FOURTH SUPPLEMENT TO THE
GIBRALTAR GAZETTE L.R. 12/78.

No. 1,809 of 10th MAY, 1979.

LAW REPORTS

Note: These Reports are cited thus —
(1978) Gib. L.R.

R. v. GIBRALTAR JUSTICES, ex p. M.B. Development Co. Ltd.

Supreme Court
Spry, C. J.

19 December 1978

Service — service on limited company — Companies Ordinance, s. 306 — *Magistrates' Court Rules,* 1968, r. 82(3)
Service—service in criminal proceedings—whether irregularity curable
Service—proof of service by process server's certificate

An information was intended to be served on a limited company. The process server left it at the office of a firm of solicitors, believing that to be the registered office of the company. It was not served on the solicitors as such, nor had they instructions to accept service. The company was convicted in its absence. When the conviction was brought to its notice, it applied for judicial review, asking that the conviction be quashed for lack of jurisdiction.

HELD: While s.306 of the Companies Ordinance (Cap. 30) and r.82(3) of the applied English Magistrates' Court Rules 1968 are not mandatory, they provide the only unquestionable method of service on a limited company. In the present case, there had been no service and the justices had no jurisdiction.

Per curiam. Irregularity of service may be cured in criminal proceedings by the summons coming to the notice of a defendant and his appearing in answer to it.

Cases referred to in the order
Pearks, Gunston & Tee Ltd. v. *Richardson* [1902] 1 K.B. 91
Montgomery, Jones & Co. v. *Liebenthal & Co.* [1898] 1 Q.B. 487
Ex. p. Railway Steel and Plant Co., in re Taylor (1878) 8 Ch.D. 183
Westminster C.C. v. *Chapman* [1975] 2 All E.R. 1103

Application

This was an application for an order of judicial review to quash a conviction for lack of jurisdiction.

H. K. Budhrani for the applicant
C. Finch for the Crown
28 December 1978: The following order was read —

The applicant company, M.B. Development Co. Ltd., was convicted, in its absence, of an offence against s.3(7) of the Entertainments Ordinance. It now asks this court to exercise its power of judicial review by quashing the conviction and remitting the proceedings to the magistrates' court which passed the conviction.

The basis of the application is that the trial court lacked jurisdiction because the company was never served with the summons. It was further argued by Mr Budhrani, who appeared for the company, that, whether that was so or not, service was not properly proved and also that the decision whether service was proved was taken by the clerk and not by the justices.

According to the affidavit evidence, a Detective Constable James McKay was instructed on or about 18 April 1978 to inquire into the alleged offence. He saw a director of the company, a Mr Bassadone, on 20 June 1978 and asked to see the company's licence. It was not then available but was produced on the following day. After inspecting it, the constable informed the director that he would be "reporting" the company.

Para. 8 of the constable's affidavit reads as follows —

> "8. That I asked Mr Bassadone for the Registered address of the said M.B. Development Company Limited and he replied "it is registered with my lawyers Triay and Triay" and he furnished me with the address "28 Irish Town" which address he personally obtained from the telephone directory;"

An information was laid, and the purported service occurred on 13 October 1978. (Why these delays occurred has not been explained.) According to an affidavit of the process server for

the magistates' court, he served the summons "upon M.B. Development Company Limited at 28 Irish Town." Five days later he endorsed on a copy of the summons a certificate that he had served the summons on M.B. Development Co. Ltd of 28 Irish Town "personally."

The case was called on 24 October 1978, when there was no appearance on behalf of the company. Mr McGrail, the clerk to the justices has made an affidavit, in which he said that he then

> "informed the justices that service of the said summons had been duly proved pursuant to the Magistrates' Court Rules by virtue of the endorsement by the process server of the certificate of service on a copy of the summons. I further advised the justices that they were accordingly entitled to proceed to hear the summons in the absence of the applicant pursuant to s.30 of the Magistrates Court Ordinance."

The justices proceeded to hear the case and convicted the company.

Mr. Bassadone has now sworn an affidavit in which he said that the registered office of the company is and has since 13 January 1973 been situate at No. 3 Queensway. He has also testified that neither he nor his fellow directors became aware of the existence of the summons until early November.

To complete the picture, Mr. Budhrani has stated from the Bar that when the summons was delivered at the offices of Messrs. Triay and Triay it was accepted by a junior clerk, it is not known who, and placed on one side. He became aware of it and, knowing that Mr. Bassadone was out of the jurisdiction, intended, although he was without instructions, to appear and ask for an adjournment but inadvertently omitted to do so.

It is quite clear from s.306 of the Companies Ordinance and r.82(3) of the Magistrates' Court Rules 1968 of England, applied to Gibraltar by the Magistrates' Court Rules, 1973 (L.N. 12 of 1973), that the normal and proper method of serving a summons on a company is by delivering it at, or sending it by post to, the registered office of the company. Both those enactments, however, say that service "may" be effected in that way, so that they would not appear to be exclusive. In *Pearks, Gunston & Tee Ltd.* v. *Richardson* (1), Lord Alverstone, C.J. said—

(1) [1902] 1 K.B. 91

> "In this case it seems to me that, in the absence of any legislation or of any rule of practice lawfully made by a competent authority, the service of such a summons upon a company should be in the manner prescribed by s.62 of the Companies Act of 1862."

(That section is substantially similar to s.306 of the Gibraltar Ordinance.) He went on to say that that was the way writs had to be served in civil proceedings and continued—

> "there seems to be no reason why a difference should be made in regard to criminal proceedings. Certainly, in criminal matters the practice should not be more lax than in civil proceedings."

Mr. Finch, who appeared for the Crown, submitted that a solicitor who has been instructed in the matter may accept service on behalf of a company. He sought to take the matter further. He submitted that service could be effected on an officer of a company of the category of a managing director and further that a company might by its director nominate a person or an address for service. He cited, by way of analogy only, *Montgomery, Jones & Co.* v. *Liebenthal & Co.* (1), but with respect I do not think it is of any assistance as it deals with partnerships and not with companies.

Some support for Mr Finch's argument is to be found in *Ex p. Railway Steel and Plant Co., In re Taylor* (2), in which, dealing with a suggestion that the writ had not been duly served on the company, Hall, V.C., said—

> "The writ was served upon the secretary of the company, who was the proper person to serve, though it was served upon him not at the office of the company, if that were necessary, ordinarily, though I do not know that it is, because he waived service on him at the office of the company by requesting that it might be served when he was seeing the creditor at his office in London"

That is not a strong authority, because of the reservation it contains, and if there is any conflict between it and *Peark's* case I prefer the latter.

(1) [1898] 1 Q.B. 487.
(2) (1878) 8 Ch. D. 183, at p. 189.

It is a curious fact that does not seem to have been commented on, that while the Joint Stock Companies Act, 1856, provided that a summons or notice might be served by leaving it or sending it by post to the company at its registered office "or by giving it to any Director, Secretary, or other principal Officer of the Company," the words quoted were omitted from all the later Acts. This must have been deliberate and supports Lord Alverstone's interpretation.

I do not think "may" in s.306 of the Companies Ordinance or in r. 82(3) of the Magistrates' Court Rules 1968 is mandatory but I do think those provisions provide the only unquestionable method of service. Other methods may be used, either of necessity, as where a fictitious address has been given for the registered office or where the registered office has been demolished, or as a matter of convenience, but any other method will be open to challenge. I have no doubt that service may be effected on a solicitor who has received instructions to accept service or that such instructions may be conveyed by a director or by the secretary of the company. I do not think, subject to what I shall say in a moment, that service can be effected on a director or the secretary elsewhere than at the registered office. I think a company might nominate a person or an address for service, but only by a formal act under its common seal: I think it would be ultra vires for a director to purport to make such a nomination.

The qualification to what I have just said is this: the object of serving a summons on a company is to bring the charge and the date of hearing to the knowledge of the company. If an irregular service has that effect and the company appears in answer to the summons, the irregularity is cured. It will be noted that the decision in *Pearks*'s case was arrived at by equating the procedure in criminal cases to that in civil cases. Since the date of that judgment, the practice in civil matters has become more liberal, with the introduction in 1964 of the present RSC Ord. 2, r.1, under which any defect in procedure is curable. Thus in *Westminster C.C.* v. *Chapman* (1) an irregular service was held to be cured by the fact that the summons in fact came to the notice of the defendants and they appeared in answer to it. I see no reason why the same approach should not be adopted in criminal matters, and I hold that what appears to be a strict rule in *Pearks*' case may be relaxed.

(1) [1975] 2 All E.R. 1103.

Applying this reasoning to the present case, it is clear on the affidavit evidence that service was not effected at the registered office of the company and Mr. Bassadone has sworn that the summons did not come to his notice or that of any other director until after the conviction had been entered. Mr. Budhrani has sworn that his firm had not received instructions to accept service. Therefore there was no service and the magistrates' court lacked jurisdiction. Mr. Finch conceded that if there was a lack of jurisdiction, the conviction could not be sustained. For a person to be convicted without having been given an opportunity to be heard is manifestly unjust.

. . . . . .

Although it is not necessary for the decision of this application, I will deal briefly with Mr. Budhrani's second and third submissions. He submitted that the proof of service was unsatisfactory. Here I agree. The certificate states that M.B. Development Co. Ltd. of 28 Irish Town had been served "personally." Although the certificate is in what I am told is the prescribed form, it is clearly inappropriate. Prescribed forms must be adapted when necessary. In the case of service on a company, the certificate should, in my opinion, normally state that service of the summons was effected "by delivering it at the registered office of the company." Where service is on solicitors, the certificate should state that the summons was served "by delivering it to Messrs. ....., the solicitors for the company." If in exceptional circumstances, service is effected in any other way, the certificate should be explicit.

Finally, Mr. Budhrani argued that the clerk of the court had usurped the function of the justices when he informed them that service had been duly proved. I do not agree. The clerk had no reason to suppose that there was any judicial decision to be taken. He had before him a certificate in what I must assume is the normal form; it had not been questioned or challenged in any way. I do not think he was doing any more than saying that the usual proof of service had been produced.

However, I base my decision on the single ground that the company was not served with the summons and had not had the opportunity of defending itself. In exercise of the power of judicial review, it is ordered that the conviction of the company be quashed. The proceedings are remitted to the justices to be heard de novo.

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