Coal Board v. Sherwin [1978] I.C.R. 700, E.A.T. and Thomas v. National Coal Board [1987] I.C.R. 757, E.A.T. considered.Ladd v. Marshall [1954] 1 W.L.R. 1489, C.A. distinguished.*Per curiam.* A claim is not only to be struck out as being an abuse of the process if it is a sham, not honest or not bona fide. It is dangerous to try and define fully the circumstances which can be regarded as an abuse of the process (post, p. 352D-E).Dictum of Stephenson L.J. in Bragg v. Oceanus Mutual Underwriting Association (Bermuda) Ltd. [1982] 2 Lloyd's Rep. 132, 139, C.A. doubted.Decision of Employment Appeal Tribunal affirmed.

The following cases are referred to in the judgment of Stuart-Smith L.J.:

- Bragg v. Oceanus Mutual Underwriting Association (Bermuda) Ltd. [1982] 2 Lloyd's Rep. 132, C.A..
- Davies (Joseph Owen) v. Eli Lilly & Co. [1987] 1 W.L.R. 1136; [1987] 3 All E.R. 94, C.A..
- Godfrey v. Department of Health and Social Security (unreported), 25 July 1988, Stuart-Smith J.
- Hunter v. Chief Constable of the West Midlands Police [1982] A.C. 529; [1981] 3 W.L.R. 906; [1981] 3 All E.R. 727, H.L.(E.).
- Ladd v. Marshall [1954] 1 W.L.R. 1489; [1954] 3 All E.R. 745, C.A..
- Loveday v. Renton, The Times, 31 March 1988
- McIlkenny v. Chief Constable of the West Midlands [1980] Q.B. 283; [1980] 2 W.L.R. 689; [1980] 2 All E.R. 227, C.A..
- Marler (E. T.) Ltd. v. Robertson [1974] I.C.R. 72, N.I.R.C.
- Medallion Holidays Ltd. v. Birch [1985] I.C.R. 578, E.A.T..
- National Coal Board v. Sherwin [1978] I.C.R. 700, E.A.T..
- Phosphate Sewage Co. Ltd. v. Molleson (1879) 4 App. Cas. 801, H.L.(Sc.).
- Thomas v. National Coal Board [1987] I.C.R. 757, E.A.T..

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The following additional cases were cited in argument:

- Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223; [1947] 1 All E.R. 498, C.A..
- Gleeson v. J. Wippell & Co. Ltd. [1977] 1 W.L.R. 510; [1977] 3 All E.R. 54
- North West Water Authority v. Binnie and Partners (unreported), 9 November 1989, Drake J.

APPEAL from the Employment Appeal Tribunal.

By a notice of application dated 10 October 1982 the applicant, Ann Ashmore, complained to the Birmingham Regional Office of Industrial Tribunals that pursuant to section 1(2)(a) of the Equal Pay Act 1970, as amended, she was entitled to receive the same pay and conditions as male canteen workers employed on like work by the employers, the National **Coal** Board now the **British Coal** Corporation. In August 1984 the applicant's application together with 1,558 other such applications was transferred to an industrial tribunal sitting at London (Central). In interlocutory proceedings on 10 October 1984 the chairman of the tribunal, Mr. G. E. Heggs, directed that sample applications representative of the issues involved be selected by the parties for determination not as test cases but as of assistance in the remaining applications. The employees selected six such cases and the employers eight, directions being given as to trial at a number of subsequent interlocutory hearings and all other applications being stayed pending determination of the sample cases. The applicant, by her legal advisers, was aware of the course taken.

By its decision promulgated on 8 September 1986 the industrial tribunal dismissed the claims made in the 14 sample cases on the grounds that the employees had not been employed on like work to the chosen male comparator within the meaning of section 1(4) of the Act and that the employers had made out a defence under section 1(3).

By a letter dated 23 September 1986 the applicant sought to transfer her application to Nottingham and to pursue her claim on the ground that she was engaged in like work to that of the chosen comparator. On 8 October 1986 the chairman of the industrial tribunal rejected her application for transfer. The applicant sought further consideration of her claim and at an interlocutory hearing on 12 December 1986 the tribunal postponed such consideration pending the outcome of the employees' appeals to the appeal tribunal in the sample cases. By a notice of appeal dated 14 January 1987 the applicant appealed to the appeal tribunal which on 15 April remitted the matter to the industrial tribunal indicating that it was appropriate to lift the stay on her application. On 15 May 1987 the appeals in the sample cases were dismissed: see Thomas v. National Coal Board [1987] I.C.R. 757.

Thereafter the applicant made a further interlocutory application for the stay to be lifted, such application being adjourned pending the outcome of a proposed appeal to the Court of Appeal by one of the employees in the sample cases. On 13 November 1987 the employers applied to the industrial tribunal for her claim to be struck out pursuant to rule 12(2)(e) of the Rules set out in Schedule 1 to the Industrial Tribunals (Rules of Procedure) Regulations 1980 on the ground that it***341** was frivolous or vexatious. By his decision promulgated on 17 November 1987 the chairman of a tribunal sitting at London South acceded to the employers' application and struck out the applicant's claim.

By a notice of appeal dated 22 December 1987 the applicant appealed to the appeal tribunal on the grounds, inter alia, that (1) by treating the decision in Thomas's case as determinative of the applicant's claim the industrial tribunal effectively compelled the applicant to be represented by the 14 employees in the sample proceedings notwithstanding that the tribunal had no power to order representative proceedings; (2) when the Thomas decision was promulgated it was clearly understood that it was only binding on the 14 employees in the sample proceedings so that the applicant might thereafter choose to proceed with her equal pay claim; (3) since the sample claims failed because they did not establish their claims under section 1(2)(a) of the Act of 1970, as amended, they could not also fail on other grounds so that the decision in the sample cases on the section 1(3) issue was obiter, that accordingly in so far as the Thomas decision was binding on other employees it only related to the section 1(2)(a) issue, and the applicant's claim on that issue, that she was employed on like work with the comparator should therefore be determined; (4) the tribunal's conclusion in the sample cases on the sec-

tion 1(3) issue were conclusions of fact which could not bind the applicant; (5) there was no reason of public policy to deny the applicant access to the tribunals and courts; (6) it was a misuse of language for the tribunal to state that the applicant was attempting to secure for herself an advantage, since she had sought to obtain a hearing of her claim ever since the promulgation of the decision in the Thomas case and it had been recognised throughout that the stay on her application was to be lifted after the appeal process in the sample cases was completed when she would be entitled to have her claim determined by the tribunal, and, accordingly, her attempts to pursue her claim could not amount to vexatious conduct.

By their answer dated 3 February 1988 the employers sought to contend, inter alia, that (1) even if the applicant could succeed on the section 1(2)(a) issue, her claim was indistinguishable from those in the sample cases on the section 1(3) issue so that in any event her claim was bound to fail unless she could persuade a fresh tribunal to reach a different conclusion on the identical factual issue to that already decided, and accordingly in view of the procedural history of the selection of sample cases it would be an abuse of the process to permit her to re-litigate that issue, and would be wrong to enable her to have a rehearing de novo on what had been clearly understood to have been the definitive determination of all genuinely common issues; and (2) the tribunal's decision was a proper exercise of its discretion and gave rise to no issue of law.

On 10 February 1989 the appeal tribunal dismissed the applicant's appeal and refused her leave to appeal to the Court of Appeal. Pursuant to the leave granted by Balcombe L.J. on 6 June 1989 and a notice of appeal dated 15 June the applicant appealed on the grounds that (1) having found as a matter of law that the applicant was not bound by the decision in Thomas v. National Coal Board [1987] I.C.R. 757 the***342** appeal tribunal erred in law in upholding the industrial tribunal's decision to strike out the claim; (2) the tribunal had struck out the claim pursuant to rule 12(2)(e) on the ground that the application was vexatious, and the appeal tribunal therefore erred in law in deciding as a matter of law that they were entitled to uphold the tribunal's decision on the ground that the claim was frivolous; (3) in so far as the appeal tribunal found that the claim was frivolous they erred in law; (4) the appeal tribunal failed to consider whether the claim was vexatious; and (5) the appeal tribunal erred in law in finding that there were considerations of public policy entitling the tribunal to strike out the claim under rule 12(2)(e) in the exercise of their discretion.

The facts are stated in the judgment of Stuart-Smith L.J.

Nigel Baker Q.C. and *Kathryn Thirlwall* for the applicant. The applicant has a right to have her application determined on its merits by an industrial tribunal. She is not bound by the decision or the findings of fact in the sample case Thomas v. National Coal Board [1987] I.C.R. 757. There is no issue estoppel and no question arises of res judicata. At no stage did the applicant agree to be bound by the sample case or by any finding of fact by the industrial tribunal, so that in pursuing her claim she is not acting contrary to any agreement or understanding. She acts in her capacity as an independent applicant. There is no reason of public policy which can be invoked to justify denying the applicant's right to have her application heard and determined. Further the applicant's challenge is not a collateral attack on the decision in the Thomas case. The sample cases heard compendiously in Thomas's case were not test cases, the industrial tribunal having no power to order such cases, and sample litigation does not proceed as class litigation: see Davies (Joseph Owen) v. Eli Lilly & Co. [1987] 1 W.L.R. 1136.

In the alternative, even if the applicant's right is not absolute, she does not seek to relitigate her claim, she merely seeks to litigate it. Accordingly it cannot be characterised as frivolous, vexatious or an abuse of the process. Rule 12(2)(e) of the Industrial

Tribunal (Rules of Procedure) Regulations 1980 refer to "scandalous, frivolous or vexatious." Such categorisation, as well as "abuse of process" cannot refer to the applicant's conduct, which has been to await the decision in the Thomas case, not having been selected as a lead case, and then to pursue her own claims which are distinct. Furthermore, the categorisation is properly applied to claims which are put forward as a sham or with dishonest intent: see Bragg v. Oceanus Mutual Underwriting Association (Bermuda) Ltd. [1982] 2 Lloyd's Rep. 132, 139, *per* Stephenson L.J. Accordingly the terms "frivolous," "vexatious" or "an abuse of process" are not appropriate in the present circumstances since there is no sham or dishonesty in respect of the applicant's claim or her wish to pursue it. To hold that in such circumstances the terms are applicable would be novel and inappropriate.

The tribunal chairman considered the application "vexatious:" see E. T. Marler Ltd. v. Robertson [1974] I.C.R. 72 and cf. Gleeson v. J. Wippell & Co. Ltd. [1977] 1 W.L.R. 510. In doing so he wrongly allowed considerations of relitigation, finality and uniformity to influence***343** his decision, and he wrongly struck out the application. The appeal tribunal upholding that exercise of his discretion, themselves wrongly concluded that "vexatious" and "frivolous" were interchangeable terms, and they therefore erroneously and without jurisdiction substituted a finding that the application was frivolous for that of the chairman's.

The appeal tribunal further elevated the decision in Thomas's case on the section 1(3) defence into an estoppel and made the assumption that the applicant's case on that defence and the evidence which she would adduce in support would be identical to that proffered in the Thomas case. The appeal tribunal was, however, wrong to conclude that the facts found in the Thomas case on the section 1(3) defence were not in issue in the present applicant's claim, and they wrongly considered that she was bound to fail. Her claim is different, although it is accepted that she is not in a position to assert that she will obtain fresh evidence in support of it. The tribunal could compensate the employers by way of costs, if it considered that such an order would be appropriate.

National Coal Board v. Sherwin [1978] I.C.R. 700, where the applicants succeeded on similar issues, is inconsistent with Thomas v. National Coal Board [1987] I.C.R. 757 so that already similar claims relating to the employers' canteen employees have received dissimilar treatment by the tribunals. Not only is that unsatisfactory, but why should the employers in the Thomas case have been permitted to raise issues already determined against them in the Sherwin case, if, as it is now said, it is an abuse of process for the applicant to do so?

Peter Goldsmith Q.C. and *Nicholas Underhill* for the employers. The fundamental principle adopted for the orderly disposal of all the cases was the selection of a number of sample or representative cases. That principle was agreed between the parties' representatives at an early stage. There was a series of interlocutory hearings at which the applicants, including the present applicant, were represented, usually by counsel. The eventual agreement was that 14 sample cases should be heard and determined first. The industrial tribunal recorded that it was mutually agreed that each side would put forward its best and most representative cases. The intention was that the issues thus raised would be the subject of the fullest and most careful scrutiny and determination, if need be, by the highest appeal court. The cases were selected with the greatest care and attention to that aim and their preparation was equally extensive. The hearing was equally conducted with the intention of raising all the issues between the employees and the employers.

Depending on the actual decision reached by the industrial tribunal it might have been necessary to apply that decision to the facts of individual cases. If that had been necessary, a short hearing on those facts might have been required. But it was never intended that where there was a common issue, in relation to which an individual applicant could not

show any difference between her own case and those of the sample applications, that issue would be relitigated. That would mean that the lengthy and expensive process of selection, pleading, discovery and the hearing itself would have been a waste of time and money, and it would moreover have been potentially unfair. Although the Thomas decision is not therefore binding in any formal sense, the court in the exercise of its discretion***344** is entitled to conclude that it would be contrary to public policy to permit a particular application to proceed.

The tribunal was in those circumstances right to strike out the present claim. The chairman had power to do so under rule 12(2)(e): see E. T. Marler Ltd. v. Robertson [1974] I.C.R. 72, 77 where the interpretation of the rule includes "abuse of process." It is a discretionary power and its exercise can only be challenged on what amount to Wednesbury grounds: see Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223, and see also Medallion Holidays Ltd. v. Birch [1985] I.C.R. 578. The tribunal was entitled to take into account that the section 1(3) defence was a distinct ground for the decision in the Thomas case, and that that defence turned on the circumstances of the particular male comparator selected and so could not vary with the identity of the applicant. The applicant's case on that aspect of her claim is indistinguishable from that of the sample applicants. She does not challenge the findings made in relation to the regional arrangements affecting the male comparator's rates of pay, nor suggest that there were similar arrangements in her own area. The tribunal were correct to take into account that it had already considered detailed evidence of events now long ago, which it would be wasteful to rehearse, and which might after so long, cause considerable risk of injustice to the employers. The tribunal in striking out the application was also correct to conclude that in seeking to relitigate the matter the applicant was in clear breach of the understanding on which the sample cases were chosen and litigated and that in any event, since her case was indistinguishable on the section 1(3) defence, her claim was bound to fail.

The applicant has no absolute right to have her case heard. If it were frivolous, vexatious or an abuse of the process and if she were bound by an agreement not to litigate it, the court might exercise its power to prevent her from doing so. The jurisdiction is wide and the categories are not closed: see Hunter v. Chief Constable of the West Midlands Police [1982] A.C. 529, 536, *per* Lord Diplock. There are similarities between that case and the present. The same parties there were before the court, here the applicant had been in a very real sense involved in the selection of the lead cases. In Hunter's case a court of competent jurisdiction had determined the issue, the same had occurred here. Similarly in both Hunter's case and the present no new evidence is sought to be adduced, bearing in mind that a higher test applies than that stated in Ladd v. Marshall [1954] 1 W.L.R. 1489, namely that it must be such as would entirely change the aspect of the case: see McIlkenny v. Chief Constable of the West Midlands [1980] Q.B. 283, 334, *per* Goff L.J.

While it is accepted that the present claim is not a collateral attack on the decision in Thomas's case, it is analogous to it, because the applicant now seeks to forsake the chosen route provided in the sample litigation. It cannot be in the public interest in the administration of justice to permit her to deviate from that chosen path, and public policy requires the court to prevent the continuance of a claim in such circumstances: see also North West Water Authority v. Binnie and Partners (unreported), 9 November 1989. In addition the court has power, and has correctly exercised its discretion, to strike out the present claim on the ground that it is bound to fail. That ground of itself is sufficient to justify such a course.

In cases of multiple applications raising identical issues, in the overall interest of the efficient administration of justice, there may be a need for flexibility in the use of the procedural powers available to the courts: see Davis (Joseph Owen) v. Eli Lilly &

Co. [1987] 1 W.L.R. 1136, 1139, *per* Sir John Donaldson M.R.

It is not an answer to suggest that the applicant's claim can proceed, the employers being compensated in costs. That is not adequate protection in particular since the tribunal's powers are restricted in that respect. Nor is National Coal Board v. Sherwin [1978] I.C.R. 700 a contra-indication militating against striking out the present application. In Sherwin's case there were only two claimants, there was no sample or representative test and no full review of the evidence. That case can therefore be distinguished from Thomas's case where there was a full review of evidence based on a selection which included all the issues and from which the applicant had not been excluded.

Baker Q.C. in reply. In Sherwin's case the employers' evidence was rejected, so it might be if the applicant is permitted to bring her claim. Hunter's case is distinguishable from the applicant's since the collateral attack which is impermissible must be brought by the same party as raised the original claim. Here the applicant raises a claim which has in fact never been litigated. If the court strikes out the present application, it will be permitting the frontiers of what constitutes "abuse of process" to be extended too far, and further than any previous decision.

Cur. adv. vult.

27 February. The following judgments were handed down

STUART-SMITH L.J.

This appeal raises important questions as to how courts and tribunals deal with large numbers of cases that raise similar factual issues.

Between July and December 1982 about 2,000 applications were made by women canteen workers employed in various parts of the country by the National Coal Board under section 1(2)(a) of the Equal Pay Act 1970, as amended by section 8(1) of the Sex Discrimination Act 1975 and the Equal Pay (Amendment) Regulations 1983 (S.I. 1983 No. 1794) ("the Act"). Proceedings were issued in the industrial tribunal at Birmingham. The claimants alleged that they were doing like work with certain male comparators and that they were employed on terms that were less favourable than those under which the men were employed.

One such claimant is Ann **Ashmore**, the applicant, who was employed at the Gedley Colliery in Nottinghamshire. At that time all claimants were members of the National Union of Mineworkers ("N.U.M.") and they were represented by the union's solicitors, Milners, Curry & Gaskell. It was necessary for the industrial tribunal and the parties to devise some means of dealing with all these cases, which eventually***346** dwindled to about 1,500, which avoided the necessity of trying each one separately.

In August 1984 the cases were transferred to London and assigned to Mr. Heggs, Chairman of Industrial Tribunals. In October of that year there occurred the first of a number of interlocutory hearings. The tribunal ordered that representative sample cases should be chosen for trial. In effect the union were to choose six of their best cases and the employers six cases (subsequently increased to eight).

In giving the tribunal's decision Mr. Heggs said:

"These would not be test cases, the decision on any of the cases would not be binding upon the applicants or the respondents in any other cases but the decision might well assist in the resolution of the remaining cases by agreement." and a little later he said:

"The tribunal must determine each case upon its individual merits but in doing so must not disregard the interests of justice to the applicants as a whole and to the respondents. Care must be exercised to ensure that the course of the proceedings is not manipulated by any party for tactical advantage. Al-

though a decision on sample cases is not binding upon the respondents or applicants in other cases it will undoubtedly have persuasive effect when the cases of other applicants fall to be considered. . . . if a multiplicity of appeals is to be avoided it is important that most of the triable issues arising should be determined in the decision covering the sample selected."

During 1985 the claimants named seven comparators and the 14 sample cases were chosen; full particulars were given of the work by each comparator and the sample claimants. There were further interlocutory hearings involving directions as to pleadings, discovery and selection of cases. All claims other than the 14 sample cases were stayed pending determination of those cases.

By 1986, if not earlier, a number of claimants had left the N.U.M. and become members of the Union of Democratic Mineworkers ("U.D.M."); these included the applicant and Mrs. Barker, who was the only one among the 14 sample cases who had become a member of that trade union. On 3 February 1986 Hopkin & Sons, the applicant's solicitors, notified the employers that they had been instructed to act on behalf of the U.D.M. claimants. On 7 May, the claimants abandoned all other comparators save one, Mr. Tilstone.

The substantive hearing of the sample cases took place between 7 and 21 July 1986 under the name Thomas v. National Coal Board [1987] I.C.R. 757; leading counsel appeared for those claimants who were members of the N.U.M. and the employers; Mrs. Barker was separately represented by junior counsel. All the applications were dismissed. The basis of the decision was two-fold: first, that none of the sample claimants were employed on like work with Mr. Tilstone, he being employed on night work and alone, unlike the claimants, and so they failed to satisfy section 1(2)(a) of the Act; and, secondly, that the***347** employers had established a defence under section 1(3), namely that the variation in rate of pay between the claimants' and Mr. Tilstone's contract was "genuinely due to a material factor which is not the difference of sex."

All 14 claimants appealed to the appeal tribunal. The appeals were dismissed on 15 May 1987. Mrs. Barker alone appealed to this court, but she withdrew her appeal in early September 1987. Meanwhile, the present applicant had made several attempts to have the stay on her claim removed and the case listed for hearing. These applications had been adjourned pending the outcome of the appeal procedure. In September 1987, after the withdrawal of Mrs. Barker's appeal, she applied again. The employers thereupon applied under the provisions of the Industrial Tribunals (Rules of Procedure) Regulations 1980 to have her claim struck out on the grounds that it was frivolous and vexatious. Rule 12(2), in Schedule 1, provides:

"A tribunal may, if it thinks fit . . . (e) at any stage of the proceedings order to be struck out . . . any originating application . . . on the grounds that it is scandalous, frivolous or vexatious."

The industrial tribunal acceded to the employers' application and struck out the claim on the grounds that it was vexatious. The argument advanced on behalf of the applicant to the tribunal was that, unlike the claimants in the 14 sample cases, the applicant was engaged in like work, because she had since 1984 been engaged in night work and she worked alone. It was argued that the tribunal's decision in the Thomas case on the employers' defence under section 1(3) of the Act was obiter, and that, in the absence of res judicata or an agreement to be bound by the findings of fact, the applicant had an absolute right to relitigate that issue before a different tribunal. It does not appear that Mr. Todd, the applicant's solicitor, who argued the case before the tribunal, suggested that there was any further evidence to be adduced on this point. The tribunal were plainly correct to reject the submission that the decision on the second ground was obiter; and Mr. Baker does not argue to the contrary. The chairman accepted that the decision in the Thomas case was not technically binding on the applicant but he held that it was an abuse of the process to

relitigate a factual issue under section 1(3) of the Act, as amended, which had been fully litigated in fact if not in form on behalf of all applicants and that, if the applicant were allowed to proceed, her claim would be bound to fail. The applicant's appeal to the appeal tribunal was dismissed on 10 February 1989. She now appeals to this court pursuant to leave granted by Balcombe L.J. on 6 June 1989.

The expression "frivolous or vexatious" in rule 12(2)(e) includes applications which are an abuse of process: see E. T. Marler Ltd. v. Robertson [1974] I.C.R. 72, 76, *per* Sir Hugh Griffiths. Whether or not an application should be struck out on this ground is a matter for the discretion of the tribunal, which can only be challenged on the basis that the tribunal has misdirected itself in law or reached a decision to which no reasonable tribunal could come: see Medallion Holidays Ltd. v. Birch [1985] I.C.R. 578.***348**

Mr. Baker submits that the tribunal did err in law. He submits that, unless she is estopped by res judicata, issue estoppel or agreement to be bound by the findings in the Thomas case, and it is common ground that she is not, the applicant has an absolute right to have her claim litigated. He argues that, because the applicant is not estopped for any of those reasons, her claim cannot be frivolous, vexatious or an abuse of process. I do not agree. A litigant has a right to have his claim litigated, provided it is not frivolous, vexatious or an abuse of the process. What may constitute such conduct must depend on all the circumstances of the case; the categories are not closed and considerations of public policy and the interests of justice may be very material. In Hunter v. Chief Constable of the West Midlands Police [1982] A.C. 529, 536 Lord Diplock, with whose speech the rest of the House agreed, said:

"My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power." In that case the House of Lords held that it was an abuse of the process to bring a civil action which involved relitigating matters which had been finally decided against the plaintiffs in a criminal court. Lord Diplock said, at p. 541:

"The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made. The proper method of attacking the decision by Bridge J. in the murder trial that Hunter was not assaulted by the police before his oral confession was obtained would have been to make the contention that the judge's ruling that the confession was admissible had been erroneous a ground of his appeal against his conviction to the Criminal Division of the Court of Appeal. This Hunter did not do."

Mr. Goldsmith accepted that the applicant's claim is not a collateral attack on the decision of the tribunal in Thomas v. National Coal Board [1987] I.C.R. 757; but he submits that it is analogous to it. He submits that, where sample cases have been chosen so that the tribunal can investigate all the relevant evidence as fully as possible, and findings have been***349** made on that evidence, it is contrary to the interests of justice and public policy to allow

those same issues to be litigated again, unless there is fresh evidence which justifies re-opening the issue. I agree; it is no answer to say that, if the applicant's claim fails, the employers can be compensated in costs. Even if an award of costs is made, and it is not necessarily so in the industrial tribunal (see Industrial Tribunals (Rules of Procedure) Regulations 1985 (S.I. 1985 No. 16), Schedule 1, rule 11), it does not always amount to an indemnity, and is seldom compensation for inconvenience and disruption caused by litigation. Moreover, it is not in the interests of justice that the time of the courts or tribunals is taken litigating claims that have effectively been already decided. Furthermore, if the applicant is to be at liberty to pursue her claim, I can see no reason in principle why the 1,486 other applicants, who were not among the sample claimants, should not also have a similar right. It is true that in their cases they have two hurdles to surmount, namely both grounds upon which the tribunal found in favour of the employers, while the applicant has only one; but, if the applicant is to be permitted to re-open one issue, I cannot see why the others cannot re-open two. This would plainly defeat the whole object of having the 14 sample cases. This was described by the chairman of the tribunal in these words at paragraph 13(b):

"Whatever the scope of the agreement between the representatives when the 14 sample cases were selected for first determination, the objective of those representing the parties at the hearing was that the tribunal should make and record all findings of fact relevant to any of the applications, irrespective of the conclusions which the tribunal might reach upon the facts found. The tribunal acted, in effect, as a body which could conveniently be utilised for the finding and recording of facts material to any of the claims. The tribunal found the facts and it was open to the parties to challenge the conclusions. There was no objection to this course by Mr. P. Waterworth representing Mrs. Baker (who was a member of the Union of Democratic Mineworkers) on the instructions of Messrs. Hopkin & Sons (who represent Mrs. **Ashmore** in the present proceedings). This was an example of the tribunal [being] 'as flexible . . . as possible in the application of existing procedures with a view to reaching decisions quickly and economically.'"

The passage in inverted commas is a reference to an observation made by Sir John Donaldson M.R. in Davies v. Eli Lilly & Co. [1987] 1 W.L.R. 1136, 1139, (the Opren claims) to the effect that courts should so act.

Mr. Baker has submitted that, if we uphold this decision, we are going further than courts have previously done. This may be so, although in my opinion we should not hesitate to do so if the interests of justice and public policy demand it. In fact, I adopted a similar course dealing at first instance in Godfrey v. Department of Health and Social Security (unreported), 25 July 1988. It was a decision in chambers and not reported. It arose out of the claims for damages in connection with whooping cough vaccine. In these cases it was alleged that various***350** doctors, nurses and health authorities had been negligent in giving those injections to young children with the result that they had suffered serious brain damage. There were a considerable number of such cases. Those in which proceedings were started were assigned to me. I stayed all but one action, Loveday v. Renton, The Times, 31 March 1988, in which I directed that there should be trial of the issue of causation as a preliminary issue, namely whether it was proved that the vaccine could cause brain damage. That issue was tried at great length, and no expense was spared on behalf of the plaintiff who was legally aided; very many expert witnesses were called, both from this country and overseas. I decided that the plaintiff had not proved the case on causation. Subsequently the plaintiff Godfrey sought to bring a similar action, but against a different defendant. It was said that the injection was given at a time when the concentration of the pertussis vaccine was greater than it was later and therefore a more potent source of damage. In my judgment, this was not a

material distinction. On the defendants' application I struck out the action under R.S.C., Ord. 18, r. 19. I held that it was an abuse of the process of the court to relitigate the same issue in the absence of fresh evidence that bore materially on the issue of causation.

Mr. Baker relied upon the decision of this court in Bragg v. Oceanus Mutual Underwriting Association (Bermuda) Ltd. [1982] 2 Lloyd's Rep, 132. The facts of that case are complex. C.T.I. International Inc. ("C.T.I.") was engaged in the business of leasing out containers to shipping lines on a large scale. By the terms of the leases C.T.I. were responsible for making good part of the damage sustained by the containers. They insured this liability with American insurers through American brokers. The American insurers became dissatisfied with the claims record and declined to remain on risk after 1 June 1975. The American brokers, on the instruction of C.T.I. placed the insurance through the second defendants C.E. Heath & Co. (Marine) Ltd. ("Heath") on the London market with the plaintiff as representative underwriter and other Lloyds syndicates.

Lloyds became equally unhappy with the claims record and gave notice of cancellation as from 1 June 1976. Heath, however, persuaded them to continue till 30 November 1976. Lloyds became even more concerned and told Heath that they would seek to avoid the cover for non-disclosure and misrepresentation and would sue Heath unless they were relieved from liability for the "run-off" of the C.T.I. policy by re-insurance. Heath approached Oceanus who eventually agreed to take over the C.T.I. cover from 1 December 1976 and re-insure the run-off of the Lloyds policy. In due course Oceanus too became dissatisfied with the claims record and sought to avoid both the C.T.I. cover and the re-insurance on the grounds of misrepresentation and non-disclosure. This led to two actions: the first by C.T.I. against Oceanus on the C.T.I. policy, the second by Lloyds against Oceanus on the re-insurance policy and alternatively against Heath for breach of duty.

Oceanus applied to consolidate the actions; this was opposed by all other parties and was refused. The actions proceeded separately. The C.T.I. action came on for trial before Lloyd J. At a late stage Oceanus***351** sought to amend their defence. Lloyd J. allowed the amendments but decided all issues against Oceanus. In the Lloyds action Oceanus sought to make similar amendments to their defence. Robert Goff J. gave leave and the plaintiff appealed. The main ground of objection to the proposed amendments was that the subject matter of the amendments had been litigated in the C.T.I. action and had been decided against Oceanus; it was therefore an abuse of the process of the court to allow the same point to be raised again. The appeal was dismissed. But I do not understand any member of the court to say that in an appropriate case the claim may not be struck out as an abuse of the process if it has been litigated and decided in previous proceedings. Kerr L.J. said, at p. 137:

"To take the authorities first, it is clear that an attempt to relitigate in another action issues which have been fully investigated and decided in a former action *may* constitute an abuse of process, quite apart from any question of res judicata or issue estoppel on the ground that the parties or their privies are the same. It would be wrong to attempt to categorize the situations in which such a conclusion would be appropriate." He also regarded a defendant who wished to relitigate a matter as being in a stronger position than a plaintiff (see p. 138), and attached significance to the fact that the defendants had themselves sought to avoid the risk of litigating the same issue twice and the risk of inconsistent verdicts by applying to consolidate.

Sir David Cairns said, at p. 138:

"I do not accept the proposition advanced by counsel for the appellant Heath that when an issue has already been decided in proceedings between A. and B. it is prima facie an abuse of the process of the court for B. to seek to have the issue decided

afresh in proceedings between himself and C. and that in such circumstances there is an onus on B. to show some special reason why he should be allowed to raise the issue against C. On the contrary, I consider that it is for him who contends that the retrial of the issue is an abuse of process to show some special reason why it is so. Since the cases in which the retrial of an issue (in the absence of an estoppel) has been disallowed as an abuse of process are so few in number, it would be dangerous to attempt to define fully what are the circumstances which should lead to a finding of abuse of process. Features tending that way clearly include the fact that the first trial was before the most appropriate tribunal or between the most appropriate parties for the determination of the issue, or that the purpose of the attempt to have it retried is not the genuine purpose of obtaining the relief sought in the second action, but some collateral purpose. It would in my judgment be a most exceptional course to strike out the whole or part of a defence in a commercial action, or to refuse leave to amend a defence in such an action, simply because the issue raised or sought to be raised had been decided in another commercial action brought against the same defendant by a different plaintiff. The facts that the first action had been fairly conducted and that the issue had been the subject of***352** lengthy evidence and argument could not, in my view, be sufficient in themselves to deprive the defendant of his normal right to raise any issue which he is not estopped from raising." He then considered that procedural advantages to the defendants in the second trial was a reason why the amendment should not be struck out.

Stephenson L.J. said, at p. 139:

"Yet it is the duty of the judge and the Court of Appeal to shut out the defence if it is an abuse of the court's procedure to repeat it, in accordance with decisions of this court in Remmington v. Scoles [1897] 2 Ch. 1, and of the House of Lords in Reichel v. Magrath (1889) 14 App.Cas. 665, and Hunter v. Chief Constable of the West Midlands Police [1982] A.C. 529. Every repetition of a defence (or claim) may be said to mount a collateral attack on a previous judicial decision, and to invite those derogatory references to 'a side wind' or 'a back door' which are in favour with advocates whose clients are not open to a frontal attack. But in my judgment it is only those defences (or claims) that are sham and not honest and not bona fide which abuse the process of the court and call for the exercise of its inherent jurisdiction to prevent such abuse."

With all respect to Stephenson L.J., I do not agree that the claim can only be struck out as being an abuse of the process if it is a sham, not honest or bona fide. On the contrary, I prefer the views of the other members of the court that it is dangerous to try and define fully the circumstances which can be regarded as an abuse of the process, though these would undoubtedly include a sham or dishonest attempt to relitigate a matter. Each case must depend upon all the relevant circumstances. In the present case there was a large number of claims which raised similar issues against the same employers. The tribunal went to great length to devise arrangements which would enable the legal representatives of the parties to put forward their best cases so that as many issues of fact as possible could be raised and decided upon after the fullest inquiry and investigation. If the applicant or her advisers wished her case to be one of the sample cases, they could have applied at any time before the hearing for that to be done; she did not do so.

I must, however, deal with two further arguments advanced by Mr. Baker. The first is based on National Coal Board v. Sherwin [1978] I.C.R. 700. In that case two women, Mrs. Sherwin and Mrs. Spruce, were, unlike the applicant, employed as canteen assistants by the employers at the same canteen as Mr. Tilstone, the comparator in the present claims; but they were not employed exclusively on night work or alone. Similar issues arose as in the present claims and in particular whether the women were employed on like work and whether the employers established a defence under sec-

tion 1(3) of the Act. The claimants succeeded and the employers' appeal to the appeal tribunal was dismissed. We are told there was an appeal to this court, but the appeal was compromised. This is a case, therefore, where there is an inconsistent verdict with that in Thomas v. National Coal Board [1987] I.C.R. 757 by different tribunals on similar facts. Why, Mr. Baker asks rhetorically, was it just for the employers to raise the same issues in the ***353** Thomas case on which they lost in the Sherwin case, but it is not just for the applicant to raise them in her claim? The first answer is that no one attempted on behalf of the 1,500 claimants to contend that the employers' defence should be struck out under rule 12(2)(e). But, even if such an application had been made, there are in my opinion material distinctions between the two cases and good reasons why an order under that rule should not have been made. In Sherwin's case they were two isolated claims; in the present there were 1,500 and the industrial tribunal took great pains to devise a method which enabled all issues of fact to be investigated at length. Secondly, although the same argument was addressed to the court in Sherwin's case as to why the variation between Mr. Tilstone's contract and that of the two ladies was due to a material difference other than sex, namely the peculiar problems that pertained in the North Staffordshire area in 1966, the evidence available to the tribunal in Thomas's case was much more extensive. In particular Phillips J. in giving reasons in supporting the industrial tribunal's decision in National Coal Board v. Sherwin [1978] I.C.R. 700, 710, said:

"Secondly, there was no reason why the employers between 1966 and 1973 or between 1973 and the coming into force of the Equal Pay Act 1970 should not have phased out the arrangements made in the case of Mr. Tilstone and Mr. Hampton and have adopted a common scale for canteen workers, irrespective of sex and with an appropriate but not exaggerated allowance for night work."

The reason was provided in the evidence in Thomas's case, namely, that pressure from the trade union prevented it.

In his decision in Thomas's case the chairman of the industrial tribunal said of Sherwin's case:

"The full background to the re-grading of night work in 1966 was not presented to the Shrewsbury industrial tribunal. It would appear that they were influenced in their assessment by what they considered to be an excessive differential in 1977 and concluded that this was partly due to the fact that the [employers] required a male night canteen worker and they knew that they had to pay more for a male than a female. The view that the differential was excessive was adopted in the judgment of the Employment Appeal Tribunal in the Sherwin case [1978] I.C.R. 700, 709 when they said: 'it seems to us that the finding of the industrial tribunal, that the differential between their pay and that of Mr. Tilstone was more than is justified by the fact that he worked permanently on nights alone, is abundantly justified by the evidence.' In reality there was no evidence before the tribunal, except the rates of pay in 1977, and the tribunal reached their conclusion that the differential was excessive by applying their own general industrial experience. We have had the benefit of the expert evidence of Dr. P. Willman. Notwithstanding the rigorous critical analysis to which Mr. McMullen subjected his evidence, it appears that shift premia or additions to basic rate vary from company to company and in accordance with the nature and demands of the work and that in addition to a night shift premium it is by no means unusual to find a further percentage***354** premium for permanent night work. Having read Dr. Willman's report and heard his evidence we find as a fact that the terms and conditions of employment as regards the rate and amount of remuneration applied to Mr. Tilstone upon his appointment in July 1973 were no greater than reasonably reflected the fact that he worked permanently at night and alone. It is important to remember that night work in canteens was regarded as surface work in November 1966 in accordance with the conditions prevailing at that time. The solution then

adopted was to move from the canteen workers' rates to the surface workers' rates, which was the next established grade. It is not for us to say what the correct differential at that time ought to have been. We have the evidence of Dr. Willman that it was not in fact excessive and he and Mr. Heathfield both agree that it was reasonable to adopt the next established grade. From 1966 onwards there was no occasion for the job to be regraded and Mr. Tilstone, in common with all other surface general workers, received only the normal increments of his grade."

If it were contended in the present appeal that there was evidence available to the applicant which had not been presented to the tribunal in Thomas's case which might affect the decision on section 1(3), then we should have to consider that evidence and whether it satisfied the test which would make it inappropriate to strike the claim out. But, although Mr. Baker said that his instructions are that there might be male comparators employed in the Nottinghamshire district at higher rates than the applicant, no such evidence has been adduced before the industrial tribunal, the appeal tribunal or this court. And, having regard to the obvious care which was devoted to the crucial task of finding a male comparator for the purpose of all the 1,500 cases, it is quite impossible for this court to be influenced by such a vague suggestion. Moreover, it appears to me that the correct test for determining whether fresh evidence is of such a kind that the court should permit a claim which would otherwise be an abuse of the process of the court is that it "should entirely change the aspect of the case." This was the test propounded by Lord Cairns L.C. in Phosphate Sewage Co. Ltd. v. Molleson (1879) 4 App.Cas. 801, 814 and adopted by Goff L.J. in McIlkenny v. Chief Constable of the West Midlands [1980] Q.B. 283, 334, in preference to the less rigorous test applied on the admission of fresh evidence in appeals as laid down in Ladd v. Marshall [1954] 1 W.L.R. 1489, 1491, namely, that "it would probably have an important influence on the result of the case, though it need not be decisive." The judgment of Goff L.J. was approved in the House of Lords when the case went there under the name of Hunter v. Chief Constable of the West Midlands Police [1982] A.C. 529, 545, *per* Lord Diplock.

As it is, if the matter were relitigated on the applicant's claim, she would merely invite the tribunal to reach different findings of fact on the same evidence, as a result perhaps of different arguments being addressed to it. That, in my judgment, is not in the interests of justice; nothing could be calculated to cause a greater sense of injustice in those who lost in Thomas v. National Coal Board [1987] I.C.R. 757, if some***355** other tribunal reached a different result on the same evidence. Alternatively, there is a risk, after so long a time, that the employers would be unable to call the same witnesses who had convinced the tribunal in Thomas's case; that would be a grave injustice to them.

Secondly, it is submitted by Mr. Baker that, because none of the 14 sample claimants was working alone and exclusively on night work, it was not in their interest at the trial to emphasize that Mr. Tilstone was being paid the rate for the job, namely, night work alone. The battle, therefore, may have been concentrated on the issue of like work under section 1(2)(a) and 1(4) of the Act and not so much on section 1(3). I cannot accept this; it is clear from their decision that the tribunal in Thomas's case went into the question under section 1(3) in great detail. Furthermore, the 14 claimants had to succeed on both issues; it was no good their succeeding on like work if they failed on section 1(3).

In my judgment, the industrial tribunal correctly exercised their discretion to strike out this claim under rule 12(2)(e) and I can find no ground for interfering with their decision.

FARQUHARSON L.J.

I agree.

LORD DONALDSON OF LYMINGTON M.R.

[1990] 2 Q.B. 338 [1990] 2 W.L.R. 1437 [1990] 2 All E.R. 981 [1990] I.C.R. 485 [1990] I.R.L.R. 283 [1990] 2 Q.B. 338 [1990] 2 W.L.R. 1437 [1990] 2 All E.R. 981 [1990] I.C.R. 485 [1990] I.R.L.R. 283
(Cite as: [1990] 2 Q.B. 338)

I also agree.Appeal dismissed with costs. (D. E. C. P.)

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1. Industrial Tribunals (Rules of Procedure) Regulations 1980, Sch. 1 r. 12(2)(e): see post, p. 347C-D.

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EXHIBIT 30

[1958] A.C. 95 [1957] 3 W.L.R. 830 [1957] 3 All E.R. 559 (1957) 101 S.J. 882 [1958] A.C. 95 [1957] 3 W.L.R. 830 [1957] 3 All E.R. 559 (1957) 101 S.J. 882
(Cite as: [1958] A.C. 95)

[1957] 3 W.L.R. 830

***95 Nana Ofori Atta II. Omanhene of Akyem Abuakwa and Another Appellants: v Nana Abu Bonsra II AS Adansehene and AS representing the Stool of Adanse and Another Respondents.**

Judicial Committee

Lord Tucker, Lord Denning, and RT. Hon. L. M. D. de Silva.

1957 Nov. 6.

Estoppel—Conduct, by—Standing by judicial proceedings—Rival claims to stool lands—Previous suits between parties' subordinates in same interest—Knowingly standing by—Estopped by conduct from litigating same issue—West Africa (Gold Coast).

West Africa (Gold Coast).

On a claim by the appellant stool against the neighbouring respondent stool to certain lands in Ghana the respondent alleged that in proceedings 16 years previously a subordinate stool of the appellant had failed to establish title to the lands now in dispute as against a subordinate stool of the respondent, and that the appellant, having knowingly stood by while the title was fought out by its subordinate in the same interest in the earlier suit - in which the appellant and respondent were not parties - was estopped by conduct from litigating the question of title again against the respondent:-

that the principle stated by Lord Penzance in Wytcherley v. Andrews (1871) L.R. 2 P. & D. 327 at p. 328 that "if a person, knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result, and not be allowed to reopen the case," was not limited to wills and representative actions, and while it might have been found appropriate in England only in special conditions, there was no reason why in West Africa it should not be applied to conditions which were found appropriate for it there. The principle was, in the absence of technical legal reasons to the contrary, applicable in the present case, and accordingly the appellant stool, having knowingly stood by while its subordinate fought the question of title in the same interest, was estopped from litigating the matter afresh.Akwei v. Cofie (1952) 14 W.A.C.A. 143 considered.Judgment of the West African Court of Appeal (1952) 14 W.A.C.A. 149 affirmed.

APPEAL (No. 43 of 1953) from a judgment of the West African Court of Appeal (Gold Coast Session) (July 9, 1952) affirming a***96** judgment of the Supreme Court of the Gold Coast (November 12, 1949) dismissing a claim by the appellants for a declaration of title to land and an injunction.

The following facts are taken from the judgment of the Judicial Committee: This case was a dispute about the title to certain lands in Ghana called the Nsuakwate or Anungya lands (hereinafter called "the lands in dispute"). The principal parties who appeared before the Board to claim title to them were, on the one hand, the plaintiff, the Stool of Akyem Abuakwa, which was represented by the Omanhene or head chief **Nana Ofori** Atta II (hereinafter called "Akim Abuakwa"), and, on the other hand, the defendant, the Stool of Adanse, which was represented by the Adansehene or head chief **Nana Abu** Bonsra II (hereinafter called "Adansi").

The plaintiff Akim Abuakwa was a paramount stool and said that the lands in dispute were under its paramountcy and in particular that they were part of the Muronam lands which were subject to it. The Odikro or sub-chief of Muronam was joined as a co-plaintiff with Akim Abuakwa. (He is hereinafter called "Muronam.")

The defendant Adansi was a neighbouring stool which claimed that the lands in dispute formed part of the Adansi stool but were under the immediate custody of the Stool of Banka, which was represented by the Ohene or Chief Brako Ababio II (hereinafter called "Banka"). Adansi said that Banka was caretaker of the lands in dispute for Adansi. In the Courts of West Africa Banka applied to be joined as co-defendants with Adansi and were joined accordingly, but they were not represented before the Board.

The question in this appeal was whether it was open to Akim Abuakwa and Muronam to litigate in this action the title to the lands in dispute. Adansi said that the title to the lands in dispute was fought out 16 years ago in proceedings between Muronam and Banka. In that earlier case Muronam failed to establish its title to the lands in dispute. The question was whether that finding precluded the paramount stool of Akim Abuakwa from now claiming title against Adansi. Adansi said that Akim Abuakwa was so precluded on one or other of two grounds: (1) estoppel by res judicata on the ground that Muronam was a party to the previous proceedings and Akim Abuakwa was a privy to them; or, alternatively, (2) estoppel by conduct on the ground that the Akim Abuakwa knowingly stood by whilst the title was fought out by their subordinate in the previous proceedings***97** and it would be inequitable to allow them to bring up the question again. Jackson J. upheld the contention of Adansi on the second ground. The West African Court of Appeal (Foster Sutton P., Coussey J.A. and Manyo-Plange J.) upheld the contention of Adansi on both grounds. The result was that the claim of Akim Abuakwa and Muronam had been dismissed. They appealed to Her Majesty in Council.

1957. July 2, 3, 4, 10. *Phineas Quass Q.C.* and *Gilbert Dold* for the appellants. The appellants were not estopped - either by res judicata or by conduct - by the earlier proceedings in 1940 between Muronam and Banka from pursuing the present suit for a declaration of title to the lands in dispute and for consequential relief. If the first appellant had been bound to intervene in the earlier proceedings to protect his interest, then he might have been estopped from litigating the present suit, but there was no reason for him to intervene except later on the basis that his rights had been affected as a result of the decision. The Adansehene was not a party to the 1940 litigation, and in that suit the Odikro of Muronam did not claim under the first appellant. The 1940 litigation did not decide the ownership of the lands in dispute; further, the interest claimed by Muronam in that suit was not identical with that claimed by the appellants in the present action. Kobina Angu v. Cudjoe Attah1 shows that "the former evidence could be looked at in order to explain what was really the subject-matter of the former dispute." Neither the first appellant nor the respondent was a "privy" to any of the parties in the 1940 litigation and there is no estoppel by res judicata on that ground. On estoppel by res judicata, see Halsbury's Laws of England, 3rd ed., vol. 15, p. 196, para. 372; Doe d. Smith and Payne v. Webber2 ; Lazarus-Barlow v. Regent Estates Co. Ltd.3

As to estoppel by conduct - the allegation that the first appellant knowingly stood by while its subordinate Muronam fought the issue of title in the same interest - estoppel by conduct regarding land was not recognized in the Gold Coast until 1952: Akwei v. Cofie.4 English authorities on this aspect of the matter are Gray v. Lewis,Parker v. Lewis,5 Borough v. Whichcote6 ***98** and Mercantile Investment and General Trust Co. v. River Plate Trust, Loan and Agency Co.7 Of the African cases, Yode Kwao v. Kwasi Coker,8 which was relied on by the respondent in the court below, does not justify the conclusion that the first appellant was estopped. Appoh Ababio v. Doku Kanga,9 if it is right, completely supports the appellants case here. Manyo-Plange J., in his judgment in the court below, said 10 : "I think the case of In re Lart, Wilkinson v. Blades11 supports the view that the first plaintiff-appellant is estopped by his conduct. I see practically no distinction between that case and the present except that, in Wilkinson v. Blades, Wilkinson ac-

tually took a benefit under the judgment; but that in my view only amounted to further evidence of acquiescence." It is submitted that the judge was in error when he said that the only distinction was that Wilkinson actually took a benefit under the judgment. That case related to the interpretation of a will, and the facts differ widely from those in the present case. The first appellant was not estopped by conduct by not intervening in the 1940 litigation.

Ralph Millner for the respondent. There are two questions: first, res judicata, i.e., estoppel by reason of the decision in the previous suit of 1940; second, estoppel by conduct - the standing by point. Res judicata is a purely English doctrine, but here it has to be applied to facts and circumstances very different from those in relation to which it has been developed in England. There being no pleadings in the suit of 1940, to ascertain what was then decided one is entitled to look at the whole record, including the evidence (Kobina Angu's case 12 , and there was plainly a head-on clash, each side claiming to own the land as against the other. [Reference was made to In re May,13 Marginson v. Blackburn Borough Council14 and Halsbury's Laws of England, 3rd ed., vol. 15, p. 184, para. 357.] The evidence should be looked at for the purpose of deciding who were privies. There was nothing to indicate any difference between the title of Muronam and of the appellant stool. "Privies" are persons claiming "through" parties: Spencer v. Williams15 - the word "under" in Gray v. Lewis16 is not necessarily quite accurate.***99** [Coke on Littleton, p. 352a, was referred to.] None of the English cases resemble the present case on the facts. In accordance with the English authorities the first appellant was a privy of Muronam in the 1940 proceedings, and the first respondent was a privy of Banka, and the issue of title is therefore res judicata as between the appellants and the respondent here.

The standing by point has a certain affinity to res judicata. The clear principle emerges from the English authorities, which has been applied in the African setting, that if a person whose interest may be affected by litigation, and who has an opportunity to intervene, nevertheless stands by and allows the litigation to proceed and the issue to be fought by another in the same interest, he cannot thereafter be allowed himself to litigate the same matter. In support of that proposition are In re Lart, Wilkinson v. Blades,17 Wytcherley v. Andrews,18 Farquharson v. Seton19 and Roden v. London Small Arms Co. Ltd.20 The following cases show how the courts in West Africa have dealt with this matter: Yode Kwao v. Kwasi Coker,21 in which standing by was treated as an estoppel; Appoh Ababio v. Doku Kanga22 ; Odua Esiaka v. Vincent Obiasogwu23 ; **Nana** Kwami Nkyi XI v. Sir Isibu Darku IX 24 ; the last cited case is close to the present case. The first appellant is estopped by conduct from litigating the same issue of title. [Reference was also made to Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd.25 ; Magrath v. Reichel 26 ; Amodu Tijani v. Secretary, Southern Nigeria, 27 and Ohene Sintim v. C. M. Apeatu.28]

Quass Q.C. in reply. The principle stated in Wytcherley's case 29 with regard to the effect of standing by should be confined to wills and representative actions. [Ruttmern v. Ruttmern,30 Yode Kwao's case 31 and Appoh Ababio v. Doku Kanga 32 were also referred to.]

Nov. 6. The judgment of their Lordships was delivered by LORD DENNING,

who stated the facts set out above and continued: ***100** Everything depends on what took place in the previous proceedings which were heard in the Chief Commissioner's Court of Ashanti in the year 1940. Their Lordships have found some difficulty in ascertaining the issues in those proceedings because there were no pleadings. The Rules of Court say that suits shall ordinarily be heard and determined in a summary way without pleadings: and this suit was so heard and determined. But it is permissible to look at the opening statements by counsel and at the evidence as well as the judgment. In the case of Kobina Angu v. Cudjoe Attah in 1916 33 Sir Arthur

Channell, delivering the judgment of the Board, said that "the former evidence could be looked at in order to explain what was really the subject-matter of the former dispute."

Looking at these materials, it becomes clear that on May 6, 1940, Muronam sued Banka in the Chief Commissioner's Court claiming a declaration of title to the self-same lands as are now in dispute, £100 damages for trespass, and an injunction to restrain Banka from entering the lands. In the course of the evidence both sides claimed to be the first settlers and both claimed to have exercised acts of ownership over the lands in dispute. A good deal was said about a decision of Captain Soden in 1907, when he, at talks with some of the chiefs, laid down the boundaries of the Banka lands. That was an executive decision only, not a judicial decision; but, after it was given, Banka acknowledged that the lands in dispute belonged to Adansi and said that Banka was caretaker of them for Adansi.

On November 19, 1940, the court gave its decision. The Acting Assistant Chief Commissioner dismissed Muronam's claim to the land, but he relied much on the executive decision of Captain Soden. He said: "I find there is no evidence on the plaintiff's side to justify the grant of the declaration of title which he seeks, but, on the other hand, that the question of the ownership of the land has already been decided by validated executive decision. There will therefore be judgment for the defendants."

Muronam appealed from that decision to the West African Court of Appeal, who, on May 29, 1941, dismissed the appeal. They saw no reason to differ from the decision in the court below that "there is no evidence on the plaintiff's side to justify the grant of the title which he seeks." But they thought it necessary to add that they did not subscribe to the other finding that***101** the matter had been decided by the executive decision. Muronam failed, therefore, on the ground that it had not made out its title to the lands in dispute.

Akim Abuakwa and Adansi were not parties to those proceedings, but they undoubtedly knew of them and of the disputes that had been going on for years before. There is ample material to show that whenever Muronam or Banka complained of a trespass, each reported it to his superior, Akim Abuakwa or Adansi, as the case might be, who then took the matter up on behalf of his subordinate. Thus, the secretary to Akim Abuakwa gave evidence on behalf of Muronam and put in a series of letters in 1935 which showed that the Adansi had purported to grant a concession over the land to a mining company, that white men had gone onto the land, whereupon Muronam reported to Akim Abuakwa, who took up the matter with the mining company saying that "all questions affecting Muronam land have got to be settled by him" and that the "Adansi has no right over this land." On the other hand, the linguist representing the Adansi gave evidence on behalf of Banka. He said that Banka was caretaker for Adansi and added that "if anyone trespass on the land the Banka is to report to Adansehene who, if he chooses, will take action."

Under the Rules of Court it would have been open to Akim Abuakwa or Adansi to apply to be joined as parties in those earlier proceedings, but neither of them did so.

Such being the facts, there is, as between Muronam and Banka, a clear estoppel by res judicata because they were parties; but their Lordships have to say whether there is an estoppel between Akim Abuakwa and Adansi, who were not parties.

The general rule of law undoubtedly is that no person is to be adversely affected by a judgment in an action to which he was not a party, because of the injustice of deciding an issue against him in his absence. But this general rule admits of two exceptions: one is that a person who is in privity with the parties, a "privy" as he is called, is bound equally with the parties, in which case he is estopped by res judicata: the other is that a person may have so acted as to preclude himself from challenging the judgment, in which case he is estopped by his con-

duct. Their Lordships propose in this case to consider first estoppel by conduct.

English law recognizes that the conduct of a person may be such that he is estopped from litigating the issue all over again. This conduct sometimes consists of active participation in the***102** previous proceedings, as, for instance, when a tenant is sued for trespassing on his neighbour's land and he defends it on the strength of the landlord's title and does so by the direction and authority of the landlord. If the tenant loses the action, the landlord would not be allowed to litigate the title all over again by bringing an action in his own name. On other occasions the conduct consists of taking an actual benefit from the judgment in the previous proceedings, such as happened in In re Lart, Wilkinson v. Blades.34 Those instances do not however cover this case, which is not one of active participation in the previous proceedings or actual benefit from them, but of standing by and watching them fought out or at most giving evidence in support of one side or the other. In order to determine this question the West African Court of Appeal quoted from a principle stated by Lord Penzance in Wytcherley v. Andrews.35 The full passage is in these words: "There is a practice in this court, by which any person having an interest may make himself a party to the suit by intervening; and it was because of the existence of that practice that the judges of the Prerogative Court held, that if a person, knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result, and not be allowed to re-open the case. That principle is founded on justice and common sense, and is acted upon in courts of equity, where, if the persons interested are too numerous to be all made parties to the suit, one or two of the class are allowed to represent them; and if it appears to the court that everything has been done bona fide in the interests of the parties seeking to disturb the arrangement, it will not allow the matter to be reopened."

Mr. Phineas Quass argued before their Lordships that the principle stated by Lord Penzance was confined to wills and representative actions and has never been extended further. No decision, however, was cited to their Lordships which confines the principle to wills and representative actions. Their attention was indeed drawn to one case where a like principle was applied to mortgages in somewhat special circumstances: see Farquhar-son v. Seton.36 But assuming, without deciding, that the English decisions have hitherto been so confined, their Lordships would point out that there is nothing in the principle itself which compels it to be limited to wills and representative actions. The principle, as Lord Penzance said, is founded on justice and***103** common sense. It may have been found appropriate in England only in special conditions. But there is no reason why in West Africa it should not be applied to conditions which are found appropriate for it there, but which have no parallel in England. It seems to be the recognized thing in this part of West Africa for all persons with the same interest in a land dispute to range themselves on one side or the other. Sometimes they apply to be joined as parties. On other occasions they regard the named party as their champion and support him by giving evidence. If he wins, they reap the fruits of victory. If he fails, they fall with him and must take the consequences. It is now 25 years ago that the Chief Justice drew attention to this way of looking at litigation: see Yode Kwao v. Kwasi Coker,37 Appoh Ababio v. Doku Kanga.38 It has led the Court of Appeal in West Africa to look for a principle to meet the situation and they have found it in the principle stated by Lord Penzance: see Akwei v. Cofie.39

In the present case the judges have applied the principle and given reasons which show that it is salutary. In the Supreme Court Jackson J. said: "The principle is clear and well-established and to hold otherwise would only tend to encourage perjury and to seek to bolster up a case by later adducing evidence which, had it been in existence, would or should have been adduced at the first trial." In the

Court of Appeal Manyo-Plange J. said 40 : "... what should the Omanhene of Akim Abuakwa have done in the circumstances? In my view he should have applied to be joined as co-plaintiff. He took no such course. Being cognizant of the proceedings, he was 'content to stand by and see his battle fought by somebody else in the same interest': the interest is the same, because the matter to be determined in the present action was the same as was determined in the former action, namely, Muronam's title to the land in dispute, without which Akim Abuakwa cannot establish an interest in the land. Having stood by and seen the battle fought to a finish to the disadvantage of Muronam, he goes to sleep for nearly five years, then suddenly wakes up and tries to reopen the question of Muronam's title to the land in dispute which had been determined in the former action."

Their Lordship are of opinion that the principle stated by Lord Penzance should be applied in this case unless technical***104** legal reasons exist which prevent its application. Their Lordships are unable to find any such reasons and are therefore of opinion that the principle was correctly applied.

This conclusion renders it unnecessary to decide whether Akim Abuakwa was a "privy" of Muronam so as to be estopped on that ground also, as was held by the West African Court of Appeal.

Their Lordships ought to notice one further argument. It was said that both Muronam and Banka were subordinate stools under the one paramount stool of Akim Abuakwa and that therefore there was no call on Akim Abuakwa to intervene, because its title would not be affected. The answer is, however, that whilst originally they may both have been subject to Akim Abuakwa, since 1907 Banka has never admitted that it was subordinate to Akim Abuakwa. In the proceedings in 1940 Banka said that the land belonged to Adansi and that Banka was only caretaker for Adansi. When Adansi's title was thus asserted, it was, as the Court of Appeal said, "clearly the duty of Akim Abuakwa to intervene" if it had an interest in the land. Akim Abuakwa did not do so and cannot now be allowed to fight the battle all over again.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the costs.(C. C.)

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1. Judgments of the Judicial Committee on appeal from the Gold Coast, 1874-1928, 43, 48.

2. (1834) 1 Ad. & E. 119.

3. [1949] 2 K.B. 465, 496; 65 T.L.R. 412; [1949] 2 All E.R. 118.

4. (1952) 14 W.A.C.A. 143.

5. (1873) L.R. 8 Ch. 1035, 1059.

6. (1732) 3 Bro.P.C. 595.

7. [1894] 1 Ch. 578; 10 T.L.R. 184.

8. (1931) 1 W.A.C.A. 162.

9. (1932) 1 W.A.C.A. 253.

10. (1952) 14 W.A.C.A. 149, 152.

11. [1896] 2 Ch. 788.

12. Judgments of the Judicial Committee on appeal from the Gold Coast, 1874-1928, 43, 48.

13. (1885) 28 Ch.D. 516; 1 T.L.R. 220.

14. [1939] 2 K.B. 426; 55 T.L.R. 389; [1939] 1 All E.R. 273.

15. (1871) L.R. 2 P. & D. 230.

16. L.R. 8 Ch. 1035.

17. [1896] 2 Ch. 788.

18. L.R. 2 P. & D. 327.

19. (1828) 5 Russ. 45.

20. (1876) 46 L.J.Q.B. 213.

21. 1 W.A.C.A. 162.

22. 1 W.A.C.A. 253.

23. (1952) 14 W.A.C.A. 178.

24. (1954) 14 W.A.C.A. 438.

25. [1955] 1 W.L.R. 761; [1955] 2 All E.R. 657.

26. (1887) 57 L.T. 850; 4 T.L.R. 296; (1889) 14 App.Cas. 665; 5 T.L.R. 552.

27. [1921] 2 A.C. 399, 402.

28. (1936) 2 W.A.C.A. 201.

29. L.R. 2 P. & D. 327.

30. (1937) 3 W.A.C.A. 178.

31. 1 W.A.C.A. 162.

32. 1 W.A.C.A. 253.

33. Judgments of the Judicial Committee on appeal from the Gold Coast, 1874-1928, 43, 48.

34. [1896] 2 Ch. 788.

35. (1871) L.R. 2 P. & D. 327, 328.

36. (1828) 5 Russ. 45.

37. (1931) 1 W.A.C.A. 162, 167.

38. (1932) 1 W.A.C.A. 253, 255.

39. (1952) 14 W.A.C.A. 143.

40. (1952) 14 W.A.C.A. 152.

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EXHIBIT 31

[1894 L. 1555.]

***788 In Re Lart v**

Chancery Division

J. Chitty

1896 April 16. July 8

Practice—Administration—Res Judicata—Person not a Party or bound by Judgment—Cognizance of former Proceedings—Accepting Benefit of Judgment—Estoppel by Conduct—Absent Parties—Class Representation—Rules of Supreme Court, 1883, Order XVI., rr. 11, 32.

A person not a party to an action or summons, nor technically bound by the judgment, but fully cognizant of the proceedings, who stands by and deliberately takes the benefit of a decision on the construction of a will under which a particular fund is distributed, is estopped by his conduct, where the circumstances are identical, from reopening any of the questions covered by the former judgment by means of a fresh action or summons relating to another fund under the same will, though claiming in respect of a different interest.

An order appointing some one to represent a class, such as next of kin, is not binding on one of the next of kin who has a distinct and independent interest in another capacity.

ADJOURNED SUMMONS.

This was an application to determine the construction of the will of one John **Lart**, who died in 1853; but the only question argued was whether or not the applicant was already bound by a previous judgment of Chitty J., given in 1883, under which part of the fund settled by this will had been distributed.

The facts, so far as material, were as follows. The testator gave his property to trustees upon trust for investment and out of the proceeds to pay to his daughters Emma, Alice, and Ellen the several annual sums of 150l.; and to his daughters Mrs. Bezir, Marianne, Fanny, and Charlotte the several annual sums of 250l.; and declared that in case of the marriage of any of his said daughters he desired that a sum of money should be invested in the names of his trustees, the interest of which should amount to the said annual sums of 150l. and 250l. as the case might be, and that in case any of his said daughters died leaving a child or children, the principal should be divided equally share and share alike; and if only one, then all to that one child; and the testator declared that if any of his daughters ***789** died not having been married, then in every case the principal should be divided among his surviving children, except in the case of his daughter Mrs. Bezir, who was given a power of disposition by will over the principal set apart to provide her annuity of 250l. The contingency of the death of a married daughter without having or leaving children was not expressly provided for; neither was there any gift of the testator's residuary estate.

The testator left his said seven daughters surviving him.

The testator's daughter Fanny died in 1869, and his daughter Charlotte in 1877, without having been married. The daughter Emma married D. Dewar and had children; the daughter Ellen married the plaintiff Wilkinson; and the daughter Marianne married W. R. Stanton, and died in 1881 without ever having had children.

On the death of Mrs. Stanton an action—In re **Lart**, **Blades** v. Bezir [1881 L. 3189]—was commenced for determining the question of construction on the will as to the destination of the share of the testator's estate set apart to provide for the annuity of 250l. given to Mrs. Stanton. In this action W. **Blades**, the trustee of the will, was plaintiff, and

Mrs. Bezir's husband, Mr. Stanton, Alice **Lart**, and Mrs. J. **Lart**, the widow of the testator's eldest son, were defendants. Alice **Lart** was subsequently appointed to represent the testator's next of kin for the purpose of obtaining the judgment of the Court on the questions arising on the construction of the will or otherwise; and Mrs. J. **Lart** was similarly appointed to represent the estate of Mrs. Stanton. At the trial of the action the fund was claimed—first, by the testator's next of kin on the ground that there was an intestacy; secondly, by the defendant Bezir on behalf of his wife, as being divisible amongst the other surviving children of the testator, in the same manner as was provided by his will in the event of any of his daughters dying without having been married; and, thirdly, by Mrs. J. Lart, as representing Mrs. Stanton's legal personal representative, on the ground that Mrs. Stanton was entitled to the whole of the fund set apart to meet her annuity.

In March, 1883, Chitty J. decided that, according to the true ***790** construction of the will and in the events which had happened, so much of a sum of 48,333l. 6s. 8d. Consols (the fund invested to answer the annuities) as was required to provide for the annuity of 250l. given to Mrs. Stanton was divisible equally among the children of the testator who survived her—namely, Mrs. Bezir, Alice Lart, Ellen Wilkinson (the plaintiff's wife), and Emma Dewar. The fund set apart to provide Mrs. Stanton's annuity was divided in accordance with this decision; and in October, 1883, a sum of 2000l. or thereabouts was paid by cheque by the trustees to Mr. and Mrs. Wilkinson on their joint receipt as her one-fourth share in this fund.

In January, 1894, Ellen Wilkinson died without ever having had children; and thereupon the present summons was taken out by the plaintiff, as the legal personal representative of his wife, against the trustees of the will, Mrs. Dewar and her children as defendants, for the determination of the question who, upon the true construction of the testator's will and in the events which had happened, became entitled on the death of Ellen Wilkinson to the capital of the fund set apart to answer her annuity. Mrs. J. **Lart** was subsequently appointed to represent the testator's next of kin.

There was evidence that the plaintiff, who acted in all business matters for his wife, was fully aware of the action of **Blades** v. Bezir, and of all the proceedings therein both before and after judgment; and a letter was produced from the plaintiff to Mrs. J. **Lart**, written in March, 1883, immediately after the decision of Chitty J., in which the plaintiff expressed his satisfaction at receiving 2000l. then, instead of a possibly larger sum at a future time, and deprecated an appeal, which some of the parties had suggested, or any further litigation.

Ingle Joyce , for the plaintiff. It is admitted that neither the plaintiff nor his deceased wife were parties to the former action, or served with notice, or otherwise technically bound by the proceedings. The representation order was only binding on Mrs. Wilkinson as one of the testator's next of kin, and did not bind her as one of the surviving children; the plaintiff, therefore, has a right to reopen the question of construction. ***791** Probably the Court would follow its former decision, but then there could be an appeal. If necessary, the plaintiff is now willing to refund what he had received from the trustees under the former decision.

Byrne, Q.C. , and *W. A. Peck*, for the defendants. The plaintiff was fully aware of all the proceedings in the former action, and with full knowledge of all the circumstances he deliberately took the benefit of the decision, and is estopped by his conduct from reopening the question of construction. The circumstances of this case are identical with those in Blades v. Bezir, and plaintiff is bound by the result of the decision in that case; had he been dissatisfied, he could have applied to be made a defendant, and could have appealed; but, as appears from his letter, he was satisfied; he has been content to see his battle fought by somebody else in the same interest, and he is bound by the result: Young v. Holloway1 ; Wytcherley v. Andrews . 2 [Duchess of Kingston's Case3 , Commissioners of Sewers of

City of London v. Gellatly4 , Watson v. Cave5 , and May v. Newton6 were also referred to.]

Munns, for the trustees of the will.

Ingle Joyce , in reply. Even if the plaintiff had been a party he would not have been bound now, because the present application relates to a different fund, and the claim is made in respect of a different interest.

CHITTY J.

The plaintiff in this action is the husband and legal personal representative of Mrs. Wilkinson, who recently died. The question raised is one of construction on the will of John Lart, who died many years ago. A question on the construction of this will came before the Court in March, 1883, when Mrs. Wilkinson was living, and upon that occasion a certain construction was put upon the will with reference to a trust fund in which Mrs. Stanton had the first life interest. Mrs. Stanton, as well as Mrs. Wilkinson, were daughters of the testator. Counsel for Mrs. Wilkinson has told me that the ***792** will was a difficult one to construe—in fact, he termed it an unintelligible will; but the Court, having to deal with wills of this class, did its best, and came to some conclusion as to the meaning of the testator. The decision turned on Mrs. Stanton's fund. The testator had provided several funds for his daughters, and the question which arose on Mrs. Stanton's death without issue was, What became of the capital of the fund of which she was tenant for life? There were many possible constructions; the Court in the result adopted this—that that fund passed to the then surviving children of the testator. Mr. Wilkinson now says that that decision is erroneous. Counsel for Mr. Wilkinson declined to reargue before me the question which I then decided, and I think rightly, because the case was thoroughly discussed at the time.

Now, Mrs. Wilkinson was not a party to the action, nor was her husband; but they were both aware of the suit and of its nature, and they were aware of the order when made, and Mr. Wilkinson, one of whose letters is before me, knew that some of the persons who claimed that there was an intestacy were disappointed with the decision, and that there was a question of appealing. Mr. Wilkinson acted for his wife, as he says in his affidavit, she leaving the matter entirely to him, and Mr. Wilkinson by the letter took a decided part in regard to the question of appeal, and dissuaded others who were parties to the action from appealing. He knew the nature of the case; he knew that it had been represented, at any rate by a solicitor, that some of the counsel considered that an appeal would succeed, and yet he took the part against an appeal that I have already stated. Then comes, in these circumstances, the division of that particular fund, and Mr. and Mrs. Wilkinson received the sum of 2000l. or thereabouts of Mrs. Wilkinson's share, as one of the surviving children of the testator, in Mrs. Stanton's fund.

Consequently he was cognizant of the proceedings before judgment; he was cognizant of the judgment itself, and with full knowledge of the circumstances he deliberately took the benefit of the order. Now, the question which he proposes to raise by the present summons is exactly similar. Mrs. ***793** Wilkinson having died without issue, her fund becomes distributable just as Mrs. Stanton's did, and Mr. Ingle Joyce, who has argued the case with his usual ability, does not for one moment suggest that there is any distinction between the destination of the Stanton fund and the Wilkinson fund. Now, it appears to me that Mr. Wilkinson has deliberately taken the benefit of that judgment; on this summons he did not even offer to restore (and there was no separate use in his wife) what he received from the trustees under the decision—I say what he received: it was paid on their joint receipt, but, there being no separate use, that was a reduction into possession by Mr. Wilkinson himself. At the Bar, however, his counsel has very properly offered to refund; but, as far as I am concerned, that offer becomes immaterial, because Mr. Ingle Joyce admits that there is no question that I should have to follow (according to

the usual practice of the Court) the decision I arrived at on a former occasion. And to this I add, that my attention has not been called to any part of the will, and that all I know about the will is just what I have stated.

Now, Mrs. Wilkinson and her husband, not having been parties to that action, were not bound, as a person who is a party is bound, by the result of the action. There was apparently some oversight on the part of counsel for the plaintiff, in not making Mrs. Wilkinson a party, and there was no representation order that covered her case. It was suggested before me on the present occasion that she was one of the next of kin, and that there was an order appointing a party to the action to represent the next of kin; but I have expressed my opinion during the argument, to which I adhere in this judgment, that an order appointing a person to represent a class, such as the next of kin, does not affect one of the next of kin who has a distinct and independent right, as Mrs. Wilkinson had, as one of the surviving children of the testator. I have been asked by Mr. Wilkinson's counsel what Mr. and Mrs. Wilkinson could have done in the circumstances. Could they have rejected the money? They certainly could have declined to take it; but Mr. Wilkinson was pleased to take it knowing of ***794** this possible case which has existed, and preferring to get the 2000l. down rather than wait for the event which has happened of his wife dying without issue, in which case his claim would be, as it now is, for a considerably larger sum. Mr. Wilkinson—I will speak of the husband alone to avoid useless repetition—could, the day after that judgment, if he had been dissatisfied with it, have brought his own action, seeing that he was not a party, and asked the Court to put a different construction on the will; and, assuming that the same judge or another judge would have followed the first decision as a precedent, Mr. Wilkinson could then have brought his appeal practically against the first decision. That is one course he could have adopted. Another is this: that pending the proceedings, had he thought fit, he could have applied to the Court under Order XVI., r. 11, which was then in force, and asked that he should be added as defendant, and had he done so he would have been made a defendant; so that there were two courses which he could have adopted for the purpose of bringing the case before the Court of Appeal within a reasonable time after the first decision.

Now, it is plain that Mr. Wilkinson has done this: he has, in the language of Lord Penzance in Wytcherley v. Andrews[7] , “knowing what was passing,” been “content to stand by and see his battle fought by somebody else in the same interest”; because the point that Mr. Wilkinson now desires to raise was raised on the occasion of the former decision. In the Probate Division, as is shewn by Young v. Holloway[8] and other earlier authorities, a party, where a will is in question, has a right to intervene, and if he does not intervene, he is primâ facie bound by the result of the litigation; and the reasoning upon which that practice has been established is that which is disclosed by the passage from which I cited an extract. He has power to intervene; he remains a spectator and he lets others fight his battles. In that case the Probate Court holds that he is bound, and Lord Penzance in Wytcherley v. Andrews[9] referred to the practice in the Chancery Division ***795** of representative actions in support, if support were wanted, of the practice in the Probate Court. The point, however, that I make on this occasion is, not that there was any representation order binding Mr. Wilkinson; on the contrary, I think there was not; and when Lord Penzance made the reference to the practice in this Division the rule to which I have referred, which was introduced in 1875, was not in existence. Lord Penzance's decision in Wytcherley v. Andrews[10] was in 1871; but the analogy between the practice in that Court and the practice in this is now the stronger, because any one who is interested in an action can now come forward and ask to be made a party. As I have already stated, if Mr. Wilkinson had come forward there can be no question that the Court would have acceded to his request and made him a defendant.

I refer—though not for the purpose of founding any decision on it—to a case which is somewhat analogous at common law. Of course parties to a judgment are bound, but persons claiming under them are also bound; and that is founded on the principle that "Qui sentit commodum sentire debet et onus." Mr. Wilkinson has taken advantage of the former trial; and though Mr. Ingle Joyce is quite right, that this is not the same fund, and that according to the strictness of common law principles in reference to judgments the analogy would not be perfect, yet it appears to me that dealing with this, which is an equitable law, that analogy does afford some reasonable ground for saying that Mr. Wilkinson in the circumstances is bound. Now, I have not said he is bound by the judgment—I think he was not; but by his conduct after the judgment and under the judgment: knowing all the circumstances and deliberately taking the benefit of it, knowing that in a certain event that judgment might prove adverse to his material interests, he stood by, and by taking the money has acquiesced if ever a man could acquiesce.

In his reply, Mr. Ingle Joyce took up a still higher position, and said that supposing he had been a party, Mr. Wilkinson would not have been bound, because the decision was not on the same fund as that which is now in question, and I listened ***796** with admiration to an argument with regard to precedent. A large portion of our law is founded on precedent. Judges at the present time find themselves bound (sometimes they somewhat object to find themselves bound) by a series of decisions. I agree that there is a liberty which a judge has at the present time, and I would even on the present occasion have listened to an argument from Mr. Ingle Joyce or any other counsel, if it could be shewn that there was something in the circumstances on which that former decision was obtained which would make it just and equitable that it should be now revised; and though I have heard some very eloquent remarks from Mr. Ingle Joyce on that topic, nothing was in fact pointed out to justify that introduction of it. These Courts are bound by precedent. I am told that is a figure of speech: I think it is not a figure of speech. At the same time, the extent to which the Court is bound by precedent is always an open question, and one which the Court will willingly consider, and which it is the duty of the Court to consider.

The result is that though Mr. Wilkinson is not technically bound by the judgment, yet, having regard to his conduct, his knowledge, and the circumstances of the case, I think it is contrary to good faith and to equity that he should raise this question at the present time.

I therefore dismiss this summons, not merely on the ground of the former decision as a precedent, but on the ground that personally the applicant is not entitled to maintain it.(W. C. D.)

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1. [1895] P. 87.

2. L. R. 2 P. & D. 327.

3. 2 Sm. L. C., 10th ed. p. 713.

4. 3 Ch. D. 610.

5. 17 Ch. D. 19.

6. 34 Ch. D. 347.

7. L. R. 2 P. & D. 329.

8. [1895] P. 87.

9. L. R. 2 P. & D. 327.

10. L. R. 2 P. & D. 327.

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EXHIBIT 32

WYTCHERLEY *v.* ANDREWS. 1871

Compromise of Testamentary Suit—Persons not Parties to Suit, although cognizant of it, not bound by Compromise. *May* 30.

A next of kin, although not cited to see proceedings, and not having intervened, is bound by a decree in a suit in which a will is contested by other next of kin, if he was cognizant of the suit and had an opportunity of intervening. But this rule does not apply to a case where the parties to the suit compromise it, and the decree is founded on the compromise.

The Court having pronounced for a will in consequence of a compromise between the parties contesting it, a next of kin, who was no party to the suit, although cognizant of it, was held not to be barred by the decree from instituting a fresh suit for the revocation of probate.

ON the 21st of June, 1869, the defendant Mrs. Andrews, then Mrs. Worth, obtained probate in common form of the will of Mary Ann Osborn, as the sole executrix therein named. She was afterwards cited to bring in the probate by Mrs. Meyrick, one of the next of kin; and having brought it in she filed a declaration propounding the will. Mrs. Meyrick pleaded undue execution, incapacity, and undue influence. Issue was joined on these pleas, and the cause came on for trial by a special jury on the 16th of March, 1870, when a compromise was effected, and Mrs. Meyrick's opposition was withdrawn on the payment of her costs by Mrs. Andrews, to the amount of 400*l.*, and the Court by consent pronounced for the will. On the 5th of May, 1870, the plaintiff, Mrs. Wytcherley, a sister of Mrs. Meyrick, cited the defendant to bring in the probate, and shew cause why it should not be revoked. The defendant filed an act on petition, alleging that the plaintiff had been privy to the previous suit of *Meyrick* v. *Worth;* that she had an opportunity of appearing in that suit, and contesting the will; that she, as well as Mrs. Meyrick, had given instructions to the solicitor in the suit, and that she had consented to the compromise; and praying that contentious proceedings might be stayed. The plaintiff, in her answer to the act on petition, admitted that she was cognizant of the previous suit, but denied that she was privy to the proceedings, and that she assented to the compromise. Affidavits were filed, the effect of which is stated in the judgment; and the question was argued on the 26th of April, 1871.

1871

WYTCHERLEY v. ANDREWS.

Dr. Deane Q.C., and *Dr. Tristram*, were for the plaintiff.

Dr. Spinks, Q.C., and *Bayford*, were for the defendant.

The cases cited were *Newell* v. *Weeks* (1); *Colvin* v. *Fraser* (2); *Ratcliffe* v. *Barnes*. (3)

LORD PENZANCE. The question in this case is, whether the plaintiff is, or is not, precluded from further proceedings by the decree in the previous suit. The plaintiff is the sister of Mrs. Meyrick, who was a party to the previous suit of *Meyrick* v. *Worth*, in which she contested the will of the deceased. That suit was commenced by Mrs. Meyrick, and was carried on with the knowledge and cognizance of the plaintiff. It is proved by the affidavits that both sisters went to the attorney, but that Mrs. Meyrick took the leading and chief part, and that she alone was a party to the suit. The cause came on for trial, and the affidavit of Mrs. Meyrick states in substance that during the trial her attorney called her out of the court, and said something to her about compromising the suit, but that before she could answer or ask for an explanation, he returned into court, and when she herself followed him thither she found another case was going on, and was told that her suit had been compromised. The compromise was certainly of a suspicious character; it was that the attorney should be paid 400*l.* for his costs, and that the will should be allowed to be proved. The question now is, whether the present plaintiff ought to be bound by those proceedings. It was contended that it was not necessary in the Court of Probate that a person should be a party to the suit in order to be bound by its result; and after looking at the authorities cited, I am bound to say that the proposition is correct. The rule may, perhaps, in some cases operate unjustly; and the question whether it is applicable to any particular case is one of fact, depending on the evidence how far the person whom it is sought to bind by the former proceedings was privy to them. But, on the other hand, it is easy to avoid all doubt, by citing all persons intended to be bound to see proceedings in the first suit. On the other hand, there is a practice in this court, by which any person having an interest may make himself a party to the suit by intervening; and it was

(1) 2 Phillim. 224. (2) 1 Hagg. Eccl. 107.
(3) 2 Sw. & Tr. 486; 31 L. J. (P. M. & A.) 61.

because of the existence of that practice that the judges of the Prerogative Court held, that if a person, knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result, and not be allowed to re-open the case. That principle is founded on justice and common sense, and is acted upon in courts of equity, where, if the persons interested are too numerous to be all made parties to the suit, one or two of the class are allowed to represent them; and if it appears to the Court that everything has been done bonâ fide in the interests of the parties seeking to disturb the arrangement, it will not allow the matter to be re-opened. That has been undoubtedly the rule also in the Prerogative Court, but I do not find that it has ever been applied to cases of compromise. It is one thing to say that a person who stands by and lets another fight his battle, must be bound by the result of the contest; and it is quite another thing to say that, without any notice that there was going to be a compromise, and without any knowledge that the suit was not proceeding to its natural end, he must nevertheless be bound by any agreement which the parties to the suit may choose to enter into. That would be carrying the rule very far indeed. I find no authority for carrying it to that length, and I am not disposed to extend it beyond the limit within which it has been confined in former cases. In the prior suit, if the story of Mrs. Meyrick be true, the compromise was not a fair one, even as far as she was concerned; but setting that aside, and assuming that she is bound by it, I see no reason why the present plaintiff should be bound by it. A bargain only binds those by whom it is made. Persons who are willing to stand by while a contest is going on are bound by the decision of the Court, but they are not compelled to abide by a compromise, when no decision is in fact come to by the Court. I pronounce against the act on petition with costs.

Attorneys for plaintiff: *Fearon, Clabon, & Fearon.*
Proctors for defendant: *Jenner & Dyke.*