1979 August 31

[SAVVIDES, J.]

NIGERIAN PRODUCE MARKETING CO. LTD., AND ANOTHER,

Plaintiffs,

v.

1. SONORA SHIPPING COMPANY LTD.,
2. THE SHIP "ASPYR."

Defendants.

(*Admiralty Action No.* 174/76).

Admiralty—Practice—Writ of summons—Not served within 12 *months of date of issue—Expiration—Renewal—Discretion of Court—Action in rem against ship—Service of writ of summons could not have been effected because ship had not called at any port within the jurisdiction—Good cause shown for making an order renewing writ for six months—Old English R.S.C. Order* 8 *rule* 1 *and Order* 64 *rule* 7, *applicable by virtue of rule* 237 *of the Cyprus Admiralty Jurisdiction Order,* 1893 *and sections* 19 *and* 29(2)(a) *of the Courts of Justice Law,* 1960.

On November 3, 1976 the plaintiffs issued a writ of summons in an action in personam (against defendants 1 as owners of the ship "ASPYR") and in rem against defendant 2 the said ship "ASPYR". As the writ of summons was not served on defendant 2 within the period of 12 months provided by the relevant Rules of Court plaintiffs, by means of *ex-parte* applications, obtained on two occasions orders renewing the writ of summons against defendant 2 for periods of six months.

On April 13, 1979, about six months after the expiration of the last period of renewal of the writ, plaintiffs applied for a further renewal of the writ of summons in so far as defendant 2 was concerned on the ground that notwithstanding the several renewals service could not have been effected on defendant 2, because the defendant ship had not called at a Cyprus port since the issue of the writ but was expected to call at a Cyprus port within the next six or seven months.

The application was based on rule 237* of the Cyprus Admiralty Jurisdiction Order, 1893 and on rule 1** Order 8 of the old English Rules of the Supreme Court.

In view of the fact that no provision is made in the Cyprus Admiralty Jurisdiction Order, 1893 as to the period that a writ of summons remains in force the English Rules and Practice in force in England on the 15th August, 1960 (see sections 19 and 29(2)(a) of the Courts of Justice Law, 1960) are by virtue of the said rule 237 applicable.

Counsel for applicant submitted that as the application was made after the expiration of the period that the writ was in force and not before, as provided by the English R.S.C. Order 8, rule 1, English R.S.C. Order 64, rule 7*** could be utilised by allowing extension of time.

Counsel further submitted that the question of limitation of time did not arise as no statute of limitation was applicable in this case.

Held, that service of a writ in rem can only be effected within the jurisdiction; that as the action is one in rem service could not have been effected once the said ship has not called at any port within the jurisdiction of the Court so that service could be effected as provided by Order 16 of the Rules of the Supreme Court of Cyprus in its admiralty jurisdiction; that on the facts before this Court good cause has been shown for granting the

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* Rule 237 provides as follows:

"In all cases not provided by these Rules, the practice of the Admiralty Division of the High Court of Justice of England, so far as the same shall appear to be applicable, shall be followed".

** Order 8 rule 1, so far as relevant provides as follows:

"No original writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of twelve months, apply to the Court or a Judge for leave to renew the writ; .....
....."

*** Order 64 rule 7, so far as relevant provides as follows:

"A Court or a Judge shall have power to enlarge or abridge the time appointed in these Rules, or fixed by an order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.....
....."

application; and that, accordingly, an order renewing the writ of summons for a further period of six months from to-day will be made.

Application granted.

Per curiam:

This renewal of the writ of summons does not in any way preclude defendant 2, after service is effected, to apply to the Court to have the order renewing the writ and service thereof set aside on good cause shown.

Cases referred to:

Jones v. *Jones and Another* [1970] 3 All E.R. 47 at p. 50;

Heaven v. *Road and Rail Wagons Ltd.*, [1965] 2 Q.B. 355;

Sheldon v. *Brown Bayley's Steelworks, Ltd. and Another* [1953] 2 All E.R. 894;

Smallpage v. *Tonge* [1886] 18 Q.B. 644;

E. Ltd. v. *C. and Another* [1959] 2 All E.R. 468 at pp. 469 and 470;

Doyle v. *Kaufman* [1877] 3 Q.B. 7; [1878] L.J. New Series Vol. 47 Q.B. 26;

Hewett v. *Barr* [1891] L.J. New Series Vol. 60 Q.B. 268;

Battersby v. *Anglo-American Oil Co. Ltd.* [1944] 2 All E.R. 387;

Holman v. *George Elliot & Co. Ltd.*, [1944] 1 K.B. 591;

Hamp v. *Warren* [1843] 11 M.W. 103;

Re Kerly [1901] 1 Ch. 469;

Re Chitterden deceased [1970] 3 All E.R. 562;

Stevens v. *Services and Window and General Cleaning Ltd.* [1967] 1 All E.R. 984;

Baker v. *Bowketts Cakes Ltd.* [1966] 2 All E.R. 290;

Heaven v. *Road and Rail Wagons Ltd.* [1965] 2 All E.R. 409;

" *The World Harmony*" [1965] 2 All E.R. 139;

Howells v. *Jones* (C.A.) The Times 11th April, 1975;

Moore v. *Burton and Motor Insurance Bureau* [1978] 128 N.L.J. 513;

The Virgo [1978] 2 Ll.L.R. 167;

The "Berny" [1979] 1 Q. B. 80;

Birkett v. *James* [1977] 3 W.L.R. 38 at p. 50.

Application.

Ex-parte application for enlargement of time within which to apply for leave to renew the writ of summons as against defendant 2 and for leave to renew the writ of summons as against the said defendant 2.

M. Papas, for *P. Cacoyiannis*, for applicants–plaintiffs.

Cur. adv. vult.

SAVVIDES J. read the following judgment. Plaintiffs in these proceedings by an *ex–parte* application dated 13.4.1979 apply:

(a) for enlargement of time within which to apply for leave to renew the writ of summons as against the ship "ASPYR" defendant No. 2.

(b) for leave to renew the writ of summons as against the ship "ASPYR" defendant No. 2.

The material facts relied upon in support of their application as appearing in the accompanying affidavit of Mr. Soterios Aniftos, a registered advocate's clerk, are to the effect that notwithstanding the several renewals of the writ of summons in this case, service could not have been effected on defendant 2, because the defendant ship had not called at a Cyprus port since the issue of the writ but was expected to call at a Cyprus port within the next six or seven months.

The action is one in personam against defendant 1, as owners of the ship "ASPYR" and in rem against defendant 2, the ship "ASPYR". Plaintiffs' claim is for the equivalent in Cyprus Pounds of £100,000.– damages claimed by plaintiff 1 as consignor and by plaintiffs 2–15 as consignees of goods, under 6 Bills of Lading which were to be carried by defendants from Lagos to Hamburg and were not delivered and/or were damaged or lost.

The writ of summons was issued on 3.11.1976 and was not served on defendant 2 within the period of 12 months, provided by the Rules of Court applicable in Admiralty proceedings.

By an *ex–parte* application dated 2.12.1977, that is, after the expiration of the writ of summons, plaintiffs obtained an order renewing the writ of summons for a period of six months.

Service having not become possible within the so extended period, plaintiffs, prior to the lapse of the renewed period, applied again and obtained on an *ex-parte* application, another renewal of the writ of summons against defendant 2 for a further period of six months as from 26.4.1978, the date of the renewal order. The so extended period expired without service having been effected on defendant 2. On the 13th April, 1979, about six months after the expiration of the last period of renewal of the writ, plaintiffs filed the present application asking for further renewal of the writ of summons in so far as defendant 2 is concerned.

In dealing with the present application, I shall not examine the merits of the previous applications on the strength of which the writ was renewed, but I shall deal with the present application on the facts put before me, on an application for renewal of an expired writ made after the last period of its renewal has expired.

The application is based on rule 237 of the Cyprus Admiralty Jurisdiction Order 1893 and Order 8, r. 1 of the English Rules (the old R.S.C. rule). Counsel for applicant argued before the Court that in view of the fact that the application was made after the expiration of the period that the writ was in force and not before, as provided by R.S.C. Order 8, r. 1 of the English Rules, R.S.C. Order 64, r. 7 could be utilised by allowing extension of the time.

Order 237 of the Rules of the Supreme Court of Cyprus in its Admiralty Jurisdiction on which the application is based reads as follows:

> " In all cases not provided by these Rules, the practice of the Admiralty Division of the High Court of Justice of England, so far as the same shall appear to be applicable, shall be followed."

In view of the fact that no provision is made in the Admiralty Rules as to period that a writ of summons remains in force, the English Rules and Practice become applicable by virtue of such order.

In the light, however, of the provisions of s. 19 and s. 29(2)(a) of the Courts of Justice Law 14 of 1960, the practice of the

Admiralty Division of the High Court of Justice in England and the Admiralty Rules in force on 15.8.1960 are the material ones to be applied for in the present case.

The rules applicable for renewal of a writ of summons in Admiralty proceedings in England prior to 15.8.1960 were R.S.C. Order 8, r. 1 and R.S.C. Order 64, r. 7. Order 8, r. 1 (R.S.C. 1960) provided as follows:

> " No original writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of twelve months, apply to the Court or a Judge for leave to renew the writ; and the Court or Judge, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reasons, may order that the original or concurrent writ of summons be renewed for six months from the date of such renewal inclusive, and so from time to time during the currency of the renewed writ. And the writ shall in such case be renewed by being marked with a seal bearing the date of the day, month, and year of such renewal; such seal to be provided and kept for that purpose at the proper office, and to be impressed upon the writ by the proper officer, upon delivery to him by the plaintiff or his solicitor of a memorandum in Form No. 18 in Appendix A, Part I, with such variations as circumstances may require; and a writ of summons so renewed shall remain in force and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes, from the date of the issuing of the original writ of summons."

Its provisions by themselves were applicable only to cases where an application was made before the expiration of 12 months from the issue of the writ. In fact, this is similar to cases in ordinary civil proceedings under our Civil Procedure Rules and the same wording is embodied in the Civil Procedure Rules, Order 4.

In cases where the application was made out of time, that is after the expiration of 12 months, then such application had also to be based on R.S.C. Order 64, r. 7 which provided that:

" A Court or a Judge shall have power to enlarge or abridge the time appointed in these Rules, or fixed by an order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed. Provided that when the time for delivering any pleading or document or filing any affidavit, answer or document, or doing any act is or has been fixed or limited by any of these Rules or by any direction on or under the summons for directions or by any order of the Court or a Judge the costs of any application to extend such time and of any order made thereon shall be borne by the party making such application unless the Court or a Judge shall otherwise order."

Order 8, r. 1 of the English Rules was subsequently revised and substituted by R.S.C. (Rev.) 1962, Order 6, r. 8 which has been largely taken from the former Order 8, and in part from the former Order 64, r. 7. The material part of the new Order 6, r. 8 reads as follows:

"8.—(1) For the purpose of service, a writ (other than a concurrent writ) is valid in the first instance for twelve months beginning with the date of its issue and a concurrent writ is valid in the first instance for the period of validity of the original writ which is unexpired at the date of issue of the concurrent writ.

(2) Where a writ has not been served on a defendant the Court may by order extend the validity of the writ from time to time for such period not exceeding twelve months at any one time, beginning with the day next following that on which it would otherwise expire, as may be specified in the order, if an application for extension is made to the Court before that day or such later day (if any) as the Court may allow. . .

(3) .....

(4) ....."

Irrespective, however, of the amendment of the old order 8 and its substitution by the new Order 6 r. 8 in substance all cases decided on the basis of the old rule and those after the

new rule came into operation, adopt the same principles in construing both rules and in consequence for the purpose of the present application the differences in the wording of the two rules (the old which is applicable in Cyprus by virtue of Order 237 and the new) is not material. This appears in the words of Salmon, L.J. in *Jones v. Jones and another* [1970] 3 All E.R. p. 47 at page 50:

> " It may be asked what was the point of altering the old rule? The old rule had stood for many years in that form and there was a certain archaic ring about its language. There had also been some difficulties about its construction. So those anachronisms in the language of the old rule, and the difficulty which it created, were, so it was hoped, cleared up by the far simpler language of the present rule; but it does not, in my judgment, lead to what I regard as the startling result for which counsel for the plaintiff contended."

Also, in *Heaven* v. *Road and Rail Wagons Ltd.*, [1965] 2 Q.B. 355, Megaw, J. in dealing with the effect of the new R.S.C. Order 6, r. 8 on the old R.S.C. Order 8, r. 1, and the dictum by Lord Denning in *Sheldon* v. *Brown etc. Ltd.*, (2) [1953] 2 All E.R., 894 that a writ can be renewed after its expiration under R.S.C. Order 64, r. 7 had this to say (at p. 363):

> " The discretion under Ord. 64, r. 7, was in terms unlimited. I am unable to see, therefore, how an alteration in wording as between the old Ord. 8, r. 1, and the new Ord. 6, r. 8, can by itself operate to widen the discretion or to annul, or derogate from, the authority of what was said in *Sheldon* v. *Brown Bayley's Steel Works Ltd.* as to the exercise by the Court of that discretion. However, even if it were correct to say, as counsel for the plaintiff contends, that the pre-existing authorities have to be treated as having interpreted Ord. 64, r. 7, against the background of, or by reference to, the terms of the old Ord. 8, r. 1, I should still be unable to accept the argument that the alteration of wording between the old Ord. 8, r. 1, and the new Ord. 6, r. 8(2), can validly be said to have made any material change. What is said is this: the old Ord. 8, r. 1, dealing, as I have said, only with applications for renewal (as it was then called) before the expiry of the 12 months, includes the words: 'if satisfied that reasonable efforts have been

made to serve such defendant, or for other good reasons': but the new Ord. 6, r. 8(2) contains no such words.

Assuming that I am wrong about the irrelevance of the words in the old Ord. 8, r. 1, to the pre-1964 decisions on Ord. 64, r. 7, I do not think that the removal of the words 'or for other good reasons' can be said to have increased the permissible scope of the discretion or to have impaired the authority of the earlier cases. That could only be the case if the Court in consequence now has authority to exercise its discretion otherwise than 'for good reasons'. That would be a remarkable proposition. No suggestion has been made, nor I think could be made, that 'other good reasons' in the old Ord. 8, r. 1, was in some way limited by some sort of application of the ejusdem generis rule, by reason of the collocation of that phrase with the preceding words relating to reasonable efforts to effect service. The words 'or for other good reasons', then, did not operate to limit the discretion under the old Ord. 8, r. 1. Their presence could not have been material to the decisions in *Battersby* v. *AngloAmerican Oil Co. Ltd.* or *Sheldon* v. *Brown Bayley's Steel Works*. Their omission from the new Ord. 6, r. 8, cannot affect the continuing authority of those cases, even if the wording of the old Ord. 8, r. 1, was relevant at all to those decisions as to the discretion. I think the omission was probably because the words omitted added nothing and subtracted nothing. They were surplusage."

That the application was correctly based on both R.S.C. Ord. 8, r. 1 and R.S.C. Ord. 64, r. 7, finds further support in *Smallpage* v. *Tonge* [1886] 18 Q.B., 644, [1886] L.J.R. New Series Q.B. 55 at p. 518 and in the words of Lord Denning in *Sheldon* v. *Brown Bayley's Steel Works Ltd.* (2) [1953] 2 All E.R. p. 894 at p. 897.

" In determining the question, it is important to notice that, even after the twelve months have expired, the writ can be renewed. This is not done under Ord. 8, r. 1 for that only permits renewal before the twelve months have expired. This is done under Ord. 64, r. 7, which is the general rule permitting enlargement of time. It was first done in 1877

by Sir George Jessel, M.R., in *Re Jones*[3], which has been accepted as good law ever since".

Also in *E. Ltd.* v. *C. and Another* [1959] 2 All E.R. p. 468 per BoxBurgh, J. at pp. 469 and 470:

> " The matter depends on two rules, and I am not myself going to enter into the rather disputable legal question whether the application is wholly under one, or partly under one and partly under the other. R.S.C. Ord. 8, r. 1, provides:
>
> > ' No original writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of the twelve months, apply to the Court or a Judge for leave to renew the writ; and the Court or Judge, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reasons, may order that the original or concurrent writ of summons be renewed for six months from the date of such renewal inclusive, and so from time to time during the currency of the renewed writ.....'
>
> It is clear that any application under Ord. 8, r. 1, has to be made before the expiration of the relevant period, and in this case it is common ground that no such application was made; and accordingly reliance has to be placed on R.S.C., Ord. 64, r. 7, which is a general rule which provides:
>
> > ' A Court or a Judge shall have power to enlarge or abridge the time appointed by these rules, or fixed by an order enlarging time, for doing any act or taking any proceedings, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.....'
>
> In my judgment there is no lack of jurisdiction in me to grant this application under the two rules in combination, if in my discretion I think fit; and the only relevance of the

3. [1877] 46 L. J. Ch. 316.

question whether the application is to be treated as a whole under Ord. 64, r. 7, or whether it is partly under Ord. 8, r. 1, is that in Ord. 8, r. 1, the discretion is qualified by the words 'if satisfied that reasonable efforts have been made to serve such defendant, or for other good reasons', and Ord. 64, r. 7, is not so qualified. But as the words 'or for other good reasons' are in themselves very wide, I doubt if it makes much difference whether I proceed under the one rule, or partly under one and partly under the other; and as there is some rather difficult authority on that point, I do not propose to embark on the question".

Until quite recently there was a strong line of authority displaying great judicial unwillingness to enable a plaintiff to have his case go forward, by renewal of the writ when it meant overriding what was viewed as an accrued right on the part of a defendant to a limitation action.

In *Doyle* v. *Kaufman* [1877] 3 Q.B. 7, L.J. 1878 New Series Vol. 47 Q.B. p. 26 where the 12 months period for service had expired as well as the period of limitation, Cockburn, L.C.J., in dismissing the application held,

"These powers which are conferred by rule 8 of Order LVII are not meant to supersede the effect of the Statute of Limitations. When it says a Judge shall have power to enlarge time—that must mean pending something. But here the debt, or at any rate the right to sue for it, is gone; and I think, therefore, that where the right of action is gone the power to revive the writ is also gone."

In *Hewett* v. *Barr* [1891] L.J. Reports New Series, Vol. 60, Q.B. p. 268 an application to renew a writ after the expiry of both the 12 month period for service and the limitation period, was refused. Lord Esher, M.R., at p. 269 had this to say:

"It was laid down in *Weldon* v. *Neal* Law Rep. 19 Q.B.D. 394, as a general rule of conduct with regard to the granting of amendments, that they ought not to be granted where they would have the effect of altering the existing rights of the parties. The principle of that rule with regard to amendments of pleadings applies still more strongly when the Court is asked to allow the renewal of a writ where, by acceding to the application, the Court would deprive

a defendant of an existing right to the benefit of the Statute of Limitations. I think, therefore, the application must be refused."

Lopes, L.J. though agreeing with the result, he relied on the case of *Doyle* v. *Kaufman* (*supra*). Kay, L.J. also agreed with the result but made the following observations:

" I should be sorry that the Court should hold that under no circumstances could such an application as that which is now made be granted in such a case as the present. As at present advised, I am disposed to think that Order IXIV, rule 7, might be so construed as to give the Court power, under exceptional circumstances, to enlarge the time for applying to renew the writ. It might under certain circumstances—for instance, where, after every kind of effort had been made to serve a writ by accident or mistake no application to renew the writ had been made within the twelve months—be very hard that the plaintiff should lose all remedy because in the meantime the period fixed by the Statute of Limitations had expired....."

The principles laid down in the two above cases, were adopted and reiterated in the leading case of *Battersby* v. *Anglo-American Oil Co. Ltd.* [1944] 2 All E.R. p. 387 by Lord Goddard at p. 391 who in delivering the judgment of the Court of Appeal, allowing the appeal against an order renewing a writ of summons on an application made after its expiration, is reported as saying:

" We conclude by saying that even when an application for renewal of a writ is made within 12 months of the date of issue, the jurisdiction given by Ord. 64, r. 7, ought to be exercised with caution. It is the duty of a plaintiff who issues a writ to serve it promptly, and renewal is certainly not to be granted as of course, on an application which is necessarily made *ex parte*. In every case care should be taken to see that the renewal will not prejudice any right of defence then existing, and in any case it should only be granted where the Court is satisfied that good reasons appear to excuse the delay in service, as, indeed, is laid down in the order. The best reason, of course, would be that the defendant has been avoiding service, or that his address is unknown, and there may well be others. But

ordinarily it is not a good reason that the plaintiff desires to hold up the proceedings while some other case is tried, or to await some future development. It is for the Court and not for one of the litigants to decide whether there should be a stay, and it is not right that people should be left in ignorance that proceedings have been taken against them if they are here to be served. While a defendant who is served with a renewed writ can, no doubt, apply for it to be set aside on the ground that there was no good reason for the renewal, his application may very possibly come before a master or Judge other than the one who made the order, and who will not necessarily know the grounds on which the discretion was exercised."

In the same case Lord Goddard is commenting the case of *Holman* v. *George Elliot & Co. Ltd.* [1944] 1 K.B. 591, 1 All E.R. 639 in which it was held by MacKinnon, L.J. that:

"The sole question is, first of all, whether there is a discretion in the Court under R.S.C., Ord. 64, r. 7, to enlarge the time fixed for the service of a writ under R.S.C., Order 8, r. 1; and, secondly, if there is such a discretion, whether the Judge exercised it rightly in this case. I think it is not accurate to say that *Doyle* v. *Kaufman* laid down as a settled rule that the Court had no power to extend the time within the rule. I think the true view is, as was indicated by Kay, L.J., in a subsequent judgment in *Hewett* v. *Barr* that there is a discretion in appropriate circumstances, though no doubt *Doyle* v. *Kaufman* points out circumstances in which it would be wrong for the Court to exercise that discretion in favour of an applicant plaintiff. That there is such a discretion I think has been recognised in subsequent cases, such as *Mabro* v. *Eagle Star and British Dominions Insurance Co., Ltd.*, where again this rule about depriving a defendant of an accrued defence under the statute of limitations was relied upon as a reason why no order should be made. Greer, L.J., sums up the matter at the end of his judgment by saying:

'Whether the matter is one of discretion or not, it appears to me inconceivable that we should make an order which would have the effect I have mentioned. It has been the accepted practice for a long time that

amendments which would deprive a party of a vested right ought not to be allowed.'

I think that there is no rule that the Court or a Judge is deprived of any discretion of allowing such an extension of time as is involved in this case but that there has been an accepted practice for a long time not to exercise that discretion in such circumstances as were dealt with in *Doyle* v. *Kaufman*. In this case, as I have said, the obligation under Lord Campbell's Act to issue the writ within 12 months of the date of the accident had been complied with; and by that issue of the writ if it had been served in proper time the defendants would have failed to be in a position to rely upon the limitations in that Act."

The facts of that case were:

" A writ was duly issued in an action brought by a widow in respect of the fatal accident to her husband within the 12 months limited by the Fatal Accidents Act, 1846. By an oversight the solicitor's clerk omitted to serve until a short time after the expiry of the 12 months allowed for service by the rules of the Supreme Court. Upon the application of the defendant that service was set aside and three months later the plaintiffs applied for a renewal of the writ and an extension of the time of service under R.S.C. Ord. 64. r. 7. It was contended that this was a case where the extension of time ought to be refused since it deprived the defendant of a defence under a statute of limitations."

Lord Goddard in expressing his disagreement with the result in *Holman's* case (*supra*) had this to say:

" That is a decision of this Court, but in our opinion, it is in conflict with the earlier cases also decided in the Court of Appeal. Accordingly, in conformity with the decision of the full Court in the recent case of *Young* v. *Bristol Aeroplane Co.* [1944] 2 All E.R. 293, we are at liberty to disregard it and in our opinion we ought to follow the earlier decisions".

And in his judgment at p. 389, the following are reported:

" That the widest discretion is given to the Court under that rule none will deny, but there is a line of authority,

unbroken till the recent decision to which reference has already been made, that the Court will not exercise that discretion in favour of renewal nor allow an amendment of pleadings to be made, if the effect of so doing be to deprive a defendant of the benefit of a limitation which has already accrued."

The principles set out by Lord Goddard in Battersby's case were affirmed and applied in *E. Ltd.* v. *C. and Another* [1959] 2 All E.R. p. 468.

Doyle v. *Kaufman* (*supra*) was criticised on the ground that it was based on the wrong assumption that an unserved writ becomes a nullity after the expiration of 12 months and in consequence it cannot prevent a limitation of the 12-month period. The question whether service after the expiration of the period of 12 months of its validity or after any extended period amounts to a nullity or mere irregularity appears however to be finally settled. The decision in *Hamp* v. *Warren* [1843] 11 M.W. 103 and *Re Kerly* [1901] 1 Ch. 469 fully support the view that such writ does not become a nullity but the service after the expiration of the period of its validity amounts to mere irregularity. In *Sheldon* v. *Brown etc. Ltd.* [1953] 2 All E.R. 894, reversing on appeal the decision of Barry, J. [1953] 2 All E.R. p. 382 it was held that service after the expiration of the validity of a writ is a mere irregularity which may be waived by the entry of an unconditional appearance.

In the same respect the judgment of Lord Goddard in *Battersby's* case (*supra*) was criticised in *Sheldon's* case (*supra*) by Singleton, L.J. as follows at p. 896:

"I do not regard it as strictly accurate to describe a writ which has not been served within twelve months as a nullity. It is not as though it had never been issued. It is something which can be renewed. A nullity cannot be renewed. The Court can grant an application which results in making it just as effective as it was before the twelve months' period had elapsed. I do not think that the Court had in mind what had been said in *Kerly's* case [1901] 1 Ch. 471, 478, to which I have referred. Moreover, it was not necessary for the decision of the Court would exercise the discretion which it had under Ord. 64, r. 7, to renew a writ when the

renewal would deprive a defendant of the benefit of a limitation which had accrued, and the judgment was to the effect that the discretion ought not to be exercised in such circumstances. If the writ had been a nullity, there would have been no point in considering whether the Court should exercise its discretion to renew it. The position under Ord. 8, r. 1, is that the writ is not in force for the purpose of service after the twelve months' period had run. It is still a writ. The unconditional appearance by the second defendants is a step in the action. It amounts to a waiver with regard to service. It prevents the second defendants' being able to contend successfully that the service on them is bad."

But the general principles laid down by Lord Goddard as to how the discretion should be exercised are affirmed in the same judgment as follows:

"The locus classicus in *Battersby* v. *Anglo-American Oil Co. Ltd.* In that case Lord Goddard, in delivering the judgment of the Court said:

'In every case care should be taken to see that the renewal will not prejudice any right of defence then existing, and in any case it should only be granted where the Court is satisfied that good reasons appear to excuse the delay in service, as, indeed, is laid down in the order. The best reason, of course, would be that the defendant has been avoiding service, or that his address is unknown, and there may well be others. But ordinarily it is not a good reason that the plaintiff desires to hold up the proceedings while some other case is tried, or to await some future developments.'

That case was decided before the rules were altered, but there are a number of cases in which this Court has since affirmed the principles laid down by Lord Goddard and said that they apply today just as much as they did 25 years ago."

In *Re Chitterden (deceased)* [1970] 3 All E.R. 562, it was held that the entry of an unconditional appearance by the defendant after becoming aware that service is out of time and that an order for extension of time for service has been made, amounts

to waiver of any irregularity and constitutes a fresh step after becoming aware of the irregularity which precludes him from applying to set aside the service of the writ.

The same principles apply irrespective as to whether the application is made prior to or after the expiration of the writ of summons.

In *Stevens* v. *Services and Window and General Cleaning Ltd.* [1967] 1 All E.R. 984 where a summons was taken out to set aside the renewal of the writ of summons after its expiration and the ensuing service of such writ on the defendants it was held that:

> " The facts that at the date when an extension of the validity of the writ was granted it had not expired did not render inapplicable the principle that good cause, viz., good reason to excuse the delay, must be shown in order to justify the granting of an extension; in the present case good cause had not been shown, and the extension granted by the registrar would be set aside."

In effect, what has been established by this decision was that it was of no real significance the time when the application for renewal was made. The case also deals with some of the leading cases on the question of renewal and the circumstances under which renewal may or should be granted when a defendant has accrued or accruing rights under the Limitations Act 1939. Chapman, J., in his judgment is reputed to have said the following (p. 988):

> " Has good cause or sufficient reason been shown here? I must not allow myself to be affected by comings and goings between the plaintiff and the legal aid committee or by delays which may have occurred on the part of the latter—it would not be right that a defendant's position should be prejudiced by matters of that kind (see *Baker's* case). What I must look for primarily, although not perhaps exclusively, is good reason to excuse the delay in service (see *Battersby's* case). Examples of excuses which might well be valid are set out in detail by Megaw, J., in *Heaven's* case. Yet nothing on these lines was put before the district registrar at all...
>
> Counsel for the plaintiff has stressed the speciality which

exists here, that when the matter came before the district registrar in October, 1965, the writ was still alive so that it was not a case where rights under the Limitation Act, 1939, had come to full maturity, as would be the case if a writ had died after the expiration of the limitation period and before any extension had been made. In my view, this cannot affect the principle of the matter. If a person issues a writ on the last day or within the last week before the falling of the guillotine under the Limitation Act, 1939, he gets the benefit of a full year, less a day or a week, before he need serve his writ; but it is all along a writ which he ought to realise will not be renewable unless good cause for the renewal can be shown. This, I think, is implicit in the stress which Lord Denning, M.R. in *Baker's* case lays on the position whether 'the Limitation Act, 1939 has run, or is running in favour of a defendant'. Counsel for the plaintiff has urged with great force what he has described as 'the intolerable injustice to the plaintiff' if the district registrar's order were set aside. If, he says, it had never been made, there would have been still time to effect service and the plaintiff's solicitors were prepared to act without legal aid backing, as was shown by their initial issue of the writ. Counsel for the defendants has urged that this is tantamount to saying that if the Court can be persuaded to make an order without their being adequate materials for it, the order should nevertheless be regarded as unassailable once it is too late to make good the deficiency. I think that counsel for the defendants is right about this. I must look at the matter on the basis of the material which has been put before the Court and if no good and sufficient reason has been shown for a renewal I am bound to say so and to make the order which necessarily follows. It is my conclusion here that no good or sufficient reason has been shown."

In *Baker* v. *Bowketts Cakes Ltd.* [1966] 2 All E.R. 290, in which service by post shortly before the expiry of twelve months was attempted but due to the fact that the address was not completely correct and the letter enclosing the writ was returned undelivered and the writ in the meantime expired it was held by majority (Lord Winn, L.J. dissenting) that:

" Where time had run under the Limitation Act, 1939,

a plaintiff seeking an extension of a writ must show sufficient reason for it; in the present case it was the plaintiff's solicitors' fault that the writ had not been served previously and, having left its service so late, it behoved them to do whatever was needed to ensure that no mistake over its service was made; accordingly, the decision of the Judge on the inter partes application that, in effect time should not have been extended was right."

In the dissenting judgment by Winn, L.J. the following are reported (at p. 294):

" Therefore, the test remains whether or not the Court or Judge is satisfied that reasonable efforts have been made to serve the defendant with the writ, the extension of which is sought by the application, at any rate if that application is made, as it was here, during the validity of the writ. In my judgment, whilst it is, of course essential that the Court should always bear in mind the maxim interest reipublicae ut sit finis litium, that is no justification for reading the word 'prompt' or 'energetic' into the words 'if satisfied that reasonable efforts have been made'. As my lords have said, the conduct of this litigation was lamentably lethargic. It is not the conduct of the litigation, however, which in my judgment provides the criterion for the exercise of the discretion of the Court; it is whether or not during the currency of a writ, i.e. whilst it is valid, reasonable efforts have been made to serve it."

The question of exceptional circumstances was further considered in the following cases:

In *Heaven* v. *Road and Rail Wagons Ltd.* [1965] 2 All E.R. p. 409, Megaw, J. in expressing his opinion as to ... amounted to exceptional circumstances had this to say at p. 415:

" Exceptional cases, justifying a departure from the general rule, might well arise where there has been an agreement between the parties, express or implied, to defer service of the writ; or where the delay in the application to extend the validity of the writ has been induced, or contributed to, by the words or conduct of the defendant or his representatives; or perhaps where the defendant has evaded service or, for other reasons without the plaintiff's fault, could not

have been served earlier even if the application had been made and granted earlier."

And on the question of hardship he concludes his judgment by considering it not a relevant factor that there will be hardship to the plaintiff or greater hardship to the plaintiff than to the defendant.

In *Jones* v. *Jones and another* [1970] 3 All E.R., p. 47, Salmon, L.J. made the following observations at pages 51 and 52:

" So, as a rule, the extension will not be granted. It is for the person asking for it to show, as Lord Denning, M.R. said, 'sufficient reason' or 'good cause', or as Lord Goddard said 'good reasons..... to excuse the delay'. I ought perhaps finally to refer briefly to *Heaven* v. *Road and Rail Wagons Ltd*, the decision of Megaw J. which was quoted with approval by Lord Denning M.R. in the passage in his judgment which I have just read in *Baker's* case. The only part of Megaw J.'s judgment which I need read is as follows:

> ' The rules of Court provide twelve months—a not ungenerous time, it might be thought—within which the plaintiff can hold up proceedings by not serving his writ. Surely, beyond that period the same public policy requires that the Court should ensure that it is only in really exceptional cases that the effective start of litigation should be yet further delayed; especially where the twelve months allowed for service extends beyond the end of the limitation period; and, above all, where the application is not made until after the period of twelve months, and with it the validity of the writ, has expired.'

Much depends on how the words 'really exceptional cases' are construed in relation to the other phrases I have already referred to—'sufficient reason' or 'good cause' or 'good reason'. I suppose that it is only in an exceptional case that 'sufficient reason' or 'good cause' or 'good reasons' exists. It is of great importance that the rules should be observed. The writ should certainly be served within the 12 months, especially if it is not issued until just before the expiration of the three-year period, unless there is good

cause for extending the time for service; and I hope that nothing that I say in this case will be construed as an encouragement for anyone to imagine that, even if he lets the 12-month period go by, he has only to come to the Courts with some fairly plausible excuse, in order to get the time extended. Certainly anyone who takes that view would be disappointed."

The facts of the case were shortly as follows:

"The plaintiff, while a passenger in a motor car driven by the first defendant, was injured in a collision with a car driven by the second defendant. On 13th June 1968, the plaintiff's solicitor issued a writ against both defendants, which was validly served on the first defendant on 11th June 1969. The plaintiff's solicitor reasonably, and without negligence (but mistakenly as the Court held) took the view that service of the writ on the first defendant within 12 months of its issue entitled him to serve it on the second defendant on 3rd July 1969. On 17th July 1969, the second defendant applied to set this service aside. On 29th July 1969, a master extended the validity of the writ on an *ex parte* application by the second defendant on 12th November 1969. By the order of a Judge in chambers the validity of the writ was later extended on application by the plaintiff. On appeal by the second defendant, the Court of Appeal dismissed the appeal."

The reasons given by Salmon, L.J., appear at p. 53 of the judgment:

"If we were to reverse the decision of the learned Judge, and it turned out in the end that the first defendant was blameless, and that the accident was caused by the negligence of the second defendant alone, the plaintiff would suffer great injustice. Not only would he have lost his cause of action against the second defendant, but in the circumstances of this case, he would have no redress against his solicitor in negligence. As this Court pointed out in *Allen* v. *Sir Alfred McAlpine & Sons Ltd.* when questions of this kind arise it is a material factor to take into account that if the action is dismissed, the innocent party, the plaintiff, will have no redress against anyone for the damages which he has suffered. In the present case the injured plaintiff was a passenger. He was

clearly entitled to recover damages against one or other or both of the defendants. Should the order of the Judge be reversed, the plaintiff might well be left 'out in the cold'. That hardship must be balanced against the hardship which the Judge recognised that the second defendant may suffer as a result of the long delay. Although there has been serious delay, for which I do not suppose that the plaintiff is to blame, the solicitors were in no way negligent."

Sachs, L.J., in the same case, reserving his opinion as to whether the plaintiff had no redress in negligence against his solicitor stated the following at pp. 55, 56:

"Where it is desired to deprive a defendant of his ability to plead a statute of limitation, naturally the good cause to be put forward must be strong. It is quite impossible to define the circumstances which can constitute 'good cause'. It is sufficient in the present case to say that here we find a most unusual set of circumstances. Probably they are and will remain unique. They cannot recur because, once this judgment has been reported, no solicitor can put up the same set of facts, or any parallel set of facts as being 'good cause' ..... To my mind, this is one of those cases in which it can properly be said that the misconception was 'good cause' for the present position arising, and it is not wrong for this Court, in such circumstances, doing justice between both parties, to grant the plaintiff a renewal of the writ. In this class of case, where the effects of statutes of limitation have to be taken into account, it may very well be that the climate of opinion, both in the legislature and in the Courts, is (as was indicated in the judgment of Lord Denning M.R. in *Chatsworth Investments Ltd.* v. *Cussins (Contractors) Ltd.*) moving more towards an ascertainment of how lies the balance of justice between the parties. In that behalf, I venture to adhere to my views recorded in that case as to what is entailed by 'the justice of the case'.

I would only add that having referred to the judgment of Megaw J. in *Heaven* v. *Road and* Rail Wagons Ltd. on the first issue, it is perhaps as well in relation to the second issue to refer to that passage in the judgment in which it was held that hardship suffered by a plaintiff

could never be taken into account. I am conscious that on the important question as to whether in exceptional cases the Court are entitled to balance the relevant hardships which will be sustained by the plaintiff and the defendant respectively somewhat differing views have been expressed in this Court. For my part, though it may not be necessary in the present case to express a final opinion on this point, I am at present disposed to think that those stated in *Allen* v. *Sir Alfred Mc Alpine & Sons Ltd.* amount to a clear authority on the law on this point. Moreover I would in any event respectfully venture once more to support those views: they can particularly be applied, for instance, to cases where the lapse of time cannot materially affect the quality of the available evidence. I, too, would dismiss this appeal."

Karminski, L.J., in the same case, had this to say at p. 56:

" In my view, the real test is 'good cause' or 'good reason', which may be translated into the words 'a sufficient reason or reasons'. Discretion in a matter of this Kind, as in other matters, must be exercised judicially, that is by weighing all the circumstances on each side and balancing so far as possible the priorities and merits."

The principles laid down in *Battersby's* case (*supra*) were also applied in "*The World Harmony*" [1965] 2 All E.R. 139, an admiralty case, in which it was held that:

" The plaintiffs had been dilatory in not making efforts sooner to serve the first defendants out of the jurisdiction, and accordingly renewal of the writ should not have been granted nor should leave for service out of the jurisdiction have been granted at the date when it was given, the action against them being one to which the proviso to s. 8 of the Maritime Conventions Act, 1911, applied; accordingly the renewal of the writ as against the first defendants and leave for service out of the jurisdiction would be set aside."

The grounds recognised by the Courts as justifying renewals have been considerably extended during recent years. (See *Howells* v. *Jones* (C.A.) *The Times* 11.4.75, *Moore* v. *Burton and Motor Insurance Bureau* [1978] 128 N.L.J. 513 (judgment of Waller, L.J.), *The Virgo* [1978] 2 Ll.L.R. p. 167).

The following is an extract from the report in The Times 11.4.1975 in the case of *Howells* v. *Jones* (*supra*):

> " The Court looked at the relative hardship to the parties and whether the plaintiff would fail altogether or would have a remedy over against his solicitors (see *Allen* v. *Sir Alfred McAlpine and Sons Ltd.* [1968] 2 Q.B. 229, 261, 269). The plaintiff would suffer an injustice if the writ was set aside. Justice would be far better attained by allowing its renewal".

And in the "*Virgo*" (*supra*):

> " It was clear that the parties were in negotiation all the time both before and after the time expired and the delay was due to the laxness of the owners and their club;
>
> the delay had caused the owners no hardship of any kind and no prejudice; the owners had not filed an affidavit to indicate that they would suffer any hardship at all if the limitation period were extended; and although the cargo-owners had allowed three months to pass by from June to September, that period was by no means so long that discretion should be refused;
>
> in the circumstances it would be an undue hardship on the cargo-owners if they were to have their claim barred; and the application for extension of time would be granted."

The question of renewal of a writ was dealt with also recently in an admiralty action in rem, the "Berny" [1979] 1 Q.B. p. 80 in which Brandon, J. took account of the fact that a subsequent disallowance of the renewal would cause greater prejudice than if the renewal sought during the currency of the writ had been refused. In expressing his opinion on renewal on the ground that it has not been possible to effect service, Brandon, J. had this to say at p. 103:

> " In my opinion, when the ground for renewal is, broadly, that it has not been possible to effect service, a plaintiff must, in order to show good and sufficient cause for renewal, establish one or other of three matters as follows: (1) that none of the ships proceeded against in respect of the same claim, whether in one action or more than one action, have been or will be, present at a place within the juris-

diction during the currency of the writ; alternatively (2) that, if any of the ships have been, or will be, present at a place within the jurisdiction during the currency of the writ, the length or other circumstances of her visit to or stay at such place were not, or will not be, such as to afford reasonable opportunity for effecting service on her and arresting her; alternatively (3) that, if any of the ships have been, or will be, present at a place within the jurisdiction during the currency of the writ, the value of such ship was not or will not be, great enough to provide adequate security for the claim, whereas the value of all or some or one of the other ships proceeded against would be sufficient, or anyhow more nearly sufficient, to do so."

There is no doubt that the English Limitation Act, 1975 has brought about important changes in accident cases by enabling the Court in proper cases where the period of limitation has expired to extend such period. Quite apart from that, however, the recent cases show a more liberal climate in which renewal of a writ may be more easy to obtain. One, however, should not ignore what was said in the House of Lords case *Birkett* v. *James* [1977] 3 W.L.R. 38 at p. 50, that, where a limitation period is exploited to the full, the plaintiff must then proceed expeditiously.

I revert now to the facts of the case before me. The claim against defendant 2 is a claim in rem against a ship which according to the affidavit before me, has not been present at a place within the jurisdiction of this Court during the currency of the writ or its subsequent renewals. Service could not, according to the affiant, be effected. It was further argued that the question of limitation of time does not arise as no statute of limitation is applicable in this case.

It is correct th the action is one in rem and service could not have been effec once the said ship has not called at any port within the tion of the Court so that service could be effecte .ed by Order 16 of the Rules of the Supreme Court c prus in its admiralty jurisdiction. On the question of service in an action in rem, we read the following in the British Shipping Laws, Vol. 1, Admiralty Practice, p. 28:

"A consideration which may lead a plaintiff to sue in

personam is that service of a writ in rem can only be effected within the jurisdiction. This means that although a writ in rem and a warrant of arrest may be issued even if the res is not within the jurisdiction, in order for either to be effective the res to be proceeded against must be, or come, within the jurisdiction unless service is accepted by a solicitor, whereas service of a writ in personam can often be effected abroad provided that the conditions laid down in the Rules of the Supreme Court are satisfied."

I am not going, at this stage, to consider the submission of counsel for applicant that there is no question of limitation arising in the present action. This may be a matter in issue which may arise in the proceedings and may have to be determined after hearing argument on both sides.

On the facts before me I find that in the present case good cause has been shown for granting the application. This does not in any way preclude defendant 2 after service is effected, to apply to the Court to have the order renewing the writ and service thereof, set aside on good cause shown.

In the result, I grant the application and I make an order renewing the writ of summons for a further period of six months from to-day.

Application granted.