

bank at any rate was not the personal account into which he paid this cheque. That is a third element in this case which was not present in the case of *R. v. Keena* (1) and I am satisfied there is ample evidence to show that this £7. 10s. 0d. was received by the accused; that he did receive it in his capacity as servant of, and on behalf of the Freetown City Council; and that he has retained that amount in disobedience of the instructions which he quite properly received under his service agreement. For these reasons I am unable to uphold the submission of counsel for the defence and I hold that there is a case for the accused to answer and that the case must proceed on that basis.

Order accordingly.

GOODING *v.* CAMPBELL (KING, third party)

SUPREME COURT (Graham Paul, C.J.): February 19th, 1941
(Civil Case No. 55/40)

- [1] Civil Procedure—parties—third party procedure—third party may be joined if defendant claims indemnity from him—valid claim to indemnity if plaintiff's successful action would not also defeat claim: A person who is not a party to an action may only be brought in under the third party procedure if the defendant claims to be entitled to contribution from or indemnity against him. The defendant has a claim to such indemnity which would justify bringing in the third party, if the plaintiff's action against him succeeded and did not at the same time defeat the claim against the third party (page 153, line 27—page 154, line 20).
- [2] Equity—notice—purchaser for value with notice of previous transaction subordinated to rights created by previous transaction: Where a vendor contracts to sell property to a purchaser and later purports to sell the same property to a third party who takes with full notice of the prior contract, the third party's rights are subordinated to those of the purchaser. There is in any event, implied in the first contract of sale, an obligation on the part of the vendor to indemnify the purchaser against subsequent dealing with the property to his detriment (page 153, lines 18–22; page 154, lines 16–20).
- [3] Guarantee and Indemnity—indemnity—implied indemnity—contract to sell creates vendor's obligation to indemnify purchaser against subsequent detrimental dealings with property: See [2] above.
- [4] Guarantee and Indemnity—indemnity—enforcement—third party procedure—third party may be joined if defendant claims indemnity from him—valid claim to indemnity if plaintiff's successful action would not also defeat claim: See [1] above.



The plaintiff brought an action against the defendant for possession of certain property, and an account of rents and profits.

Certain premises, owned by the third party, King, were let to the defendant and later sold to him. The contract of sale was evidenced by a receipt for part of the purchase price, the balance to be paid at an agreed future date. The balance was duly paid to King's brother, who acted as his agent, and a receipt in full settlement was given to the defendant with King's full knowledge and approval. Meanwhile, before the balance had been paid but after entering into the initial contract of sale with the defendant, King purported to sell the same premises to the plaintiff, who knew of the previous transaction with the defendant.

The plaintiff brought the present proceedings against the defendant, founding his claim on the conveyance to him. The defendant brought King in as third party to the action under O.XVI, r.47 of the Supreme Court Rules (*cap.* 205). King contended that there was no complete contract of sale with the defendant, and that in any event he had been improperly brought in to the present proceedings. He maintained that in order to support the third party procedure the defendant must have a claim to indemnity and that there was no such claim in this case.

Case referred to:

- (1) *Wynne v. Tempest*, [1897] 1 Ch. 110; (1896), 75 L.T. 624, *dictum* of Chitty, J. applied.

Legislation construed:

Supreme Court Rules (Laws of Sierra Leone, 1925, *cap.* 205), O.XVI, r.47:

"Where a defendant claims to be entitled to contribution or indemnity over against any person not a party to the action, he may by leave of court issue a notice . . . to that effect. . . ."

Lightfoot Boston for the plaintiff;
Tuboku-Metzger for the defendant;
Metzger-Boston for the third party.

GRAHAM PAUL, C.J.:

The plaintiff in this suit claims possession of certain premises at 6 Aitkins Street, Murray Town, together with an account of the rents and profits from the month of June 1939 until judgment.

His claim is based upon a deed of conveyance dated June 27th,

1939 and registered on October 5th, 1939, whereby J.D.D. King conveyed to the plaintiff the premises in question.

5 The defendant was a tenant of the premises, his landlord being the said J. D. D. King. After certain negotiations the defendant, on March 10th, 1939, bought the premises from the said J. D. D. King at a price of £36. 0s. 0d. This contract is evidenced by a receipt dated March 10th, 1939, which shows that on that date £14. 0s. 0d. was paid on account to E. S. King, brother of J. D. D. King, and payment was made in the presence of J. D. D. King, E. S. King being
10 his agent in the transaction. The receipt shows the terms of the sale and expressly provides that the balance of the price (£22) should be payable "on December 31st, 1939, without fail." The terms of that receipt were read and approved at the time by J. D. D. King.

15 The balance of £22 was similarly paid on December 8th, 1939, and a receipt in full settlement was given to the defendant by E. S. King in the presence of his brother who was aware of, and approved, the terms of the receipt.

On March 25th, 1939, that is to say 15 days after he had entered into the contract of sale to the defendant, J. D. D. King entered
20 into another contract with the plaintiff. This was a contract of sale of the same premises at a price of £35. 0s. 0d. which was paid in full by the plaintiff on that date. Subsequently, on June 27th, 1939, the said J. D. D. King executed a conveyance of the premises in question to the plaintiff, and it is that conveyance upon which the
25 plaintiff founds his case.

The defendant, under the Supreme Court Rules (*cap.* 205), took steps to bring in the said J. D. D. King as a third party to the action, and he has been represented by counsel who has taken an active part in the proceedings in this suit. It is clear from the cross-examination of the witnesses by the third party's counsel that the third
30 party's case was that no complete contract of sale had been made with the defendant. After hearing the evidence in the case, counsel for the third party very prudently decided not to put his client into the witness box to substantiate on oath the case which had been
35 adumbrated by the cross-examination.

It is common ground that as between the plaintiff and the defendant the only question is whether the plaintiff was a *bona fide* purchaser for value without notice of the prior completed contract of sale between the third party and the defendant.

40 I have given careful consideration to the evidence on this point. It depends mainly upon the evidence of the plaintiff and the defendant,

and I have no hesitation in accepting the evidence of the defendant as against that of the plaintiff. I am satisfied that the defendant did show the receipt to the plaintiff immediately after he got it, and that he explained to the plaintiff, who understood perfectly well, that the defendant had purchased the property in question, paid £14 down and was to pay a balance of £22 on December 31st, 1939. It was with that knowledge definitely and freshly in his mind that the plaintiff entered into his contract of sale with the same vendor 15 days later. It is clear from the correspondence that between March 10th and 25th, 1939 something happened to make the third party doubtful as to whether the defendant would be in a position to pay the balance of the price, and for that reason the third party made up his mind to try and get out of his binding contract with the defendant in favour of a new contract with the plaintiff. I think there can be little doubt on the evidence that it was the plaintiff who was responsible for creating that doubt in the mind of the third party.

It is quite clear that the plaintiff in these circumstances cannot in equity be allowed to succeed in his claim against the defendant. He may have been a purchaser for full value, but he was a purchaser with full notice and knowledge of the prior completed contract of sale to the defendant. The plaintiff's claim is accordingly dismissed.

Counsel for the third party has not attempted either by evidence or argument to dispute or defend the dishonest behaviour of his client, but he contends that his client has been improperly brought in as a third party in these proceedings.

Third party procedure in this court is regulated by O.XVI, r.47 of the Supreme Court Rules (*cap.* 205), and this procedure can be properly employed only where a defendant claims to be entitled to contribution or indemnity over against the third party. Here there is no question of contribution, and the only question is whether the defendant had a right to indemnity as against the third party. Counsel for the third party has argued that the defendant might be entitled to bring an action for damages for breach of an independent contract, but that that is no claim to indemnity to support third party procedure.

The test to be applied in questions of this kind is clearly stated by Chitty, J. in the case of *Wynne v. Tempest* (1). In that case Chitty, J. said ([1897] 1 Ch. at 114; 75 L.T. at 625):

"It is obvious that this is not a claim to indemnify the defendant against the plaintiff's claim in the action. The right of the

defendant (if it exists) to recover from the surviving partners a sum equal to the lost trust fund is not a right depending on the liability of the defendant in the action: it is an independent right. It may be tested thus: If the plaintiff failed in the action, would the defendant's claim against the third parties be thereby defeated? It is clear that it would not."

Applying that test to the present circumstances it is clear that the result is the opposite of the result of applying the test in the case of *Wynne v. Tempest*. For in the present case if the plaintiff fails in his action the defendant would have no claim for indemnity as against the third party, for the reason that there would be nothing to be indemnified against. If on the other hand the plaintiff succeeds in his claim in this case, there would be a good claim against the third party for indemnity against the result of the third party's action in selling again to the plaintiff what he had already sold to the defendant. It seems to me clear that that obligation to indemnify is implied in equity in the completed contract of sale between the third party and the defendant.

I therefore hold that the third party was properly brought into this case.

The only question remaining is as to costs and it is clear that the defendant is entitled to costs. In all the circumstances of the case the only just order as to costs is that the defendant will be entitled to the costs of the action against the plaintiff and the third party jointly and severally and it is so ordered.

Suit dismissed.