1979 September 6

[TRIANTAFYLLIDES, P., A. LOIZOU AND MALACHTOS, JJ.]

NEOPTOLEMOS SPYROPOULLOS,

Appellant–Defendant,

v.

TRANSAVIA HOLLAND N.V. AMSTERDAM,

Respondents–Plaintiffs.

(*Civil Appeal No.* 5253).

Civil Procedure—Practice—Action by company resident outside the scheduled territories as defined by the Exchange Control Law, Cap. 199*—Claim for a liquidated demand—Writ of summons not indorsed in terms of rule* 3 *of the Exchange Control Rules—Defect not so fundamental as to render the proceedings a nullity—Waived by the filing of an unconditional appearance—An irregularity coming within the ambit of Order* 64 *of the Civil Procedure Rules as being a mere non-compliance with the Rules.*

Company—Change of name—Effect on legal proceedings commenced by company under old name—Section 19(4) *of the Companies Law, Cap.* 113.

Conflict of Laws—Foreign company—Change of name—Whether necessary to prove foreign Law in order to establish what was the procedure thereunder for the change of the name.

Civil Procedure—Practice—Parties—Substitution of plaintiff—Company—Change of name before filing of action—Writ issued under old name—Case of misnomer—Substitution allowed—"Person" in rule 2 *Order* 9 *of the Civil Procedure Rules does not only include mere physical persons but also legal or juristic persons—Interpretation Law, Cap.* 1, *section* 2, *definition of "person".*

On February 6, 1969, the respondents–plaintiffs, a foreign company resident in the Netherlands, filed an action, under the name "Transavia Holland N.V., of Airport Schiphol, Amsterdam", claiming C£3,175 from the appellant–defendant, the balance of air freight and/or for breach of an aircraft charter.

An unconditional appearance was duly entered by the defendant and statements of claim and defence were filed. After the filing of the defence it was found out that the above name was the previous name of the plaintiff company in an abbreviated form; and that it was changed into "Luchtvaartmaatschappij Transavia Holland N.V." by an amendment of the memorandum and articles of association of the company duly made and approved as required by Dutch Law and published in the Annex to the Netherlands Official Gazette of the 18th April, 1968. Thereafter an application for the substitution of the plaintiffs and a consequential amendment of the statement of claim was made. The defendant opposed the application on the ground that the plaintiffs were not entitled in Law to their application under the Civil Procedure Rules Order 9 r. 2 and Order 25; and on the ground that the issue of the writ and all subsequent proceedings in the action were bad in law and a nullity because the writ was "issued in contravention of the Exchange Contol Rules* which are applicable to the present case for the reason that the plaintiff is resident outside the Scheduled Territories as defined by the Exchange Control Law, Cap. 199".

The trial Court found that the omission to comply with the Exchange Control Rules was a mere irregularity and not a nullity and, therefore, the matter was waived by the filing of the unconditional appearance. It further found, by referring to the definition of "person" in section 2 of the Interpretation Law, Cap. 1 that "person" in Order 9 rule 2 does not only refer to physical persons but, also, to legal or juristic persons and that, by virtue of section 19(4) of the Companies Law, Cap. 113 the change of name could not render defective any legal proceedings by or against the company and that any legal proceedings that might have been continued or commenced against it by its former name may be continued or commenced against it by its new name.

* The relevant rule is rule 3 which so far as relevant reads as follows:

"3. Wherever the plaintiff's claim is for a debt or liquidated demand only, and the plaintiff or one of two or more co-plaintiffs is resident outside the scheduled territories, as defined by the Exchange Control Law ....the indorsement, besides stating the nature of the claim, shall state the amount claimed for debt, or in respect of such demand, and for costs respectively, and shall further state that the defendant can pay the amount claimed and costs into Court within ten days after service.............".

Upon appeal counsel for the appellant–defendant contended:

(a) That the non–compliance with the Exchange Control Rules has rendered the writ issued a nullity and that the trial Judge was wrong in considering same as a mere irregularity which had been waived.

(b) That the trial Judge was wrong in law in allowing the substitution of the plaintiff because rule 2 of Order 9 applies only to living physical persons and not to companies and because at the time of the issue of the writ "Transavia Holland N.V." was not existent and under Dutch Law the change in the name of the Company had not been duly effected.

(c) That the trial Judge approached section 19(4) of the Companies Law, Cap. 113 the wrong way and particularly as no certificate of incorporation was produced.

Held, dismissing the appeal, (1) that the non–compliance with rule 3 of the Exchange Control Rules does not constitute a fundamental defect which made the whole proceedings a nullity and which could not be waived by the subsequent appearance and the taking of steps by the appellants as defendants in the action; that there is no inherent illegality in omitting to refer to the possibility of paying into Court the liquidated demand instead of paying same to plaintiff or his advocate; that the said defect is an irregularity that brings the matter within the ambit of Order 64 of the Civil Procedure Rules as being a mere non–compliance with the Rules; and that, accordingly, contention (a) must fail.

(2) That the reference in Order 9 rule 2 of the Civil Procedure Rules to "person" as plaintiff cannot be confined to mere physical persons; and that legal persons or juristic persons cannot be excluded therefrom (see section 2 of the Interpretation Law, Cap. 1 which defines "person" as including "any company, partnership, association, society, institution or body of persons corporate or incorporate"); that there was no necessity, in the circumstances, to prove Dutch Law and establish thereby, beyond what was stated in the relevant affidavit, what the procedure under Dutch Law was, so that the trial Judge could determine, if same was duly complied, for the change of the

name of the company; and that, accordingly, contention (b) must fail.

(3) That the trial Court properly approached section 19(4) of the Companies Law, Cap. 113; that the change of the name of the Company could not render the company under its previous name as non-existent (see the principle of *Tetlow* v. *Orela Ltd.* [1920] 2 Ch. 24); that the plaintiff company was an existing company referred to by a mistake in its name and whilst so existing it had its name changed and the proceedings commenced in its previous name; that it never ceased to exist and it was only a matter of an action commenced with a wrong name; that it is a case of misnomer and leave should have been given to amend (see *Alexander Mountain & Co.* v. *Rumere Ltd.* [1948] 2 All E.R. 144); and, that, accordingly, the appeal must be dismissed.

Appeal dismissed.

Cases referred to:

Craig v. *Kanseen* [1943] 1 All E.R. 108;

MacFoy v. *United Africa Co. Ltd.* [1961] 3 All E.R. 1169;

In Re Pritchard (deceased) [1963] 1 All E.R. 873 at p. 881;

Clay v. *Oxford* [1866] 36 L.J. Ex. 15;

Tetlow v. *Orela Ltd.* [1920] 2 Ch. 24;

Alexander Mountain & Co. v. *Rumere Ltd.* [1948] 2 All E.R. 144;

Pontin v. *Wood* [1962] 1 Q.B. 594 at p. 609;

Establissment Boudelot v. *R.S. Graham & Co. Ltd.* [1953] 2 Q.B. 271;

Whittam v. *W.J. Daniel & Co. Ltd.* [1961] 3 All E.R. 796.

Appeal.

Appeal by defendants against the order of the District Court of Limassol (Stylianides, P.D.C.) dated the 15th November, 1973 (Action No. 330/69) directing the substitution of the plaintiff and the amendment of the statement of claim.

P. Cacoyiannis, for the appellant.

Chr. Demetriades, for the respondents.

Cur. adv. vult.

TRIANTAFYLLIDES P.: The judgment of the Court will be delivered by Mr. Justice A. LOIZOU.

A. LOIZOU J.: The plaintiffs, respondents in this appeal,

filed on the 6th February, 1969, an action against the defendant, the appellant, in the District Court of Limassol on behalf of the plaintiff company the name of which as set out in the title of the action was Transavia Holland N.V., of Airport Schiphol, 5 Amsterdam, claiming C£3,175.— the balance of air freight and/or for breach of an aircraft charter agreement dated the 10th June, 1968, legal interest and the costs of the action.

The writ being in respect of a claim for a debt or liquidated demand, contained the indorsement provided for in Order 2, 10 rule 7, of the Civil Procedure Rules to the effect that upon payment of the amounts claimed to the plaintiffs or their advocates within ten days after service, further proceedings would be stayed.

An unconditional appearance was duly entered by the 15 defendant; on the 6th May, 1970, the statement of claim was filed and on the 8th September, 1970, the defence was filed; it was, *inter alia*, denied thereby that the defendant ever entered into the contract sued upon by the plaintiffs and in para. 2 thereof it was alleged, subject to his traversal of the material 20 paragraphs in the statement of claim, that "on the 10th June, 1968, Transavia (Limburg) N.V., having its principal place at the Airport Schiphol near Amsterdam of the Netherlands (hereinafter referred to as Transavia) and the defendant entered into a charter agreement by which the defendant took on charter 25 from Transavia aircrafts type 8-700 for the transport of grapes from Cyprus to London on the 7/7, 9/7, 11/7, 13/7 and 15/7/1969 of a maximum load capacity of 40.000 kgs. each flight. The charter price was agreed at 10,800.—U.S. dollars each flight......".

On seeing this, counsel for the respondents communicated 30 with the Dutch lawyers who had instructed them and the explanation they were given was that Transavia (Limburg) N.V., was the name appearing in the contract between the parties which is attached to the Notice of the Opposition of the appellant and that was the previous name of the plaintiff company 35 which was changed into Luchtvaart—maatschappij Transavia (Limburg) N.V. by an amendment of the memorandum and articles of association of the company claimed to be duly made and approved as required by Dutch Law and published in the Annex to the Netherlands Official Gazette of Thursday, 40 18th April, 1968, No. 76, under No. 1961 which was approved

and published on the 16th April, 1968, the other name being an abbreviated one.

Thereafter an application for the substitution of the plaintiff and a consequential amendment of the statement of claim was made and the ruling of the trial Judge thereon is the subject of this appeal. 5

It was common ground that the plaintiff company was and still is a person resident outside the scheduled territories as defined by the Exchange Control Law, Cap. 199, and on the writ of summons there was no indorsement and no clear statement as to the plaintiff's residence, except that it was "of Airport Schiphol". Moreover, though there was the usual indorsement provided for in Order 2, rule 3, of the Civil Procedure Rules regarding the stay of the proceedings in case of payment of the amount claimed and costs, yet it did not contain the indorsement provided for by rule 3 of the Exchange Control Rules—to be found in the subsidiary Legislation of Cyprus, volume II p. 293. 10 15

This rule corresponds to Order 3, rule 7 of the Old English Rules (see the Annual Practice of 1958, page 29) and which in so far as material reads as follows: 20

> "7.—(1) Wherever the plaintiff's claim is for a debt or liquidated demand only, the indorsement, besides stating the nature of the claim, shall state the amount claimed for debt, or in respect of such demand, and for costs respectively, and shall further state that the defendant can pay the amount claimed and costs 25
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> (a) into Court if the plaintiff or one of two or more co-plaintiffs is resident outside the scheduled territories, as defined by the Exchange Control Act, 1947, or is acting by order or on behalf of a person so resident, or if the defendant is making the payment by order or on behalf of a person so resident, or 30
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> (b) in all other cases to the plaintiff, his solicitor or agent."

The application of the respondents was opposed by the appellant. The opposition was based on the Exchange Control Rules, rules 2 and 3, and the Civil Procedure Rules, Order 9, rule 2 and Order 48 rule 4 and on the following grounds: 35

"(a) The issue of the writ and all subsequent proceedings in this action are bad in law and a nullity on the ground that the writ was issued in contravention of the Exchange Control Rules which are applicable to the present case for the reason that the plaintiff is resident outside the Scheduled Territories as defined by the Exchange Control Law, Cap. 199.

(b) The alleged facts appearing in the affidavit in support of the application and the documents attached thereto marked 'A' and 'B' are in certain respects conflicting and not clear and unambiguous and in any case they are not consistent with the Charter Agreement dated 15/6/1968 referred to in the Defence photocopy of which is attached.

(c) The applicant is not entitled in Law to his application under the Civil Procedure Rules 0.9 r.2 and 0.25 even if the alleged facts in support of the application are true and correct.

(d) In any case the action should, for the reasons stated above, be dismissed with costs."

The learned trial Judge for the reasons given in his elaborate judgment, granted the application, having found that the omission to comply with the Exchange Control Rules was a mere irregularity and not a nullity and, therefore, the matter was waived by the filing of the unconditional appearance; after reviewing the authorities he said:-

"Non-compliance with this rule is not to my mind a fundamental defect. It does not go to the root of the proceedings. If the defendant submits to judgment to such an indorsed writ, he cannot come later on and say that the proceedings are void. The indorsement provided by the Exchange Control Rules is for the payment into Court of the amount due to a non-resident of scheduled territories. The Exchange Control Law provides for the payment of money outside non-scheduled territories only with the permission of the appropriate organ. (See Exchange Control Law, Cap. 199, Part II and Fourth Schedule). The proceedings are valid, though irregular. The Court has a discretion to set aside irregular proceedings.

A defendant *ex-debito justitiae* is entitled on application to have irregular proceedings set aside. Such application, however, has to be filed within reasonable time and no such application is entertained if the party applying has taken any fresh step after knowledge of the irregularity. (Order 64, rules 2 and 3).

The defendant in the present case filed an unconditional appearance. An unconditional appearance puts an end to his rights to object to the irregularity. Furthermore, he filed a Statement of Defence. It is too late for the defendant to take the objection and especially by way of opposition for an application for amendment."

In making the distinction between what is null and void and what is an irregularity, in the sense of involving non-compliance with some rule, he referred to the cases of *Craig* v. *Kanseen* [1943] 1 All E.R. 108, *MacFoy* v. *United Africa Co. Ltd.*, [1961] 3 All E.R. 1169 and In *Re Pritchard* (deceased) [1963] 1 All E.R. 873.

It is the contention of counsel for the appellant that the non-compliance with the Exchange Control Rules has rendered the writ issued a nullity and that the trial Judge was wrong in considering same as a mere irregularity which had been waived. It was argued that these Rules were specially made for the purpose of preventing contravention of the Exchange Control Law, Cap. 199, in particular, section 7 thereof which reads, as modified under Article 188 of the Constitution, as follows:-

"7. Except with the permission of the Central Bank of Cyprus no person shall do any of the following things in the Republic, that is to say:-

(a) make any payment to or for the credit of a person resident outside the scheduled territories; or

(b) make any payment to or for the credit of a person resident in the scheduled territories by order or on behalf of a person resident outside the scheduled territories; or

(c) place any sum to the credit of any person resident outside the scheduled territories:

Provided that where a person resident outside the scheduled territories has paid a sum in or towards the satisfaction of a debt due from him, paragraph (c) of this section shall not prohibit the acknowledgment or recording
5 of the payment."

Moreover, it was urged that the aforesaid section read in conjunction with section 35(1) and para. 4 of the Fourth Schedule to the Law make compliance with the Rules mandatory in order to prevent payment of the claim without the permission
10 of the Central Bank of Cyprus.

Sub-sections (1) and (3) of section 35 (we are not concerned with sub-section (2) thereof), in so far as material read:-

"35.(1) It shall be an implied condition in any contract that, where, by virtue of this Law, the permission or consent
15 of the Central Bank of Cyprus is at the time of the contract required for the performance of any term thereof, that term shall not be performed except in so far as the permission or consent is given or is not required:

Provided that this subsection shall not apply in so far
20 as it is shown to be inconsistent with the intention of the parties that it should apply, whether by reason of their having contemplated the performance of that term in despite of the provisions of this Law or for any other reason.

(2) ....

(3) Notwithstanding anything in the Bills of Exchange
25 Law neither the provisions of this Law, nor any condition, whether express or to be implied having regard to those provisions, that any payment shall not be made without the permission of the Central Bank of Cyprus under this Law, shall be deemed to prevent any instrument being a bill of
30 exchange or promissory note."

It is also useful to refer to para. 4(1) and (2) of the Fourth Schedule to the Law, which also read:-

"4.(1) In any proceedings in a prescribed Court and in any arbitration proceedings, a claim for the recovery of any
35 debt shall not be defeated by reason only of the debt not

being payable without the permission of the Central Bank of Cyprus and of that permission not having been given or having been revoked.

(2) No Court shall be prescribed for the purpose of this paragraph unless the Central Bank of Cyprus is satisfied that adequate provision has been made therefor by rules of Court for the purposes specified under the last preceding paragraph". 5

These provisions are useful in the sense that under section 35(1) hereinabove set out, where under the Law the permission or consent of the Central Bank is at the time of the contract required, for the performance of any term thereof, it only provides that the term shall not be performed except in so far as the permission or consent is given or is not required. Therefore, the non express reference to the obtaining of the consent or permission of the Central Bank does not render void or illegal a contract. It merely suspends the performance of a term until such consent or permission is obtained. The sub-section only applies, and, therefore, a term of intended compliance with the Law is not implied, when it is shown to be inconsistent with the intention of the parties that it should apply and that because of the parties having contemplated the performance of that term despite the provisions of the Law. 10 15 20

As far as the Fourth Schedule is concerned, it is made clear that in any proceedings a claim for the recovery of any debt shall not be defeated by reason only of the debt not being payable without the permission of the Central Bank of Cyprus and of that permission not having been given or having been revoked. 25

In other words, the eventual compliance with the requirements of the Law for the purpose of obtaining the necessary consent or permission from the appropriate organ under the Law for the due compliance with its provisions is not excluded and the non-reference to the prerequisite of a permission does not render the transaction ipso facto illegal or that it is illegal in anticipation of illegally performing the contract. 30 35

Moreover, if a plaintiff does not resort to Court proceedings but through his lawyer sends a notice claiming payment under a contract—as in the instant case, the respondents could have done—he would be committing no offence whatsoever by

demanding payment to him of the amount due through a person resident outside the scheduled territories.

It has to be examined, therefore, in the absence of any inherent illegality, whether the non-compliance with rules 2 and 3 of 5 the Exchange Control Rules renders the issuing of the writ null and void.

In *Re Pritchard* (deceased), [1963] 1 All E.R. 873, Upjohn, L.J. at p. 881 said:-

> "I am not so sure that it is so difficult to draw a line 10 between irregularities, by which I mean defects in procedure which fall with R.S.C., Ord. 70, and true nullities, though I agree that no precise definition of either is possible."

He commented on the use of the phrase "*ex debito justitiae*" by Lord Green in *Craig* v. *Kanseen*, and after reviewing examples 15 of nullities and irregularities in decided cases he said at p. 882:-

> "I do not think that the earlier cases or the later dicta on them prevent me from saying that in my judgment the law when properly understood is that R.S.C., Ord. 70, applies to all defects in procedure unless it can be said that the 20 defect is fundamental to the proceedings. A fundamental defect will make it a nullity. The Court should not readily treat a defect as fundamental and so a nullity and should be anxious to bring the matter within the umbrella of Ord. 70 when justice can be done as a matter of discre- 25 tion, still bearing in mind that many cases must be decided in favour of the party entitled to complain of the defect ex debito justitiae .... it cannot be a completely legal test, for until one has decided whether the proceedings is a nullity, one cannot decide whether it is capable of waiver.
>
> 30 The authorities do establish one or two classes of nullity such as the following. There may be others, though for my part I would be reluctant to see much extension of the classes. (i) Proceedings which ought to have been served but have never come to the notice of the defendant at all; 35 .... (ii) Proceedings which have never started at all owing to some fundamental defect in issuing the proceedings; (iii) Proceedings which appear to be issued, but fail to comply with a statutory requirement: ...."

Is the non-compliance with the Exchange Control Rules a fundamental defect which renders the proceedings a nullity? The material parts of both rule 7 of Order 2 of the Civil Procedure Rules and Order 3 of the Exchange Control Rules correspond to the old English Order 3, rule 7 and to the new English Order 6 rule 2. 5

Having considered the position, we agree with the learned trial Judge that the non-compliance with this rule does not constitute a fundamental defect which made the whole proceedings a nullity and which could not be waived by the subsequent appearance and the taking of steps by the appellants as defendants in the action. There is no inherent illegality in omitting to refer to the possibility of paying into Court the liquidated demand instead of paying same to the plaintiff or his advocate. We are not prepared to treat such a defect as so fundamental as to be a nullity and we feel that it is an irregularity that brings the matter within the ambit of Order 64 as being a mere non-compliance with the Rules. 10 15

We turn now to the second ground of appeal argued in this Court, namely, that the trial Judge was wrong in law in allowing the substitution of the plaintiff as prayed in the application on the ground, first, that the said rule applies only to living physical persons and not to companies and that in any event at the time of the issue of the writ Transavia Holland N.V. was not existent and secondly that under Dutch Law the change in the name of the company had not been duly effected. 20 25

The facts relied upon, as set out in the affidavit accompanying the said application, were that the previous name of the plaintiff company was changed into the one sought to be substituted, by an amendment of the memorandum and articles of association of the company duly made and published in the Annex to the Netherlands official Gazette of Thursday the 18th April, 1968 No. 76 NR. 1961, and attached thereto was also the consent of the plaintiff company under its new name which was sought to be substituted as plaintiffs in the action. These facts remained uncontradicted. 30 35

The approach of the trial Court was that "person" according to the Interpretation Law, Cap. 1, section 2, "includes any company, partnership, association, society, institution or body

of persons corporate or incorporate" and that the reference in Order 9 rule 2 to "person" as plaintiff, cannot be confined to mere physical persons and legal persons or juristic persons be excluded therefrom.

5 If we were to accept the contention that a person suing as plaintiff refers only to natural persons, it would mean that corporations whether a limited company or otherwise, could not take advantage of this rule or of any other rule of Court, where plaintiffs or defendants are described as persons.

10 He further referred to the cases of *Clay* v. *Oxford* [1866] 36 L.J. Ex. 15 and *Tetlow* v. *Orela Ltd.* [1920] 2 Ch. 24 which are to the effect that where an action is commenced in the name of a dead man his representatives cannot be substituted as plaintiffs. A substitution of a plaintiff can only be done for a 15 living plaintiff but it does not justify the Court in creating a plaintiff in an action for the first time.

Both these cases were referred to in the case of *Alexander Mountain & Co.* v. *Rumere Ltd.*, [1948] 2 All E.R. p. 144. Lord Goddard, C.J. held that there was no power under R.S.C. 20 Order 16, rule 2 to amend the writ by substituting the executrix as plaintiff, being a case where the sole proprietor of a business which he carried on under the name of "A.M. & Co." died and after his death his executrix who continued to carry on the business under the same trading name brought an action in the 25 name of "A.M. & Co." as a firm, the action being on a contract made by A.M. during his lifetime. On appeal, and the judgment appears on page 482 of the same volume, it was held that while the action did not fall within R.S.C. Ord. 16, r. 2 as having been "commenced in the name of the wrong person as plaintiff", 30 the case might properly be treated as one of misnomer and the writ amended by substituting the executrix as plaintiff.

In our view, there was no necessity in the circumstances, to prove Dutch Law and establish thereby, beyond what was stated in the aforesaid affidavit, what the procedure under Dutch 35 Law was, so that the trial Judge could determine, if same was duly complied, for the change of the name of the Company.

The trial Judge then went on to examine what was the effect of the change of the name of the Company which was effected before the filing of the action which was filed under the previous

name but again abbreviated as such. The trial Court approached the matter as follows:

> " What is the effect of the change of the name of a company? Is the company a continuing legal person with a changed name or are there two companies one of which ceased to exist and the new one came into being? A company is a legal person created under Law. The incorporation of a company and its dissolution are governed by Law. According to the Companies Law—and in the absence of evidence before me that the Law of the Netherlands is different from our Law, I apply the Law of Cyprus—the change of name of a company does not affect its legal entity. A company may, by special resolution, change its name. A change of name does not affect any rights or obligations of the company or render defective any legal proceedings by or against the company, and any legal proceedings that might have been continued or commenced against it by its former name may be continued or commenced against it by its new name.
>
> (Section 19(4) of the Companies Law, Cap. 113").

I was argued on behalf of the appellant that the trial Judge approached section 19(4) of our Companies Law, the wrong way and particularly as no certificate of incorporation was produced.

We do not subscribe to this contention. The respondents placed before the trial Court sufficient material to justify it grant the application. There all along existed a company with which the appellant had contracted. The proceedings were instituted in the name of that company in a somewhat abbreviated form, but as it was before it was changed by an amendment of its memorandum and articles of association. The original misnomer could definitely be amended under the Rules. The change of the name of the company could not render the company under its previous name as non-existent, so as to bring the case within the principle of the case of *Tetlow* v. *Orela* (*supra*).

The plaintiff company was an existing company referred to by a mistake in its name and whilst so existing it had its name changed and the proceedings commenced in its previous name.

The Company never ceased to exist, it was only a matter of an action commenced with a wrong name; it is a case of misnomer and leave should have been given to amend on the principle of the *Alexander Mountain & Co.* case where the text of an article in the Law Journal of May 9, 1942 at p. 150 was quoted.

"In D. Glanville & Co. Ltd. *v.* Lyne, it is said that the only matter calling for report is the form of order for costs, but it appears, on a perusal of the very short report of the case, that a point of some general importance is involved. A writ had been issued in the name of 'D. Glanville & Co. Ltd.', the claim being for damages for breach of contract..... At the trial it appeared that 'D. Glanville & Co. Ltd.' was a misnomer, the real name of the Company being 'Dudley Glanvillee & Co., Ltd.' It also appeared that the contract was ultra vires the company, so that (on the merits) there would in any case have to be judgment for the defendant. In these circumstances, says the report ((1942) W.N. 65), the Judge 'refused the plaintiffs leave to amend by substituting the name of Dudley Glanville & Co. Ltd., in order to make them liable for costs instead of the solicitors. The defendant intimating her willingness to accept party and party costs only, he made an order in this form (a representative of the original solicitors being present and waiving notice of the application for costs): 'Judgment for the defendant on ground of non-existence of plaintiffs. Defendant's costs to be paid by the plaintiff's solicitors.'

With all due deference to the learned Judge, it is submitted that there never was a time, not even in the days before the rigour of the procedure at common law had been modified by statute, when such a judgment on the trial of an action could have been appropriate in a mere case of an action could have been appropriate in a mere case of misnomer. It may be doubted whether it would have occurred to anyone in the above case to suggest a judgment in this form if the plaintiff had been an individual, one of whose names had been omitted, or wrongly abbreviated, instead of a corporation. There is, however, no magic in the name of a corporation. It is true that a corporation, whether a limited company or otherwise, can sue only in its corporate name, but, equally, an individual can sue only in his proper name."

And then at p. 485,

> " A plaintiff, whether an individual or a corporation, is, of course, still required to bring his action in his proper name. There does not appear to be any specific rule of Court dealing with the matter, nor do the rules of Court deal with misnomer in any way. It therefore, appears that R.S.C., Ord. 72, r. 2, applies; i.e., 'the present procedure and practice' (i.e., the practice in force when the rules of 1883 were framed) remains in force, and the defendant by summons, supported by affidavit, could compel the plaintiff to amend. If he does not do so, and the matter proceeds to trial, it is submitted that the misnomer can then be amended, and that in no circumstances could the misnomer affect the substantive judgment which the Court is called upon to pronounce.' "

The former Order 16, rules 2, 5, 8, 11 and 39 were knit together without any material change in substance and as pointed out in the Notes to this Order, the Supreme Court Practice, 1976, p. 177, after referring also to Orders 20 and Order 2, states, "These are all provisions designed to save rather than to destroy, to cure that which is capable of cure" (*Pontin* v. *Wood* [1962] 1 Q.B. 594 at p. 609); and under heading "Mistake as to plaintiff or defendant—Misnomer or substitution" (15/6/14 at p. 184) it is stated "The question is no longer whether the amendment sought is the correction of a mere misnomer or the substitution of a new party, but whether in all the circumstances of the case the mistake was genuine and was not misleading or raised any reasonable doubt as to the proposed plaintiff or defendant. Each case must depend upon its own facts." Among the authorities given are those of *Alexander Mountain* (*supra*), *Establissement Boudelot* v. *R.S. Graham & Co. Ltd.*, [1953] 2 Q.B. 271, C.A. *Whittam* v. *W. J. Daniel & Co. Ltd.*, [1961] 3 All E.R. 796, C.A. which referred to the omission of the word "Limited" from the title of the defendant company.

For all the above reasons this appeal fails and is hereby dismissed with costs.

Appeal dismissed with costs.