1st. September, 1948.

Judge:

The Hon. Mr. Justice W. Harding, B.Litt., LL.D.

The Police *versus* Joseph J. Scorey (*)

Exhibits — Rule Governing Their Production.

In summary proceedings the rule regarding the exhibit of documents, as well as the practice, is, whenever a document is exhibited, either to make a mention of the fact of the document being attached to the writ of summons, and/or to enter on the document itself, through the clerk of the Court, a record of its production.

However, if this rule and practice is not followed, this omission does not lead to the consequence that the document has not been properly exhibited, and that consequently it is to be considered as totally non-existent. The production and identity of the document may be proved by other means, provided the Court is satisfied that such a proof has been made, and also that no wrong has been occasioned to the defendant by this omission. In such a case, the plea of the irregularity of production of the document and of its non-existence, cannot be upheld.

This is an appeal entered by the defendant from a judgment given by the Criminal Court of Magistrates for the Island of Malta on the 14th. May, 1948. The charge brought forward against the defendant is that of having, by means

(*) Vide subsequent judgment in this case, given by this Court on the 8th. November, 1948 (published).

of an article in the "Bulletin", a newspaper whereof he is the editor and proprietor, directly incited persons to disobey the law embodied in the "Census Act 1948" (ss. 8 and 10 thereof). The Court below found him guilty in terms of the charge and sentenced him to the payment of a fine (multa) of £50, and moreover ordered the suspension of the publication of the newspaper afore mentioned for a period of two months;

In the hearing before this Appellate Court, defendant has set up the plea that the copy of the newspaper, containing the article complained of, was at no time properly exhibited, and that, consequently, as the Court below did not have before it the article in respect of which the charge is made, it could not in any way find defendant guilty, and its judgment should be quashed;

This point was argued at length by counsel for the appellant and the Crown Counsel, and written submissions were also put before the Court;

The gist of the issue now raised may be put as follows: was the copy of the newspaper containing the incriminated article properly exhibited? If it was, then the appeal falls to be dealt with on the merits; if it was not, then there was nothing on which the Magistrate could have come to the conclusion contained in the judgment;

In order to clarify matters, it should be stated at the outset that, in point of fact, the copy of the "Bulletin" exists in the record at page 3, but the point made by the learned counsel for the defence is that it was not exhibited in terms of law — which, it is argued, is tantamount to its not being exhibited at all;

There is, of course, no doubt that one of the oldest legal maxims is that thus expressed by Bacon: "nihil habet forum ex scena"; that is, the Court has nothing to do with what is not before it. Nor can there be any doubt that what is not "properly" before the Court is not legally before it;

This maxim is only qualified in so far as there are certain matters which are considered too notorious to require proof, and such matters are therefore "judicially noticed", that is to say, the Judge

nature without requiring any evidence thereof. As is stated in Cockle's "Cases and Statutes on the Law of Evidence" (4th Edition, page 13), it is impossible to state completely the matters which the Court will judicially notice; but any matter of such common knowledge that it would be an insult to intelligence to require proof of it would probably be dealt with in this way. Sir James Stephen gives a list of twelve kinds of matters which would be judicially noticed (Dig. Ev. Art. 58). Wills classifies the matters under three heads (Wills, 19). Powell deals with these matters, in his textbook "On Evidence" at page 146 (1910 edit.). Judge Taylor mentions them "in extenso" at page 3 Vol. I of his treatise on the Law of Evidence (1906 edit.). Moreover, judicial notice is required by statute of many matters. It is certain, however, that the incriminated article in a case of this nature is definitely not a matter which may be judicially noticed without any proof. In the present case, therefore, one must revert to the rule contained in the above quoted maxim "nihil habet forum ex scena";

Was the newspaper materially existing at page 3 of the record properly exhibited?

If this case were one triable on indictment, and the proceedings before the Magistrate were in the nature of a preliminary enquiry, then the point would fall to be dealt with under section 408 Chap. 12 Rev. Edit., which lays down that "every document produced in the course of the enquiry shall be counter-signed by the Magistrate, and a record of such production shall be entered on the document itself by the Registrar or the officer acting on his behalf". The present case, however, is one of summary jurisdiction, and triable by the Court of Magistrates as a Court of Criminal Judicature. There is no similar provision with regard to summary proceedings; nor is the afore quoted provision made applicable to summary proceedings as in other cases ss. 422 to 424 or 509 to 528 ibidem. What, therefore, is the rule in summary proceedings?

According to a practice of long standing, borne out by the personal experience of the sitting Judge over the last twenty years, and by the inspection of various Court records,

it is almost invariably the rule in summary cases, whenever a document is exhibited, either to make a mention of the fact of its being attached to the summons, and/or to enter on the document itself, through the clerk of the Court, a record of its production. Thus, to quote some past cases, at random, in the Criminal Appeal "The Police vs. Degiovanni", 13th. May 1931, a record of the production of the newspaper mentioned in the charge was entered on the document itself thus:— "Il 12 luglio 1930 — Presentato insieme colla citazione — G. Cassar, P.L., scrivano";

In the Criminl Appeal "The Police vs. Anthony Bartolo", 13th. November 1937, the fact that the newspaper was attached to the summons was duly recorded by the very wording of the summons itself, thus:— "Dokumenti mdahhlin maċ-ċitazzjoni";

In the Criminal Appeal "The Police vs. Sir Gerald Strickland, 17th. April, 1925, the words "Doc. A" in the writ of summons showed that the newspaper was being attached to the writ; and similarly, in the case "Miller vs. Scorey", disposed of by this Court on the 20th. January, 1948, the words included in the writ of summons "li kopja tiegħu tinsab mehmuża ma' dan l-att", gave clear notice that the newspaper was attached to the summons;

This has been undoubtedly past practice, and this undoubtedly is the practice which should be followed, and the Magistrates' clerks should be strictly instructed not to depart from this very sound method of procedure with all its undisputed "auctoritas usus longaevi";

Now, what happened in the present instance?

Although in the writ of summons there is a detailed reference to the particular newspaper and to the particular article in question, there is no mention of the fact that the newspaper was being attached to the writ of summons. There is not, in other words, any mention of any exhibit together with the writ of summons. The newspaper in question, containing the article complained of, exists at page 3 of the record, but the Magistrate's clerk failed to follow the practice of writing on the document itself the fact that it was being filed by so-and-so on such-and-such a date. In other

words, the afore said practice was not followed, not even in part. Inspector Emmanuele Agius, the prosecuting officer before the Court of First Instance, in his evidence before this Court, stated that the document in question was, in point of fact, attached to the writ of summons, and was handed to the Magistrate together with the original of the summons before the charge was read out to the defendant. In reading out the charge the Inspector naturally read as well the details referring to that particular newspaper and to that particular article, but he did not mention that the newspaper was being attached to the summons;

Those are the facts. The "usus receptus" afore mentioned was not adhered to by the Magistrate's clerk. The point is now: what are the legal consequences of this omission? Does the omission lead to the conclusion urged by counsel for the defence, that is, that the document should therefore be considered as totally non-existent, and the defendant acquitted in the absence of any proof of the incriminated article? The sitting Judge, after duly considering the point, has come to the following conclusion;

As has already been stated, in the case of offences triable on indictment, the procedure whereof is more formal than that in summary cases, in which the Court proceeds "de plano", the rule is that in section 408 afore quoted, according to which the document must be counter-signed by the Magistrate, and a record of its production must be noted down by the Registrar or the officer acting in his behalf. Now, supposing this were a case triable on indictment, what would be the consequences of the violation of the provisions of this section?

This question has already been considered by this Court consisting of three eminent judges (Chief Justice Sir Antonio Micallef, Judge Sir Salvatore Naudi and Judge Dr. Ignazio Schembri) in the case "The Queen vs. Ignazio Agius", 10th. April, 1866, wherein, commenting on the afore said section 408, then section 358, of the Criminal Code, this Court laid down the very sound principle that the Magistrate's signature and the Registrar's entry of production required under that section had no bearing on the admissibility

of the document as a proof, but merely intended to show that the document had been in fact produced and that it was the identical one put before the Court. Such production and identity could, however, be proved by other means. This Court in fact said:— "Che il difetto del contrassegno del magistrato e del certificato del registratore sui detti documenti, come è prescritto nell'articolo 358 delle dette Leggi, non ha alcuna influenza sull'ammissibilità dei detti documenti in prova, ma solamente potrà essere allegato quando si volesse far uso di tali documenti e non si provasse con altri mezzi la loro identità ed esibizione. Le prove legali concernenti la esibizione di documenti presso l'autorità giudiziaria sono indipendenti dalla forza probante intrinseca del documento, ed il detto contrassegno del magistrato ed il detto certificato della esibizione sullo stesso documento non ha altro scopo se non quello di far provare l'identità e la esibizione del documento, indipendentemente e senza la necessità di ricorrere ad altri mezzi di prova di tale identità ed esibizione";

The sitting Judge entirely concurs in this view taken by his predecessors; to which perhaps it should be added that the Court must be satisfied that no wrong has been occasioned to the defendant by the omission of the prescribed formalities;

Now, this construction of the purport of section 408 afore quoted is applicable "a fortiori" to the case of a document in summary proceedings; not only because what is tolerated in formal proceedings should "multo magis" be tolerated in summary proceedings, but also because, after all, the practice afore mentioned, obtaining in summary proceedings (that is, an express mention of the exhibition of the document in the summons and/or a record of its production written on the document itself by the Magistrate's clerk) is more or less tantamount to the procedure under section 408 afore quoted;

Applying this test, therefore, to the present case, the issue is narrowed down to seeing whether, failing the observance of the practice obtaining in summary proceedings, the production and identity of the document have been satisfactorily proved by other means;

The Court is satisfied that this proof has been made (1) by the uncontradicted evidence of Inspector Agius, who stated that the document at page 3 was in point of fact attached to the writ of summons, and that he identified it as such; (2) by the circumstance that the newspaper so exhibited is numbered in the proper numerical sequence of the record. This circumstance is important, because, if the document had not been produced, or had it been inserted afterwards "extra iudicium", then it would not have come in at all in the proper paging of the record. Judge Sir Philip Pullicino, in an appeal which came before him ("The Police vs. Camilleri", 14th. December, 1929), very properly grounded one of the reasons of the judgment on the fact that the document had not been paged, and that, were it to be counted, the number of pages of the record would exceed those certified to by the Registrar on the back of the cover of the record. The argument is equally applicable "a contrario sensu" in this case; (3) by the fact, duly recorded in the proces verbal at page 5, that the Police made express reference to the article in question;

Nor should one omit to note that no contrary evidence of any kind has been tendered or attempted to be made by the defendant. Once the Prosecution discharged the "onus" laid upon it of proving "aliunde" the production and identity of the document, the burden of proving the contrary was shifted on to the defence, who did not, as has been stated, offer or attempt to make any proof displacing that of the Prosecution;

This Court does not hesitate to say that no wrong whatsoever was occasioned to defendant by the fact that the production and identity of the document was not proved in the usual way. Indeed, since the very first sitting of the case (vide proces verbal at page 6) the accused declared that he was the editor, proprietor, printer, publisher and writer of the article in question. Further, in his note of submission at page 18, defendant dealt with the contents of the article in question. At no stage of the proceedings was any question raised as to the production or identity of the exhibit at page 3; indeed, throughout, as is evidenced by the record,

the existence of the exhibit was impliedly common ground between the prosecution and the defence. This Court is aware that the doctrine of "estoppel" (in particular, estoppel by conduct) is a rule of civil actions, and has no application to criminal proceedings; but, as is remarked in Powell's "Principles and Practice of the Law of Evidence" (page 449, 1910 edit.), in criminal proceedings "matters which in civil actions create an estoppel are usually so cogent that it would be almost useless to set up a different story". Defendant's line of conduct and defence before the Court below was such as to imply the acceptance of the fact of the production and identity of the exhibit at page 3;

For the foregoing reasons the Court disallows the plea set up by defendant, and orders that the case be proceeded with.