We find no English cases to show what " influence " means, in such a case, but because of the context we think there must be involved in the term something akin to the relationship existing between a male or female " souteneur " and the person for whom he or she lives. It would be impossible to hold that this woman was guilty of an offence under Section 151 without the implication that anyone who asks a prostitute to have connection with anybody else is also guilty of such offence, and that we have seen is not the Law.

The result is that the appellant, who was not allowed under the circumstances to withdraw her appeal, succeeds in it, and the conviction and sentence must be set aside.

Appeal allowed.

[BELCHER, C.J., DICKINSON AND LUCIE-SMITH, JJ.]

ALEKOS N. ZENON AND 6 OTHERS AS MEMBERS OF THE LATE SCHOOL COMMITTEE FOR THE TOWN OF LIMASSOL, AND ALSO PERSONALLY AS GUARANTORS (DEFENDANTS "B"). *Appellants,*

v.

THE BISHOP OF KITIUM AS PRESIDENT AND 8 OTHERS AS MEMBERS OF THE SCHOOL COMMITTEE OF LIMASSOL (DEFENDANTS "A") AND

THE PEOPLE'S BANK, LIMASSOL, LTD. *Respondents.*

Contract—Powers of School Committee—Powers of borrowing—Education Laws of 1923, *Nos.* 32 *and* 33 *of* 1923—*Subrogation—Liability of individual members of Committee on their personal Guarantee—Warranty of Authority.*

The Town School Committee of Limassol in August, 1924, entered into an agreement in writing with the respondent, The People's Bank Limassol Ltd. to borrow upon overdraft up to £500. Seven members of this Committee signed the agreement also in their personal capacity as guarantors. The account was overdrawn for £363. 16*s.* 7*cp.*, of which £155 was used to pay teachers' salaries, and the balance represented losses in buying books for the pupils. In an action by the Bank against the members of the present School Committee, and also against the members of the previous Committee in their capacity as members of such Committee, and also against them personally as guarantors.

Held: (1) that the School Committee had no power to borrow money from the Bank;

(2) that the Bank was entitled to be subrogated to the creditors and recover that part of the loan used to pay teachers' salaries and similar debts, which it was within the powers of the Committee to contract;

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(3) that the members of the Committee were not liable on a warranty of authority;

(4) that the members of the Committee who signed as guarantors were liable to the Bank for the whole sum claimed.

Appeal from a decision of Fuad, J., in the Divisional Court of Limassol.

Triantafyllides, Lanitis and *Tornaritis* for appellants.

Chrysafinis and *Theophanides* for respondents (defendants "A")

Clerides for respondent Bank.

The judgment of the Court was delivered by the Chief Justice.

JUDGMENT :—

BELCHER, C.J.: The facts in this appeal are as follows :—

On 15th August, 1924, the Town Committee for the Greek-Christian School of Limassol, arranged with the respondent Bank for a credit in current account up to £500, and seven members of the Committee gave their joint and several personal guarantee for "the amount which might be overdrawn." The arrangement was in writing. The account was operated on, and became £363. 16*s.* 7*cp.* in debit; of this debit £155 is to be attributed to the honouring by the Bank of cheques drawn to pay teachers' salaries and minor items of the same character, and the rest to losses on a purchase of school books which was intended to reduce the costs of them to pupils, but which in fact was a failure. The Bank sued the Committee and the guarantors for the £363, 16*s.* 7*cp.*; the case was heard by Fuad, J., in the Divisional Court of Limassol–Paphos and he dismissed the action as against the Committee in what may be called their official or fiduciary capacity but found for the plaintiffs as against the guarantors personally. From that judgment the guarantors appeal to this Court.

A preliminary objection was taken on the hearing of the appeal by Mr. Chrysafinis, junior, who appeared for Mr. Kakoyannis, one of the members of the Committee for the year in which action was brought, that the plaintiff Bank being a respondent which contends that the judgment of the Court below should be varied, has not given him the notice required by Order 21, Rule 14, setting forth the variations contended for. The rule is meant to prevent parties being taken by surprise, and at most might give rise to an adjournment in a proper case, but Mr. Clerides for the respondent Bank has not addressed to us any argument for variation of the judgment; on the contrary he stated that he is not interested in the dispute between the other respondents and the guarantors, being contended with his judgment against the latter. In the circumstances we find no substance in the objection.

The case for the appellants was put before us in considerable detail by their respective counsel. Their arguments may be summed up as follows:— If the legal question whether the schools are or not a corporation is material to their liability, they are a corporation, and the money in this case was borrowed by the appellants acting with due authority received from the corporation. In giving that authority the corporation was acting within its powers. There was, consequently, no personal liability upon the appellants as principals. If, on the other hand, the contract to repay the Bank did not for any reason bind the schools, then on the principles enumerated in the Mejellé, Section 612 *et seq.* the liability of the appellants is at an end.

For Mr. Kakoyannis who claimed to be entitled to defend separately, as being named in the writ of summons as a member of the School Committee (though he was not such at the time the overdraft document was signed), it was contended by Mr. Chrysafinis, junior, that, assuming the schools to be a corporation, it was outside their powers to contract the debt sued on; that only those who signed the contract could possibly be liable, and that such liability was personal if the Bank knew of the inability of the Corporation to contract, and that if the Bank had not such knowledge no liability attached to anyone. Mr. Chrysafinis further contended that the schools were merely a voluntary and unincorporate association of persons.

The Court did not at the beginning of this case feel satisfied of the right of Mr. Kakoyannis to be represented, but it resolved to hear his counsel before deciding the question. It will be convenient at the stage now reached to consider what is his position. He was not a member of the School Committee when the alleged cause or causes of action arose; clearly, therefore, he was not sued in his personal capacity. Then in what other capacity was he sued? The form of the writ from the outset shows that he was sued as a member of the School Committee of Limassol at the time the writ was issued. Now the majority of the Committee, or the Committee as a body, at issues and at the time the action came on for hearing, were quite willing to let judgment go by default. If in fact the alleged debt, or any part of it, were *ultra vires* the powers of the Committee as a body to contract, then on the principle laid down in the case of *Great North-West Central Railway* v. *Charlebois* (1), a judgment so obtained against them by consent would be of no validity or effect; the Committee having raised neither the defence of *ultra vires* or any other defence at all, the plaintiff is certainly not going to raise it, but the Court ought not in these circumstances to refuse to allow a member of the

(1) (1899) A.C. 114.

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Committee, even though it is a statutory body, so to sever in his defence from the majority as to enable the Court to hear arguments which, if they prevail, will prevent the Court from giving a void judgment which would later have to be set aside if the matter was regularly brought to its notice, as I do not doubt that it would be possible to do on our existing procedure. This seems to me not to depend on whether or not the Committee is a corporation.

To show that more powers are to be attributed to the Committee than are expressly mentioned in the Law No. 33 as read with the Law No. 32 with which it is, somewhat inartistically, combined, it was argued for the appellants that these schools were a corporation for many years prior to the first Education Law, and that the Committee are now that corporation.

That does not seem to me to be sound. The Town Committees were created as new bodies by statute: it is nowhere said or necessarily implied in the statute that they are to have any wider powers than those which they are there given: indeed, if they were, the statute would hardly have been necessary. Their powers and duties are those set out in Sections 4 to 7 of Law 33 of 1923 and no others.

Whether the Committee as a body created by statute is for all purposes a corporation, it is unnecessary, in my opinion, to decide. The personnel goes out of office when a new Municipal Council is elected, but the new Committee has the school assets held for it by the Chairman by mere operation of law (see Section 6) and to that extent there is continuity. It appears from Section 5 that there are at least some contracts which a Town Committee can make and expenses due under such contracts are to be paid not out of the Committee's individual pockets but out of the school funds in their control, however limited that control may be.

Now, the primary contract material in this case is a loan from a Bank, and the question is whether authority to borrow from a Bank is to be found in, or reasonably implied from, the Education Laws. We have to go to Section 71 of Law 32 of 1923 to see where the Committee's revenues come from, and there we find that the foundation of their funds consists of a sum equal to a tenth of certain taxes which are collected from tax-payers in general by Government, and by Government paid over to the Committee "to be applied to the maintenance of the Secondary Schools." Then there are teaching and examination fees, and grants from the Municipality and the Church: so much is plain from the evidence of Mr. Demetrios Nicolaides who is called the Cashier of the Committee, and appears to have ordinarily received and paid the school ingoings and expenses respectively, though not to have operated on the Bank account in question.

In the main then the fund is one which arises annually and is spent annually. But capital expenditure may have to be incurred upon schools, as well, that is obvious, and Section 5 shows that it is the Town Committee which is to incur it, and also how they are to meet it, namely by loans which they may get from the Public Loan Commissioners. Section 5 (2) is not a model of draftsmanship, and it is not necessary to interpret it in detail here, but it seems to mean that the Committee can get from the Public Loan Commissioners a loan before they build and without giving any security for it, and that then later when the Commissioners are due their principal or interest, the Committee may borrow money, and to secure the lender may charge certain definite classes of immovable and movable property belonging to the schools.

Sub-section (3) contains a provision which should be noticed, because it indicates that the Committee for the time being is not to tie the hands of its successors as to the appointment of teachers, while at the same time it is clear that if it were literally carried out a Committee's final appointment of teachers could only be for six months. No doubt that might create a very difficult position.

Then by Section 5 (4) salaries for the school teachers are to be paid " so far as the funds available will permit."

There is another provision in Section 6 (2) which says that no disposition of the school property (meaning, it is clear from the section's introductory words, either movable or immovable) shall be made without the authority of the District Committee of Education subsequently approved by the Board of Education.

The existence of these provisions, which are closely restrictive of the Committee's powers, not to say embarrassing, seems to me to be quite inconsistent with a claim on the part of the Committee to have the full rights of a corporation at Common Law, and on the other hand, if they can borrow whenever they like on the strength of the schools assets being behind them, there would be no need to keep salaries down to the limits of the " funds " unless one gives a wider interpretation to " funds " than the context warrants. The case nearest on the facts to this which I have been able to find is the *Queen* v. *Sir Charles Reed*, reported in 5 Q.B.D., p. 483, where it was held that in England a School Board had not the power, when the school fund proved insufficient, to contract a temporary loan for the purpose of meeting their current expenses until they could obtain money out of the rates. The cases are not indeed exactly parallel, because the English Statute is, I need hardly say not identical in terms with ours, and the point arose not on a claim by the Bank but on the Auditor disallowing Bank interest paid by the Board, and also because in the circum-

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stances of that case a superior authority had power to remit the surcharge in a case where it would be unreasonable to sustain it. But the general principle involved is the same. Cotton, L.J., said in words which I think are entirely applicable to the case before us :—

"This was no question of mere overdraft, but on an advance made on terms agreed upon between the banker and customer. In our opinion the power of a corporation established for certain specified purposes must depend on what those purposes are, and except so far as it has express power given to it it will have such powers only as are necessary for the purpose of enabling it in a reasonable and proper way to discharge the duties or fulfill the purposes for which it was constituted. Is there anything in the Act, besides the limited express power, which gives a School Board by implication of power to borrow money? Intention is shown that all expenses to be paid as they from time to time were incurred and the means of making those payments except so far as provided by other sources mentioned (*i.e.*, authorized loans) is to be provided by funds to be from time to time paid by the rating authority of each district to the School Board in accordance with a precept served by the School Board. This is against implying from the words of the Act any power to borrow, and in our opinion there are no words in the Acts from which power money can be given by implication to the School Board."

There was this difference also in the facts of the English case, that it was within the power of the School Board to claim from the authorities controlling the local rates in advance the sums which they estimated to be necessary to meet their own proper liabilities : so that there, income might be raised to meet expenditure, while in Cyprus expenditure has to be kept down to the limits of a to some degree unascertained income, a very much more difficult task and one which might make it more easy to justify, as ancillary to and necessary to the carrying out of the statutory powers of the Limassol Committee, a small temporary borrowing to meet some narrow margin of excess where that which caused the excess was a debt which it was within the Committee's power to contract. But that was not, or not entirely, this case.

And the general answer to the question whether it was within the Committee's legal powers to borrow this money from the Bank must, therefore, be "no".

But that does not dispose of the whole matter, for the appellants have set up the argument that the Bank were entitled, even supposing the loan was, if it stood by itself, *ultra vires*, to the benefit of the equitable doctrine of subrogation ; and although that point was not taken on appeal

by the Bank itself, we are not precluded from considering it when raised by the guarantors whose obligations may depend upon the antecedent obligation of the Committee to the Bank.

The important case on the subject is *Wenlock* v. *River Dee Company*, decided by the Court of Appeal in 1887 and reported in 19 Q.B.D., p. 155. That case decided that the equitable doctrine in question, established long before, (namely that if a Company, borrowing beyond or without powers, has had the benefit of the moneys advanced by its being applied to debts or liabilities validly incurred and which it was bound to meet, the lender then assumes by subrogation the rights of creditors so paid off), not only applies to liabilities existing when the advance was made but it is to be extended to such accruing subsequently and paid off out of the advance. Fry, L.J., in delivering the judgment of the Court says: "This equity is based on a fiction, which like all legal fictions has been invented with a view to the furtherance of justice. The Court closes its eyes to the true facts of the case, viz., an advance as a loan by the quasi-lender to the Company and a payment by the Company to its creditors as out of its own moneys: and assumes on the contrary that the quasi-lender and the creditor of the Company met together and that the former advanced to the latter the amount of his claim against the Company and took an assignment of that claim for his own benefit." And he quotes the words of Selborne, L.C., in an earlier case, *Blackburn Building Society* v. *Cunliffe Brooks and Co.* (1): "The test is, has the transaction really added to the liabilities of the Company? If the amount of the Company's liabilities remains in substance unchanged, but there is merely for the convenience of payment a change of the creditor, there is no substantial borrowing in the result so far as relates to the position of the Company. Regarded in that light, it is consistent with the general principle of equity that these who pay legitimate demands which they are bound in some way or other to meet and have had the benefit of other people's money advanced for that purpose, shall not retain that benefit so as in substance to make those other people pay their debts. (In such case) there has been no real transgression of the principle on which they are prohibited from borrowing."

Now, whatever difference there may be between the constitution of the Committee of the schools which they manage and that of a public company, I see none which would prevent the application of this principle to a loan by the Bank to the Committee if the facts of the particular case otherwise

(1) 2 Ch.D. 61.

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warrant it. Whether they do depends upon whether the liabilities paid off out of the overdraft were properly incurred debts of the Committee which could have been sued for by the creditors, and it becomes necessary to examine in that light the purposes to which the money got from the Bank were applied.

First, there are the school teachers' salaries. These to the extent of £143. 17*s.* were, as it seems, actually due and unpaid when the overdraft was arranged for, and if there is one kind of contract which is within, I do not say the implied, but the express power of the Committee to make it is the engagement of teachers on salary. Nor was there any evidence before the learned trial Judge to show that the salaries due and later paid were of an extraordinary nature. This part, indeed, of the loan might perhaps have been held a necessary borrowing and, therefore, *intra vires* the Committee's powers, but there is no need to say more than that it is a case where the Bank is rightly entitled to be subrogated to the creditors. Then the rest of the money went to pay for school books. It seems profiteers were thought to be fleecing the scholars when they bought their books, so that if the Committee could buy wholesale and sell at a small profit the scholars would benefit and everyone be pleased. Unfortunately it did not work out like that; there was no gain to anyone except perhaps the sellers of the books. We may draw the inference that ordinarily the school does not provide books, the scholars having to bring their own, and it is, therefore, no more necessary to the carrying on of the schools to enter upon a transaction of this nature than it would be to buy clothes for the children to attend in. It was purely a trading venture, even though with an object in view which was gain to the scholars' parents rather than to the schools or to the Committee. If the booksellers had sued the schools they could without doubt have been met with the defence or *ultra vires* and, therefore, the Bank must be in turn in no better position, and the doctrine of subrogation cannot be availed of as to this part of its claim.

In my view the Bank then are entitled to judgment against the Committee as representing the schools and the assets held by or in trust for the schools, for such part of the overdraft as was used directly or indirectly to pay the teachers' salaries and debts of a similar character, but not for such part of it as was used to pay those who sold the books, the subject of the speculation above-mentioned. If necessary there will have to be a reference to ascertain the exact figures, but if the parties will use just a little more reasonableness in this than they have exhibited in the rest of the litigation they will be able to agree on the figures.

Next comes the question of the liability of the individual members of the old Committee. I am not altogether clear whether the intention was to join them in direct relation to the principal contract and apart from their guarantee, but the case has been argued on the footing that liability attached to them as on a warranty of authority and as we should certainly have allowed any amendment necessary to clarify and settle once for all the matters in dispute, I will deal with the matter as if such a claim, *i.e.*, on a warranty were embodied in the writ of summons.

What warranty can be suggested it was that they gave to the Bank? No doubt it is that they were in a legal position to borrow the money on behalf of the schools. Since *Collen* v. *Wright* (1) was decided in 1857, there has been a series of cases, including *Richardson* v. *Williamson* (2); *Cherry* v. *The Colonial Bank* (3); *Weeks* v. *Propert* (4); *Firbanks Executors* v. *Humphrey & others* (5); and *Starkey* v. *Bank of England* (6) which show that were a person by asserting that he has the authority of the principal induces another person to enter into any transaction which otherwise the latter would not have entered into and the assertion is untrue, then fraud or no fraud, the former must be taken to have undertaken personally that it was true. But that the rule is not quite so broad as might be supposed from a perusal of the cases referred to appears from two other cases decided in the Courts of Chancery; *Rashdall* v. *Ford* (7) and *Beattie* v. *Lord Ebury* (8). In the latter cases Sir G. Mellish, L.J., said: "If the cases" (he is referring to the first three mentioned above) "are examined, there was in each a misrepresentation of fact . . . if there was no misrepresentation of fact but only a mistake or misrepresentation in point of law, that is to say if the person who deals with the agent is fully aware in point of fact of what the extent of the authority of the agent is to bind his principal, but makes a mistake as to whether that authority is sufficient in point of law or not, then the agent would not be liable." And he supports his view by the decision in *Rashdall* v. *Ford*.

Applying that equitable modification of the principle to the fact in this case, can it be said that there was any misrepresentation of fact? The Bank must be taken to know the contents of the statute and that was all the Committee knew. They never pretended either directly

(1) 110 Revised Reports 611.
(2) (1871) L.R. 6 Q.B.D. 276.
(3) (1869) L.R. 3 P.C. 34.
(4) (1873) L.R. 8 C.P.C. 427.
(5) (1886) 18 Q.B.D. 54.
(6) (1903) A.C. 114.
(7) (1866) L.R. 2 Eq. 750.
(8) (1872) L.R. 7 Chancery Appeal Cases 777. ...

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or by leaving it to be inferred, that any facts existed which did not exist. They never, for instance, pretended that they were borrowing to pay off an authorized loan. The members of the Committee cannot then, in my opinion, be made liable as on a warranty of authority, and the only matter which remains to be considered is the personal guarantee of those of them who signed it at the foot of the overdraft-document. The third book of the *Mejellé* contains the law to be applied. At the outset I should say that I cannot attach any legal significance to the words added to those of guarantee to the effect that the debt is that of the guarantors personally apart from their position as guarantors. It is not: the principal debt was contracted for the Committee's purposes as an educational body, and saying otherwise cannot alter that. Now as to the effect of the *Mejellé* provisions: Article 612 says that suretyship is a second liability added to an existing one, and Article 631 that it is necessary that the subject matter of the guarantee in this case the overdraft, should be a burden on the principal debtor, in this case the Committee as a body: the complement of this is Article 662 which says that the release of the principal debtor carries with it necessarily the release of the guarantor. Applying those principles literally it would seem that they defeat the clear and express intention of the parties in this case, which is that the guarantors shall be liable themselves as guarantors for the amount in which the current account is found to be in debit when the Bank asks for payment, up to the limit laid down of course. If that argument could succeed it would mean the end of all honourable dealing in cases such as the present: but the *Mejellé* itself provides the clue to a more reasonable interpretation. Doubtless there were, when the principles of the *Mejellé* were formulated, no such things as companies or public bodies for whom it was necessary to lay down limits as to their contractual liability, but there were always minors and insane persons. The debts of such could form the subject of a guarantee (Article 629): a man who had asked a shopkeeper to supply goods to an infant or a lunatic, and at the same time said he would guarantee the debt, was not allowed to defraud the creditor by a plea of the minority or unsoundness of mind of the other when he himself was sued. These were debts which themselves could be annulled owing to an objection purely personal to the debtor: yet the guarantor was held to his bargain: (Cf. Section 2012 of the French Civil Code). Exactly the same ratio exists for holding the guarantors liable in the present case, and I think we are bound so to decide.

The appeal must be allowed and the judgment of the Court below set aside and in lieu thereof judgment must be entered for the plaintiff against the Committee as a statutory

body and so as to bind the assets held by or in trust for them as such body for a sum representing that part of the sum claimed which went to pay teachers' salaries and other lawful debts within the power of the Committee to contract: as to which there will be liberty to apply further if the parties cannot agree on the figures: and the Bank must also have judgment against those members of the Committee who signed the guarantee, for the whole of the amount claimed. We order the Bank's taxed costs to be paid as to half by the schools and to half by the persons who signed as guarantors, and the latter must also pay the taxed costs of Mr. Kakoyannis. All others concerned must bear their own costs.

Appeal allowed.

[STRONGE, C.J., THOMAS AND CREAN, JJ.]

1931.
May 13.

REX

v.

YANNIS PAVLI

Criminal Law—Procedure—Magisterial Court—Summons charging several offences—General finding of guilty without specifying on which charge.

The appellant was charged before the Magisterial Court with (1) stealing a ewe, (2) taking upon himself the control and disposition of such ewe well knowing it to have been stolen, and (3) with being in possession of such ewe reasonably suspected of being stolen. The Court entered a general finding of " guilty " without specifying of which of the offences charged in the summons, and imposed a sentence of imprisonment and fine.

Held: (1) that several offences of the same nature may be included in one summons;

(2) that, if the conviction was intended to be on one of the three counts, it was bad for uncertainty, and that, if it was intended to be a conviction upon all three counts, it was likewise bad as being a conviction twice for the same offence.

Appeal from the Magisterial Court of Larnaca.

Chacalli for appellant.

Pavlides, Crown Counsel, for the Crown.

Chacalli: The conviction is bad as it does not say on which charge appellant was found guilty. Cites *Police* v. *Yona Christo* (1). This was a case of theft and receiving where the conviction was quashed for uncertainty.

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(1) 10 C.L.R. 128.