

VUETI VITI

A

v.

ROSS DENNEY LTD.

W. R. CARPENTER & CO. (FIJI) LIMITED

B

v.

ROSS DENNEY LTD.

[COURT OF APPEAL, 1962 (Marsack P., Trainor J.A., Knox-Mawer J.A.), 9th February, 14th June]

C

Civil Jurisdiction

*Execution—set off—cross judgments—no application or order for set off—whether Writ of Fieri Facias by one judgment creditor for full amount of his judgment irregular.*

*Execution—garnishee proceedings—attachment of money owing by Sheriff to judgment debtor—order absolute opposed on ground insurer entitled to the money so owing by subrogation—insurer in no better position than judgment debtor—money not subject to trust in hands of Sheriff.*

D

*Contract—subrogation—payment by insurer—insurer acquires no greater rights by subrogation than those of assured.*

On the 9th February, 1959, C & Co. Ltd. (Vueti Viti) obtained judgment in Civil Action No. 353 of 1958 against R.D. Ltd. for £423-13-7 and costs. On the 24th January, 1961, in Civil Action No. 340 of 1958, R.D. Ltd. obtained judgment against C. & Co. Ltd. (Vueti Viti) for £464-17-0 and costs. At no time was any application made in either action to have one judgment set off against the other. On appeal from the dismissal by the Supreme Court of an application by C. & Co. Ltd. to have a Writ of Fieri Facias issued by R.D. Ltd. in Civil Action No. 340 of 1958 set aside as irregular on the ground that the amount claimed had been offset by the judgment in Civil Action No. 353 of 1958 —

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*Held:* There was nothing on the face of the proceedings to prevent the issue of the Writ of Fieri Facias and there is no principle of law that a judgment in one action must be set off against the judgment in another action between the same parties. Appeal dismissed.

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Per KNOX-MAWER J.A.: There is an inherent discretionary power in the court to order that judgments be set off but no application was made in the present case for the exercise of such power.

C. & Co. Ltd. paid to the Sheriff of Fiji under the compulsion of a Writ of Fieri Facias issued by R. D. Ltd. in Civil Action No. 340 of 1958, the sum of £481-5-1. C. & Co. Ltd. then obtained a Garnishee

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A Order Nisi in relation to this sum as judgment creditor of R. D. Ltd. in Civil Action No. 353 of 1958. The application to make the order absolute was resisted upon the ground that the judgment in Civil Action No. 340 of 1958 was for the sole benefit of the Legal and General Insurance Society allegedly entitled under a right of subrogation. The Chief Justice stated a case to the Court of Appeal asking whether the right of subrogation relied upon could defeat the claim, otherwise valid, of a judgment creditor of R. D. Ltd.

B *Held*: 1. The Legal and General Insurance Society, as insurers, could not under the principle of subrogation acquire any greater rights than those of R. D. Ltd.

C 2. The moneys in the hands of the Sheriff were moneys which he was under a legal obligation to pay to the execution creditor R. D. Ltd.; they were not held by the Sheriff in trust for any other person or company. As a debt due to R. D. Ltd. they were subject to attachment by a judgment creditor of R. D. Ltd.

D Cases referred to: *Yorkshire Insurance Co. Ltd. v. Nisbet Shipping Co. Ltd* [1961] 2 All E.R. 487; *Castellain v. Preston* (1883) 11 Q.B.D. 380; 49 L.T. 29; *Re Miller, Gibb & Co. Ltd.* [1957] 2 All E.R. 266; 101 Sol Jo. 392; *West of England Fire Insurance Co. v. Isaacs* [1897] 1 Q.B. 226; 75 L.T. 564; *Burnand v. Rodocanachi Sons & Co.* (1882) 7 App. Cas. 333; 47 L.T. 371; *Goodfellow v. Gray* [1899] 2 Q.B. 498; 81 L.T. 314; *Randal v. Cockran* (1748) 1 Ves. Sen. 98; 27 E.R. 916; *Re Greer, Napper v. Fanshawe* [1895] 2 Ch. 217; 72 L.T. 865; *Roberts v. Death* (1881) 8 Q.B.D. 319; 46 L.T. 246.

E Appeal from dismissal by the Supreme Court of an application to set aside a Writ of Fieri Facias and also a case stated in related proceedings upon an application to have a Garnishee Order Nisi made absolute. The appeal (No. 16 of 1961) and case stated (No. 4 of 1962) were heard together. In the appeal Marsack P. and Knox-Mawer J.A. delivered separate judgments and Knox-Mawer J.A. also concurred with the judgment of Marsack P. In the case stated Marsack P. delivered a judgment, with which Knox-Mawer J.A. concurred. Trainor J.A. delivered a single judgment covering both appeal and case stated, but as it is severable it has been found convenient to divide it into the two relevant portions for the purpose of reporting. The facts adumbrated in the headnote are taken from the judgments generally.

F A. D. Leys for the appellant and the judgment creditor.

G H. W. Scott for the respondent and the judgment debtor.

The following judgments were delivered: [14th June, 1962]—

In the appeal (No. 16 of 1961).

H MARSACK P.: This is an appeal against the dismissal of an application to set aside a Writ of Fieri Facias issued in Action No. 340 of 1958.

It is not necessary to set out the facts in any great detail. The Court was informed at the hearing of the appeal by both Counsel for the appellants and Counsel for the Respondents that the name "Vueti Viti" is merely a trade name under which the company W. R. Carpenter & Co. (Fiji) Ltd. is trading in certain areas in Fiji, and that the Court may proceed upon the basis that Vueti Viti and W. R. Carpenter & Co. (Fiji) Ltd. are one and the same.

Two separate actions were brought in the Supreme Court between the Appellants and Respondents. In Civil Action No. 353 of 1958 the Appellants obtained judgment against the Respondents on the 9th February, 1959, for £423.13.7 and costs £7.7.0. In Civil Action No. 340 of 1958 the Respondents obtained judgment on the 24th January, 1961, against the Appellants for £464.17.0 with the appropriate costs. There was no consolidation of these two actions. No counter-claim was filed or notice of set-off given. No application was made before the Court below to set off one judgment against the other. Further proceedings were taken by each of the successful plaintiffs upon the separate judgments. The further proceeding which requires consideration by this Court is the issue of a Writ of Fieri Facias by the Respondents against the Appellants in respect of the judgment given in Civil Action No. 340 of 1958. The Appellants applied in the Court below that the Writ should be set aside on the grounds that it was irregular and that the sum in respect of which it was issued was not at the time of the issue of the Writ due and owing under that judgment. The learned Acting Chief Justice held that there was no irregularity and he dismissed the application to set aside the Writ.

At the hearing of the appeal two grounds were argued by Counsel for the Appellants :

- (a) that no money was in fact owing by the Appellants to the Respondents at the time of issue of the Writ;
- (b) that the Judge in the Court below erred in law and in fact in holding that the judgment in Action No. 340 was not offset by the judgment in Action No. 353.

I can find no substance in either of these grounds of appeal.

At the time the Writ was issued there was a judgment in favour of the Respondents against the Appellants in Action No. 340. No steps had been taken or application made to set off the judgment in Action No. 353 against this, and at the time of the issue of the Writ the judgment in Action No. 340 subsisted in full force and effect. The judgment itself is the best evidence that the sum concerned was owing by the Appellants to the Respondents. There was nothing whatever on the face of the proceedings to prevent the issue of a Writ of Fieri Facias. While that judgment stood unchallenged there could, in my opinion, be no irregularity in taking whatever further proceedings were available upon the judgment.

A I am unable to find any authority laying down the principle that the Judge of the Court dealing with the matter, or the Sheriff to whom a Writ of Fieri Facias is directed, must necessarily set off any other judgment there may be between the parties against that in respect of which the Writ is issued. Steps, no doubt, could have been taken by the Appellants in this direction before the action reached the stage of final judgment. But when a judgment has been entered, as it has been in this case in Action No. 340, it is, in my view, quite competent for the successful plaintiff to take such further proceedings on that judgment as may be open to him in the ordinary course of law. There is nothing on the record to prevent the issue of further proceedings upon that judgment, and I can find no obligation on the part of either the Judge or the Sheriff to hold up the issue of those proceedings.

B In the result I would dismiss the appeal. I would order that the Respondents have their costs against the Appellants which I would fix at twenty guineas and disbursements.

C KNOX-MAWER J.A.: I concur with the above judgment and the reasons for it, and agree with the order proposed as to costs.

D TRAINOR J.A.: This is an appeal against a judgment of the acting Chief Justice refusing to make an order to set aside a writ of fieri facias issued at the request of Ross Denney Limited (hereinafter referred to as "the respondents") which W. R. Carpenter and Co. (Fiji) Ltd. (hereinafter called "the appellants") had applied for, and which appeal was heard at the same time as a case stated by the learned acting Chief Justice.

The facts are as follows :—

E On the 6th November, 1958 the respondents claimed from the appellants damages for loss sustained by reason of the negligence of the appellants in carrying electric plant the property of the respondents. On the 24th January, 1961 judgment for £464-17-0, with costs of the action, were awarded to the respondents. This action will hereinafter be referred to as "Civil Action No. 340 of 1958".

F On the 4th December, 1958 the appellants sued the respondents for £423-13-7, a balance due for goods sold and delivered, and obtained judgment for this amount and £7-17-0 costs on the 9th February, 1959. (This action will hereinafter be referred to as "Civil Action No. 353 of 1958".)

G The electric plant, the damage to which gave rise to Civil Action No. 340 of 1958, had been insured with the Legal and General Insurance Society Limited, and the insurers had paid the respondents for their loss before Civil Action No. 340 of 1958 was instituted. Before the insurers paid the respondents the respondents wrote to them on the 14th October, 1958 as follows :

Dear Sir,

H In consideration of the payment of our claim for loss or damage in respect of the undermentioned goods insured under Policy No. 1932, we hereby assign to you all our rights of recovery from third parties.

We undertake also to provide any further information and to take any further steps and assist you in any way you may reasonably require in order that you may obtain such recovery.

Any cost that may necessarily be incurred in so doing are to be borne by you.

Yours faithfully

Ross Denney Limited.

Neither judgment was satisfied and on the 20th July, 1961 the respondents issued a writ of fieri facias and on the 26th July, 1961 the appellants did likewise. The appellants withdrew their writ and on the 28th July, 1961 addressed a summons to the respondents, their solicitors and the Sheriff of Fiji to attend a Judge in Chambers on the 8th August on the hearing of an application for an order "that the writ of Fieri Facias issued in this action" (Civil Action 340 of 1958) "on the 20th July, 1961 directed to the Sheriff of Fiji and all proceedings thereunder may be set aside as irregular or that it should not have issued on the grounds that the sum which is by the endorsement of the said writ directed to be levied was not at the time of the issue of the said writ due and owing on the said judgment having been off-set by the judgment obtained against the plaintiff by W. R. Carpenter and Co. (Fiji) Limited as the plaintiff in Action No. 353 of 1958 in this Honourable Court, and that the costs of this application be paid to the plaintiff".

In Civil Action No. 340 of 1958 no point was ever made that the defendants were styled Vueti Viti and that no such legal entity exists but in an affidavit in support of the summons in Chambers the secretary of the appellants admitted that "The defendant . . . in fact and in law is the said W. R. Carpenter and Co. (Fiji) Ltd". In this affidavit the appellants claimed to be entitled to set off their judgment in Civil Action No. 353 of 1958 against the judgment obtained in Civil Action No. 340 of 1958. The only reply thereto was an affidavit filed by one, Sydney George Gould, the Attorney in Fiji of the Legal and General Assurance Society Limited. In that affidavit he said: "That on the 6th November, 1958 proceedings were instituted in this Honourable Court in Civil Action No. 340 of 1958 by the Legal and General Assurance Society Limited under its right of subrogation with the firm of Ross Denney Limited as Plaintiff and the firm of Vueti Viti as defendant" and claimed that the appellant was not entitled to set off the judgment obtained in Civil Action No. 353 of 1958 against the judgment obtained in Civil Action No. 340 of 1958. He further claimed that if the appellants were entitled to a set-off the respondents would have the benefit of a double indemnity; and also that it would be against the principles of equity and contrary to the doctrine of subrogation if the appellants were entitled to the set off.

It is surprising that this affidavit was admitted. The insurers were strangers to the proceedings and, while entitled to any benefits that might accrue to the respondents by virtue of subrogation, were not entitled to be heard as a party to the action on the motion in Chambers. The position is, as was said by Diplock J. in *Yorkshire Insurance Co. Ltd. v. Nisbet Shipping Co. Ltd.* [1961] 2 All. E.R. 487 at



491: "It is also an implied term of the contract" (contract of assurance) "that if it is within the power of the assured to reduce the amount of the loss for which he had received payment from the insurer, by exercising remedies against third parties, he must do so on being indemnified by the insurer against the costs involved. Since such remedies are personal to the assured they must be exercised in his own name . . . But in the action brought in the name of the assured pursuant to the equitable remedy it is the assured who recovers judgment against the third party and the judgment can be satisfied only by payment to him. When he receives it the insurer can recover from him at common law, as money had and received, such sum as he has overpaid to the assured under the contract of insurance." The learned acting Chief Justice heard the application to set aside the writ of fieri facias and dismissed it, and against his dismissal the appellants have appealed.

The appellants paid over to the Sheriff the amount due by reason of the judgment and on the 28th August, 1961 obtained a garnishee order nisi attaching it.

At the hearing before the acting Chief Justice to make the order absolute an affidavit filed by the respondents was read in which was the following paragraph :

"5. That the said judgment of this Honourable Court in Action No. 340 of 1958 accrues to and is for the sole benefit of the Legal and General Insurance Society Limited under its right of subrogation, the firm of Ross Denney Limited having lent its name solely so that the said Legal and General Insurance Society Limited could indemnify itself in regard to monies paid out to the said Ross Denney Limited by reason of the negligence of W. R. Carpenter and Co. (Fiji) Limited trading as Vueti Viti the Defendant in the said Action No. 340 of 1958 which caused loss to the said Ross Denney Limited." On behalf of the respondents it was urged that the Sheriff held the money in trust for the Legal and General Insurance Society by operation of law. It was further urged by the respondents that unless the money recovered by them was paid to the Insurance Society they the respondents, would receive a double indemnity.

The appellants maintained that the Sheriff was not a trustee, and that no trust could exist in the money until it reached the hands of the respondents, and so it was liable to be attached while in the hands of the Sheriff. At the conclusion of the argument the acting Chief Justice decided to state a case to this Court and did so in the following terms: "In these circumstances can the Insurers, the Legal and General Insurance Society Limited, exercise their rights of subrogation to defeat the claim of a Judgment Creditor of Ross Denney Ltd., who is otherwise entitled to an Order Absolute in respect of the monies now in Court in these proceedings". The appeal against the refusal by the learned acting Chief Justice of an order to set aside the writ of fieri facias and the case stated were, with the consent of both parties, heard together.

The Notice of appeal sought an order that the whole of the judgment "dismissing the said application except that part thereof which held that the writ of Fieri Facias in question was not irregular may be

reversed, and that an order may be made on the said application as sought therein with costs of the application" and for the costs of the appeal or such other order as to the Court of Appeal shall seem just.

The grounds of appeal, summarised, are that the learned acting Chief Justice erred in law and in fact in not holding that the respondents' judgment was set off against that of the appellants and that on the balance there was nothing due to the respondents, therefore the relief sought in the alternative in the Summons should have been granted.

There is no doubt, as Counsel for the appellant concedes, the relief sought in the summons is most unhappily worded. In fact the whole purpose of such an application appears to be misconceived.

I know of no principle of law to the effect that a judgment in one action must be set off against another; or that a writ of fieri facias may not issue on a judgment if there exists another judgment in which the judgment creditor is the judgment debtor in the first judgment, except for the balance after set off. The alternative order sought was for an order "that it" (the writ of fieri facias) "should not have issued on the grounds that the sum which is to be levied was not at the time of the issue of the said writ due and owing on the said judgment obtained against the plaintiff by W. R. Carpenter and Co. (Fiji) Ltd. as the plaintiff in Action No. 353 of 1958 ..." But there is no automatic set-off of two separate and distinct judgments. It is perfectly true that an application may be made to a judge at Chambers for an order permitting so much of a judgment in a case as represents damages to be set off against a judgment in another case in which the parties are the same; but this is a matter in the discretion of the judge. A case in point is *Goodfellow v. Gray* [1899] 2 Q.B. 498.

The alternative claim in the application to the acting Chief Justice was not for an order permitting a set off but for an order that the writ of fieri facias should not have issued on the grounds that the sum stated in the writ was not due and owing because it had been set off. Counsel for the appellants in his argument on the appeal suggested that this Court should consider whether there should be a set off as if there should the result would be that there would be nothing due by the appellant and therefore the writ of fieri facias would be satisfied. With respect to the very able argument presented by Counsel that question is not before this Court any more than it was before the Court below. Had the acting Chief Justice been asked to consider that question he would have exercised his discretion as he thought fit and if he did so adversely to the appellants it would be for this Court on appeal to consider how he had exercised it; but the question was never before him. At no time during the hearing at Chambers, or in this Court, did the appellants seek to amend their application and I respectfully agree with the decision of the learned acting Chief Justice that the writ of Fieri Facias was not irregular, as the appellants now concede, and that the appellants were not entitled to the relief sought. Accordingly I would dismiss this appeal with costs.

KNOX-MAWER J.A.: The facts giving rise to this appeal are as follows. On 6th November, 1958, Ross Denney Ltd. issued a writ against Vueti Viti claiming damages for negligence. This action, No. 340 of 1958, was defended and the defence was filed on 8th November, 1958. No point was taken at that time or subsequently that the defendant should have been styled "W. R. Carpenter & Co. (Fiji) Ltd. trading as Vueti Viti". Since no issue is now raised in this respect I shall in this judgment use the designation "Carpenter's (Vueti Viti)" to describe the limited liability company W. R. Carpenter & Co. (Fiji) Ltd., which company has a registered business name Vueti Viti — irrespective of the particular description elsewhere employed.

On 4th December, 1958, Carpenter's (Vueti Viti) issued a writ against Ross Denney Ltd. claiming £423.13.7 as the balance due for goods sold and delivered. This action, No. 353 of 1958, was not defended and Carpenter's (Vueti Viti) obtained judgment for £423.13.7 and £7.7.0 costs against Ross Denney Ltd. on 9th February, 1959.

Civil Action No. 340 of 1958 was not entered for trial until 3rd July, 1959. The particular facts relating to this action, No. 340 of 1958, were these. Ross Denney Ltd. ordered an electric lighting plant. This plant was received at Savusavu wharf by Carpenter's (Vueti Viti) for delivery to Ross Denney Ltd. During the course of delivery the plant fell into the sea. The plant had been insured with the Legal and General Assurance Society Ltd. from whom Ross Denney Ltd. received the £439.5.1, being the agreed loss for the plant (in fact the Assurance Company paid the moneys to a third party at Ross Denney's request). By letter dated 14th October, 1958, Ross Denney Ltd. purported to assign to the Insurance Company "all our rights of recovery from third parties". The Insurance Company did not give express notice of any assignment to Carpenter's (Vueti Viti). The Insurance Company relied on their rights of subrogation. Action No. 340 of 1958 was thus commenced in the name of Ross Denney Ltd. Judgment was obtained by Ross Denney Ltd. in this action against Carpenter's (Vueti Viti) on 24th January, 1961, for £464.17.0 (damages for negligence), and costs. On 20th July, 1961, Ross Denney Ltd. issued a Writ of Fieri Facias against Carpenter's (Vueti Viti) directed to the Sheriff of Fiji commanding him to levy execution upon the goods and chattels of Carpenter's (Vueti Viti) for the sum of £464.17.0 plus costs and interest. On 26th July, 1961, Carpenter's (Vueti Viti) issued a Writ of Fieri Facias against Ross Denney Ltd. for the amount of the judgment debt in Civil Action No. 353 of 1958 but later withdrew it. Carpenter's (Vueti Viti) issued a summons returnable before the learned Acting Chief Justice in Chambers applying for an order that "the Writ of Fieri Facias issued in Action No. 340 of 1958, directed to the Sheriff of Fiji, and all proceedings thereunder be set aside as irregular, or that it should not have issued on the grounds that the sum which, by the endorsement of the said writ directed to be levied, was not at the time of the issue of the said writ due and owing on the said judgment, having been off-set by the judgment obtained against Ross Denney Ltd. by Carpenter's (Vueti Viti) in Action No. 353 of 1958". The learned Acting Chief Justice dismissed this application. It is against this dismissal that this appeal is brought.



After the dismissal of this application, Carpenter's (Vueti Viti) paid to the Sheriff of Fiji, under the compulsion of the Writ of Fieri Facias issued in Civil Action No. 340 of 1958, the sum of £481.5.1. On 28th August, 1961, Carpenter's (Vueti Viti) obtained a Garnishee Order Nisi attaching in its favour, as the judgment creditor of Ross Denney Ltd. in Civil Action No. 353 of 1958, this sum of £481.5.1 held by the Sheriff of Fiji. When Carpenter's (Vueti Viti) subsequently came before the learned Acting Chief Justice in Chambers for this Garnishee Order Nisi to be made absolute, it was opposed by Ross Denney Ltd. The Sheriff had paid the sum of £481.5.1 into Court to abide a decision therein.

Those are the facts giving rise to this appeal. While the memorandum of appeal sets out five grounds of appeal, Mr. Leys for the appellant has argued the case on general grounds. It is his contention that when the summons of 20th July, 1961, came before him the learned Judge should have set off the two judgments, one against the other, in exercise of an inherent jurisdiction to do so. I do not consider it necessary to refer to the authorities upon which Mr. Leys has relied to establish that such an inherent jurisdiction to set off judgments exist. I have no doubt that there is such a discretionary power. In my opinion, the question to be decided is whether, upon the summons before him, the learned Judge was correct in dismissing the application. That summons asked for the Writ of Fieri Facias to be set aside on the grounds that it was irregular, or should not have been issued because the sum for which it was issued was not at the time due and owing to Ross Denney Ltd. This Writ of Fieri Facias was issued in respect of the judgment debt in Civil Action No. 340 of 1958. At the time when it was issued the judgment debt was unsatisfied. The learned Acting Chief Justice was not asked in the summons to exercise any inherent powers to set off judgments. He was asked to say that the Writ of Fieri Facias was irregular and/or that the judgment debt in Civil Action No. 340 of 1958 was not then due. The applicant Company could neither show that the Writ of Fieri Facias was irregular, nor that the sum in respect of which it was issued (the judgment debt in Action No. 340 of 1958) was not due under that judgment at the time of the issue of the Writ of Fieri Facias. The learned Judge was, therefore, in my opinion perfectly correct in dismissing the application. I would therefore dismiss this appeal with costs in favour of the respondent, Ross Denney Ltd.

In the case stated (No. 4 of 1962).

MARSACK J.: The question submitted in the Case Stated for the answer of this Court is neither lengthy nor complicated. To answer it, it is necessary in my opinion to determine just what is the legal liability of the Sheriff in respect of the moneys held in his hands, and the precise extent of the rights acquired by the Legal and General Assurance Society Ltd. under its rights of subrogation.

As to the obligations and liabilities of the Sheriff with regard to the moneys held in his hands, it must be kept in mind that, to be capable of attachment, there must be in existence, at the date when the attachment becomes operative, something which the law recognises as a debt: 16 *Halsbury's Laws of England* (3rd Ed.) 81. If

A there is a debt in existence then the moneys payable thereunder may be attached by means of garnishee proceedings. If the relation of debtor and creditor does not exist between the person holding the sum concerned and the judgment debtor, then this sum cannot in general be attached by means of garnishee proceedings.

B It is the duty of the Sheriff to hand the proceeds of the execution, after deducting his costs, to the judgment creditor, and if he does not do so he or his personal representatives may be sued for moneys had and received: 16 *Halsbury's Laws of England* (3rd Ed.) 21. Once the Sheriff has levied a sum of money under a writ of execution, therefore, a debtor-and-creditor relation arises between the Sheriff and the judgment creditor, whereunder he becomes indebted to the judgment creditor for the amount levied, less his costs.

C In the course of the argument Counsel for the insurers urged that the moneys held by the Sheriff are trust funds which are not subject to attachment; funds which by reason of the rights acquired by the insurers by subrogation are subject to a trust in favour of the insurers and therefore not liable to attachment in favour of the judgment creditor. I can, however, find no authority for the proposition that the moneys held by the Sheriff are subject to a trust in such a way that they may not be taken in execution by a judgment creditor. They represent, in my view, a simple debt due from the D Sheriff to the Company at whose instance execution was levied in the first place, and consequently are attachable in proceedings taken on behalf of a judgment creditor of that Company.

E It thus becomes necessary to determine and to define the rights acquired by the insurers under the doctrine of subrogation. It must be noted that although there was in fact an assignment from Ross Denney Ltd. to the insurers no notice of that assignment was given to the judgment creditor W. R. Carpenter & Co. (Fiji) Ltd.; and the Case Stated expressly asks that the question be answered on the basis of subrogation.

F At the hearing before this Court a great many authorities were cited in the argument of Counsel. These have been carefully considered, but it does not seem necessary to refer to them in any great detail. What has to be determined is the time at which the paramount right of the insurers attaches to any particular moneys payable to the insured, by virtue of the doctrine of subrogation. Subrogation is thus defined in 22 Hals. 3rd Ed. 261 :

G "Subrogation in the strict sense of the term expresses the right of the insurers to be placed in the position of the insured so as to be entitled to the advantage of all the rights and remedies which the assured possesses against third parties in respect of the subject matter."

H I find myself unable to accede to the contention of Mr. Scott that the insurers can acquire, by this doctrine of subrogation, greater rights against third parties than the rights the assured himself possesses. In *Yorkshire Insurance Co. Ltd. v. Nisbet Shipping Co. Ltd.* [1961] 2 All E.R. 487 the incidents of subrogation are explained by Diplock J. at p. 490 in these words :

"'Subrogation' is concerned solely with the mutual rights and liabilities of the parties to the contract of insurance. It confers no rights and imposes no liabilities on third parties who are strangers to the contract. It vests in the insurer who has paid a loss no direct rights or remedies against anyone other than the assured."

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It seems to me that this sets out very succinctly the principles applicable to the matter now before the Court. The insurers cannot by virtue of the doctrine of subrogation acquire any rights against the Sheriff directly; their rights are against the assured company, Ross Denney Ltd.

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Considerable stress was laid on the decision of Wynn-Parry J. in *Re Miller, Gibb & Co. Ltd.* [1957] 2 All E.R. 266 and the extracts cited therein from the judgment in *Castellain v. Preston* (1883) 11 Q.B.D. 380; and the learned Judge who stated the case for this Court appeared to be impressed by this decision as being in favour of the Insurance Company. But even in that case there is no suggestion that the insurers can acquire any greater rights than those of the assured. A passage from the oft-quoted judgment of Brett L.J. in *Castellain v. Preston* reads:

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"In order to apply the doctrine of subrogation it seems to me that the full and absolute meaning of the word must be used, that is to say the insurer must be placed in the position of the assured."

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The very wide definition given by Brett L.J. of the rights acquired by the doctrine of subrogation commences with the phrase:

"As between the underwriter and the assured the underwriter is entitled to the advantage of every right of the assured."

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It is important to note the qualification "as between the underwriter and the assured".

The main burden of the judgment of the Court of Appeal in *Castellain v. Preston* was that the assured must in no circumstances obtain a double indemnity, and that the operation of the doctrine of subrogation has as its main object the prevention of this double indemnity. It was strongly urged by Mr. Scott that if the money held by the Sheriff is paid over not to the insurers but to W. R. Carpenter & Co. (Fiji) Ltd. under the garnishee order, then the assured Ross Denney Ltd. will have obtained a double indemnity; in that they will have received credit from the Agricultural and Industrial Loans Board in respect of the money originally paid by the insurers, and will also have received credit for the sum held by the Sheriff as against their indebtedness to the judgment creditor W. R. Carpenter & Co. (Fiji) Ltd. But the right of the Insurance Company to re-imbursement would still subsist as against Ross Denney Ltd., although admittedly that right would be of no value because of the fact that Ross Denney Ltd. is in liquidation. As the matter was put during the argument, it is just a question as to which of the two companies suffers the loss arising from liquidation of Ross Denney Ltd., that is to say the insurers or the judgment creditor W. R. Carpenter & Co. (Fiji) Ltd.

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There can be no doubt that once the moneys were received by Ross Denney Ltd. or the liquidator there would be a trust in favour of the insurers under the doctrine of subrogation. As was stated in *Re Miller, Gibb & Co. Ltd.* at 271 :

A "Therefore if (which did not happen) the sterling sum in question had been received by the company the company would thereupon have become the trustee thereof for the department" (ie. the insurers).

B The decision of the Court of Appeal in *West of England Fire Insurance Company v. Isaacs* [1897] 1 Q.B.D. 226 makes it clear that the insurer is entitled to recover from the assured not merely the value of any benefit received by him by way of compensation from other sources in excess of his actual loss but also the full value of any rights of the assured against third parties which the assured has renounced. It is the assured who owes the obligation to the insurers, but not third parties. In *Burnand v. Rodocanochi* (1882) 7 A.C. 333, Blackburn L.J. says at p. 339 :

C "If the indemnifier has already paid it then if anything which diminishes the loss goes into the hands of the person to whom he has paid it it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back."

D As Atkinson J. says of this passage in *Meacock v. Bryant* [1942] 2 All E.R. 661 at 664 :

"One could not get a principle laid down in clearer language than that."

E The time when the right of the insurers to particular moneys arises is when those moneys pass into the hands of the assured who has been previously indemnified by the insurers.

F In my opinion, therefore, the moneys in the hands of the Sheriff are moneys which he is under a legal obligation to pay over to the execution creditor Ross Denney Ltd., and those moneys are not held by the Sheriff in trust for any other person or company; they constitute a debt due from the Sheriff to Ross Denney Ltd. and, therefore, are subject to attachment on behalf of a judgment creditor of Ross Denney Ltd. Under the doctrine of subrogation the insurers do not acquire a right to payment to them of such moneys until they actually come into the hands of the assured, namely Ross Denney Ltd.

G The Company Ross Denney Ltd. could not, in my opinion, demand that the Sheriff ignore the garnishee order and pay the sum held by him to the company despite the attachment. As the insurers cannot under the principle of subrogation acquire any greater rights than those of Ross Denney Ltd., then the insurers, whether acting in their own name or in the name of Ross Denney Ltd., cannot compel the Sheriff to pay out to them or to the company in disregard of the rights of the creditor who has attached those moneys. That being so  
H I am of opinion that the judgment creditor W. R. Carpenter & Co. (Fiji) Ltd. is entitled to an order absolute in the garnishee proceed-

ings. The question asked in the Case Stated should accordingly, in my opinion, be answered in the negative. I would also order that W. R. Carpenter & Co. (Fiji) Ltd. should have the costs of the argument on the Case Stated which I would fix at 25 guineas and disbursements.

KNOX-MAWER J.A.: I concur with the above judgment and the reasons for it, and agree with the order proposed as to costs.

TRAINOR J.A.: In dealing with the case stated I do not consider any lengthy consideration is necessary as to whether the Legal and General Insurance Society were subrogated to Ross Denney Ltd. or not. As far back as *Randal v. Cockran* (1748) 1 Ves. Sen. 98 the circumstances by virtue of which subrogation arises were considered, and I think it is sufficient to say that unquestionably the Legal and General Insurance Society Ltd. were subrogated to Ross Denney Ltd.

The result of subrogation is clearly and lucidly set out in the judgment of Brett L.J. in *Castellain v. Preston* (1883) 11 Q.B.D. at page 388 (a judgment which Diplock J. in *Yorkshire Insurance Co. Ltd. v. Nisbet Shipping Co. Ltd.* (supra) described as "a classic judgment") and I think the following extract from it covers the position in the instant case. "In order to apply the doctrine of subrogation it seems to me that the full and absolute meaning of the word must be used, that is to say, the insurer must be placed in the position of the assured . . . as between the underwriter and the assured the underwriter is entitled to the advantage of every right of the assured . . . But it will be observed that I use the words 'of every right of the assured'. I think that the rule does require that limit". In his judgment (at p. 390) Brett L.J. quoted from the judgment of Chitty J. in the case which was under appeal 'What is the principle of subrogation? On payment the insurers are entitled to enforce all the remedies, whether in contract or in tort, which the insured has against third parties, whereby the insured can compel such third parties to make good the loss insured against', and said "I should venture to add this 'and if the assured enforces or receives the advantages of such remedies, the insurers are entitled to receive from the assured the advantages of such remedies'". Later in his judgment he said, with reference to a settlement arrived at between the assured and a third party who had been liable to the assured for the injury giving rise to the insurers having to fulfil their contract of indemnity, "The insurer is equitably entitled to recover to the extent of the benefit so received" (P 160).<sup>\*</sup> Thus the Legal and General Insurance Society Ltd. having been subrogated to Ross Denney Ltd. were entitled to the advantage of every right of the assured. But they were not entitled to any greater right as suggested by Counsel for the Respondents. The position between the insurers and the assured in the instant case is, in my opinion, the same as that referred to in the Judgment of Diplock J. in the *Yorkshire Insurance Co. Ltd. v. Nisbet Shipping Co. Ltd.* cited above; the insurers not having, in the circumstances of the instant case, acquired any rights from the letter of the 14th. October, 1958 which they did not have under the implied term of the contract of assurance.

<sup>\*</sup> This reference has not been traced—Ed.



In the course of argument before this Court reference was made to an assignment by the respondents to the insurers of their rights against the appellants. Suffice it to say on this that as the only right the respondents had at the time of the letter referred to was a right to litigate on a tort, such right was not assignable.

If an assured who has subrogated to his insurers takes proceedings against the third party and fails to recover the damages awarded and has to execute his judgment by way of a writ of fieri facias any money or proceeds which the Sheriff obtains he holds on behalf of the judgment creditor, and only the judgment creditor can give him a discharge for it. There is no question here of him holding in trust for the party subrogated to the judgment creditor; such a person is a stranger to the proceedings "The result of the authorities ... is that the sheriff holds the money to the use of the judgment creditor, and is liable to be sued in an action for money had and received" per Chitty J. in *In re Greer, Napper v. Fanshawe* [1895] 2 Ch. 217 at 221. In the instant case the money in the hands of the Sheriff belongs to the respondents.

Reference has been made during the hearing to *Roberts v. Death* (1882) 8 Q.B.D. 319 but that case is not analagous.

I would answer the question raised by the learned acting Chief Justice in the case stated by saying that no trust attaches to the money in the hands of the Sheriff, that it is the property of the respondents and that the Legal and General Insurance Society are not entitled to be heard to defeat the appellants' claim for an order that the garnishee order nisi be made absolute. I would award the appellants their costs of the case stated.