

# **NIGERIAN BANKING LAW REPORTS**

**[1933 – 1966]**

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## **THE NIGERIAN BANKING SYSTEM**

### **1. The Development of Banking in Nigeria**

The historical development of the financial system in Nigeria dates back to 1892 when modern banking business commenced and a formal and institutional channel of saving mobilisation was introduced into the economy with the establishment of the African Banking Corporation (ABC). The operation of ABC was later taken over in 1894 by the British Bank of West Africa (which later became Standard Bank) and subsequently, First Bank of Nigeria. Owing to the colonial heritage, the pioneer commercial banks in Nigeria were of foreign origin and their operations favoured the finance of foreign trade and commerce.

Thereafter, several other foreign and a host of indigenous banks were established. The establishment of indigenous banks was initially propelled largely by nationalistic consciousness rather than the existence of relevant resources, including basic skilled manpower, for running such institutions. Consequently, most of the early indigenous banks collapsed in rapid succession, Banks that failed during the early stage of the evolution of the Nigerian financial system were largely those with problems of inadequate capital, poor management, and fraudulent practices, among other factors.

An important feature of the Nigerian financial system, especially before the establishment of the Central Bank of Nigeria (CBN), was the small scope of operations of participating foreign institutions and the complete absence of any form of institutional regulatory framework which would provide the necessary guide for both the operations and orderly development of the financial system during the pre-CBN era.

The situation however changed from 1958 when the CBN was established. Since then a series of efforts had been made by the CBN and other relevant authorities to promote the growth and development of the Nigerian financial system. For example, the need to develop the system and create an avenue for investment of short-term funds informed the issue by the CBN in 1960 of Treasury Bills as a supplement to Commercial Papers that were already in the market. Other money market instruments after the establishment of the CBN but prior to the introduction of the Structural Adjustment Programme (SAP) in 1986 included Treasury Certificates in 1968, Certificates of Deposit in 1975 and the Bankers' Unit Fund as well as Stabilisation Securities in 1976. The establishment of the CBN also aided the development of the capital market. This was achieved by ensuring the emergence of the securities markets and instruments (primary and secondary) and by promoting the establishment of development banks.

Following the adoption of the SAP in 1986, and the subsequent deregulation of the financial system, the banking system witnessed radical changes. Apart from the introduction of measures and instruments to deregulate the financial services industry, the techniques and the range of products offered by the industry, changed significantly. The major objective of the deregulation was to enhance economic efficiency and effective resource allocation through service-driven competition and improvement in quality and spread of financial services delivery.

On July 6th 2004, the Governor of CBN announced a banking reform programme aimed at strengthening and consolidating the banking system. The reform is expected to address the safety of depositors' funds, enable the banking sector to play an active developmental role in the economy and transform Nigerian banks into competitive players in the African and Global financial system.

## **2. The Nigeria Deposit Insurance Corporation**

One of the key measures introduced during the era of deregulation of the banking sector was the establishment of the Nigeria Deposit Insurance Corporation (NDIC), with the promulgation of Decree No. 22 of 1988 now Cap. N102 Laws of the Federation 2004. The NDIC was established to insure all the deposit liabilities of licensed banks, promote banking stability and a sound financial system. Although the NDIC enabling Act was promulgated in 1988, the Corporation only commenced operations in March 1989. The Nigerian Deposit Insurance scheme was introduced to provide a further layer of protection to depositors and complement the role of prudent bank management as well as the CBN's supervisory activities in ensuring a safe and sound banking system. It was also considered as an additional framework to serve as a vehicle for addressing some of the challenges that followed the deregulation of the financial system under the SAP. Prior to the establishment of the NDIC, the Government had played the role of what in industry parlance is referred to as an implicit insurer, by bailing out troubled banks in its bid to protect depositors. With deregulation, an explicit Deposit Insurance Scheme (DIS) became imperative. The establishment of NDIC was also informed by the change in government bank support policy, the bitter experiences of prior bank failures in Nigeria and the lessons of other countries with bank deposit insurance schemes. The scheme aims at increasing the competitive efficiency of the banking system as well as reducing the system's vulnerability to destructive runs, panic-induced shocks by reinforcing depositors' confidence in the nation's financial system.

The mission of the Corporation is to protect depositors through effective supervision of insured institutions, provision of financial and technical assistance to eligible insured institutions, prompt payment of guaranteed sums and the orderly resolution of failed financial institutions.

The Corporation currently acts as the Liquidator of thirty-four (34) banks out of a total of thirty six (36) banks whose operating licenses were revoked by the Governor of the CBN. All depositors of the banks in liquidation who have come forward to file their claims have been paid their insured deposits while liquidation dividends making up 100% of total uninsured deposits have been declared and paid to depositors of ten (10) banks in Liquidation.

In September 1997, the Corporation commenced publication of the Failed Banks Tribunal Law Reports (FBTLR) which contained only reported decisions of the Tribunal established under the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act 1994 and decisions of the Special Appeal Tribunal established under the Recovery of Public Property (Special Military Tribunal) Decree No 3 of 1984. In 1999, with the return to civil rule, the Corporation restructured the publication into a compendium of decisions of all banking-related matters given by our superior courts of record from 1933 to date. This gave rise to the birth of the Nigerian Banking Law Reports (NBLR).

**Nigeria Deposit Insurance Corporation**  
November, 2005

## FOREWORD

The doctrine of judicial precedent as a unique feature of the common law relies heavily on availability of law reports. In Nigeria, law reporting has played a very important role in the development of the body of law. Over the years, law reporting has become specialised with Law Reports focusing on specific areas of the law such as Criminal Law, Constitutional Law, Banking Law and so on. The Law of Banking indeed occupies a position of pre-eminence in the economic development of a country and this underscores the importance of a law report on the subject.

The efforts of the *Nigeria Deposit Insurance Corporation* in the development of the Law of Banking through the publication of a banking law report started with the launching of the *Failed Banks Tribunal Law Reports* (FBTLR) in 1997. This law report was however short-lived following the advent of civil rule in 1999. It is in cognisance of this that when the Corporation decided to expand the scope of the publication to include the decisions of the Supreme Court of Nigeria and the Court of Appeal on banking matters and renamed the law report as *Nigerian Banking Law Reports* (NBLR), I did not hesitate in giving my consent.

The *Nigeria Banking Law Reports* (NBLR) is a compendium of case law on Nigerian banking from 1933 to date. The first batch of the compendium contains cases decided between 1933 and 2002 which I understand would soon be updated to 2004. Thereafter, the reports would be published quarterly. This initiative, I believe will prove invaluable to members of the Bench, the Bar and the academia who cannot but conduct research on the Nigerian banking case law.

I congratulate the Management and Staff of the *Nigeria Deposit Insurance Corporation* for this worthy effort.

It is my pleasure to recommend this law reports to all and sundry.

**Muhammadu Lawal Uwais, GCON**

The Chief Justice of Nigeria,  
Chief Justice's Chambers,  
Supreme Court of Nigeria, Abuja



## **PREFACE TO THE NIGERIAN BANKING LAW REPORTS**

An explicit Deposit Insurance Scheme (DIS) was introduced in Nigeria in 1988 with the establishment of the *Nigeria Deposit Insurance Corporation* (NDIC). The core functions of the NDIC are the insurance of bank deposits, supervision of insured banks, resolution of distress in the banking system and the liquidation of failed banks whose licences have been revoked by the Central Bank of Nigeria.

In 1994, when the Corporation was appointed as the Liquidator to carry out the liquidation of some failed banks, it was observed that there were hardly any records relating to the winding up of banks that had failed in the past. There was also no sufficient data on the causes of the past bank failures. The Corporation therefore, took the initiative, in September, 1997 to report and publish decisions of the Failed Banks Tribunal that was established under the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994. This effort culminated in the publication of the *Failed Banks Tribunal Law Reports* (FBTLR). Thus, the Corporation was motivated by the need to place on permanent record the lessons from the new wave of bank failures/distress, particularly with regard to the causes of such failures/distress and efforts made to resolve such failures.

Hitherto, the absence of proper documentation relating to the bank failures experienced in the early fifties had made it exceedingly difficult for practitioners and researchers to make references to such failures. The decision to publish the FBTLR was to ensure that the mistakes of the past were not repeated through elaborate documentation of the recent failures, the essence of which were captured in the decisions of the Failed Banks' Tribunal.

However, with the return to democratic rule in May, 1999, the Failed Banks Decree No. 18 of 1994 which established the Tribunal was consequently amended by the Tribunals (Certain Consequential Amendment, etc.) Decree No. 62 of 1999, which abrogated the Tribunal. The civil and criminal

jurisdictions of the Tribunal were accordingly transferred to the Federal High Court. Consequently, the title of the Publication was changed to **Nigerian Banking Law Reports**.

Furthermore, in response to the new democratic dispensation, the Corporation decided to expand the scope of the publication into a compendium containing decisions of the Supreme Court, Court of Appeal as well as Federal and State High Courts on banking matters from 1933 to date in order to provide a comprehensive database for all banking related cases decided by the superior courts of record. Also, in order not to miss the tremendous achievements recorded by the Failed Banks Tribunals during their relatively short tenure, their decisions have been included in the compendium thereby making NBLR very comprehensive. In addition, there is an index for the compendium to ease research and to aid quick referencing. The printers have been able to deliver the initial volumes of the compendium up to 2002, which would soon be updated to 2004 and thereafter, it would be published on quarterly basis.

It is therefore, my hope that Legal Practitioners, my Lords the Honourable Justices and Judges, distinguished scholars and Law Professors, fellow Bankers, students and the general public would find this initiative helpful in the course of their activities.

I would like to express my profound appreciation to the Editorial Board of the Nigeria Banking Law Reports and the Legal Department of the Corporation that co-ordinated the project. They left no stone unturned in bringing the Corporation's dream to reality. Their commitment in ensuring the completion of the project is highly commendable.

Management will on its part do everything possible to ensure that publication of the NBLR is sustained.

**G. A. Ogunleye, OFR**

Managing Director/Chief Executive

November, 2005

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- s 114 ..... [1933 – 1966] 1 N.B.L.R. 192
- s 231(5)..... [1933 – 1966] 1 N.B.L.R. 427

#### **Companies Ordinance (Cap 38)**

- s 146(1)(a) ..... [1933 – 1966] 1 N.B.L.R. 38

#### **Constitution of Northern Nigeria, 1960**

- s 4 ..... [1933 – 1966] 1 N.B.L.R. 265

#### **County Courts Act, 1888**

- s 116 ..... [1933 – 1966] 1 N.B.L.R. 101

**Criminal Code (Cap 28)**

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**Criminal Procedure Code (Northern Nigeria)**

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**Criminal Procedure Ordinance**

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**Illiterates Protection Law (Cap 47)**

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**Real Property Limitation Act, 1833**

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**Registration of Business Names Ordinance**

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vol 2, page 229 ..... [1933 – 1966] 1 N.B.L.R. 82

vol 2, page 232, para 434 ... [1933 – 1966] 1 N.B.L.R. 295

vol 6, page 430, para 833 ... [1933 – 1966] 1 N.B.L.R. 429

vol 11 ..... [1933 – 1966] 1 N.B.L.R. 359

vol 16, page 38, para 56 ..... [1933 – 1966] 1 N.B.L.R. 200

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*a*

Paterson Zochonis and Co Limited v. Pepple  
*b* and others In re: The Manager, Barclays  
Bank, Aba

DIVISIONAL COURT

CAREY J

*c*

Date of Judgment: 4 APRIL 1933

*Banking – Garnishee – Money placed on deposit at bank –  
Whether attachable*

*d*

**Facts**

*e* The manager of Barclay's Bank, Aba, appeared in answer to  
a summons to show cause why he should not pay over to the  
judgment creditor the sum of £503.4s.2d being the amount  
of the judgment debt and costs owing to the plaintiff firm by  
the defendants jointly and severally. The payment is claimed  
*f* out of the debt alleged to be due or accruing due to the sec-  
ond-named defendant by Barclay's Bank at Aba which debt  
the manager was prohibited from paying by order *nisi* dated  
the 12th January, 1933.

*g* It appears that the only monies to the credit of the defen-  
dant with the said bank are deposited in the Savings Bank  
Branch. The garnishee contended that the money in his  
hands was not attachable in as much as by the rules of the  
*h* bank the depositor can only make withdrawal of money so  
deposited in person and on production of his passbook (ex-  
cept in certain circumstance which are not material) and  
even then he may be required to give 15 days notice of his  
*i* desire to withdraw.

**Held –**

*j* 1. Money placed on deposit at a bank is not attachable debt  
until notice of withdrawal has been given.

***Per Curiam****a*

I must admit I suspected this contention as being a statement of the law for which there was no judicial authority. However on hearing Counsel and consulting such books of reference and reports as are accessible to me I have come to the conclusion that the contention is well founded. The case of *Cowley v. Taylor* (1908) 124 L.Y. Jo. 569 would appear to be authority for the proposition that money placed on deposit at a bank is not an attachable debt until notice of withdrawal has been given. No notice was given in this case unless the service of the garnishee order *nisi* can be said to constitute such notice (which I very much doubt where the bank account is not a current one). It does not seem to be necessary to enter upon a consideration of this last point however in that a condition precedent to the debt becoming payable to the depositor is an application in person by the depositor and production of his passbook or, in case of unavoidable absence, a written order of the depositor duly authenticated accompanied by the depositor's passbook. No application or order was made by the depositor. A garnishee order cannot accelerate the time for payment of a debt, and where the debt is not due there is nothing to be attached see *Webb v. Stenton* (1883) 11 Q.B.D. 518; *In re Greenwood* (1901) 1 Ch. 887.

*b**c**d**e**f*

Order *nisi* discharged.

*g***Cases referred to in the judgment*****Foreign***

*Cowley v. Taylor* (1908) 124 L.T. Jo. 569

*h*

*General Horticultural Co In re; Ex parte Whitehouse* (1886) 32 Ch.D. 512

*Greenwood, In re* (1901) 1 Ch.D. 887

*Webb v. Stenton* (1883) 11 Q.B.D. 518

*i***Counsel**

For the plaintiff: *Paul*

For the judgment debtor: *Renner*

*j*

**a Judgment**

**CAREY J:** The judgment of the Divisional Court delivered at  
**b** Aba on 4th April, 1933, was as follows:—

“The Manager, Barclays Bank, Aba, appeared before this Court in  
 answer to a summons to show cause why he should not pay over to  
 the judgment creditor in this suit the sum of £503.4s.2d being  
 amount of the judgment debt and costs owing to the plaintiff firm  
**c** by the two above-named defendants jointly and severally. The  
 payment is claimed out of the debt alleged to be due or accruing  
 due to the second-named defendant by Barclay’s Bank at Aba  
 which debt the manager was prohibited from paying by order *nisi*  
**d** dated the 12th January, 1933.”

It appears that the only monies to the credit of the defendant  
 Denner with the said bank are deposited in the Savings Bank  
 Branch. The garnishee contended that the money in his  
**e** hands was not attachable inasmuch as by the rules of the  
 bank the depositor can only make withdrawal of money so  
 deposited in person and on production of his passbook (ex-  
 cept in certain circumstances which are not material at the  
**f** moment) and even then he may be required to give 15 days  
 notice of his desire to withdraw. In support of this conten-  
 tion the garnishee produced a judgment of the Police Magis-  
 trate, Lagos, *Gilbert v. Lewis: In re Barclay’s Bank-*  
**g** *Garnishees.*

I must admit that I suspected this contention, as being a  
 statement of the law for which there was no judicial author-  
**h** ity. However on hearing Counsel and consulting such books  
 of reference and reports as are accessible to me I have come  
 to the conclusion that the contention is well founded. The  
 case of *Cowley v. Taylor* (1908) 124 L.T. Jo. 569 would  
 appear to be authority for the proposition that money placed  
**i** on deposit at a bank is not an attachable debt until notice of  
 withdrawal has been given. No notice was given in this case  
 unless the service of the garnishee order *nisi* can be said to  
 constitute such notice (which I very much doubt where the  
**j** bank account is not a current one). It does not seem to be

necessary to enter upon a consideration of this last point <sup>a</sup>  
however in that a condition precedent to the debt becoming  
payable to the depositor is an application in person by the  
depositor and production of his passbook or, in case of un- <sup>b</sup>  
avoidable absence, a written order of the depositor duly  
authenticated accompanied by the depositor's passbook. No  
application or order was made by the depositor. A garnishee  
order cannot accelerate the time for payment of a debt and <sup>c</sup>  
where the debt is not due, there is nothing to be attached.  
*Webb v. Stenton* (1883) 11 Q.B.D. 518; *Greenwood, In re*  
(1901) 1 Ch.D. 887. A judgment creditor cannot, by means  
of attachment, stand in a better position as regards the gar- <sup>d</sup>  
nishee than the judgment debtor did: *General Horticultural*  
*Co In re; Ex parte Whitehouse* (1886) 32 Ch.D. 512 is stated  
in the 1933 Annual Practice at 834 as being an authority for  
this.

In my opinion the garnishee has shown sufficient cause <sup>e</sup>  
and the order *nisi* must be discharged.

a

## Pappoe v. Bank of British West Africa

APPEAL COURT, ACCRA, GOLD COAST COLONY

b

MICHELIN ACJ, KINGDON, NIGERIA CJ, BARTON AJ

Date of Judgment: 12 JUNE 1933

c

*Banking – Custom of bankers – Party relying on – What to prove*

### Facts

d

The plaintiff's claim was for an account of what sums had been overpaid by the plaintiff to the defendants as interest on his overdrawn account and for payment to the plaintiff of the amount so found due with interest.

### Held –

e

1. “Where a party relies on banking custom in a matter, the usage of the custom must be shown to be certain and reasonable and so universally acquired in that everybody in the trade knows it or ought to know it if he took the pains to enquire.”

f

2. In the instant case, the charge of 10 percent compound interest with monthly interest on an overdrawn current account has been proved to be well known to the plaintiff who acquiesces in the rate of interest charged against him in accordance with the custom in the Gold Coast.

g

### Cases referred to in the judgment

h

#### *Foreign*

*Bruce v. Hunter* 3 Camp. 467

*Chatterton v. London and County Bank* referred to in Volume 3 of *British Empire Digest* at 244

i

*Fergusson v. Fyffe* 8 Cl. and F. 121

*Inland Revenue Commissioners v. Holder* (1931) 2 K.B. 81

*Moore v. Voughton*, 1 Stark 487

j

*Nash v. Armstrong* 10 C.B. (N.S.) 259

*Parr's Banking Co Ltd v. Yates* (1898) 2 Q.B. 460

*a*

*Spencer v. Wakefield* (1887) 4 T.L.R. 194

*Standard Bank v. Brodrecht* page 255 Volume 3, *British Empire Digest*

*b*

### Counsel

For the plaintiff/appellant: *Phipps*

For the defendants/respondents: *Carter*

*c*

### Judgment

**MICHELIN ACJ:** This is an appeal by the plaintiff from the judgment of the Chief Justice (Sir George Campbell Deane) dated the 30th December, 1932, in which he gave judgment for the defendants with costs.

*d*

By his writ of summons dated the 8th of July, 1932, as amended in court on the 21st September, 1932, the plaintiff claimed that an account should be taken of what sums had been overpaid by the plaintiff to the defendants as interest on his overdrawn account with them or otherwise from the 1st January, 1918, to the 11th February, 1932, the date of the settlement of the said overdrawn account, and for payment to the plaintiff of the amount so found due with interest thereon from the date of such payment to the date of filing of the writ of summons herein.

*f*

*g*

Pleadings were ordered by the court and filed by Counsel on each side and after an exhaustive hearing the Chief Justice delivered a written judgment on the 30th December, 1932, in which after setting out the facts and the law, he concluded as follows:—

*h*

“I am of opinion that the money paid by plaintiff on the 11th February, 1932, to settle his account with the bank was not paid under any mistake, but that on the contrary right through he knew of what was being done and agreed to it. I am further of opinion that the charges against plaintiff right through were the customary and usual charges of banks in the Gold Coast and fully justified, and I see no reason for reopening the account which has been settled.”

*i*

“There must be judgment for the defendants with costs.”

*j*

- a* Three grounds of appeal were originally filed, but in arguing the appeal Mr *Phipps*, on behalf of the appellant, confined his submissions to the following two grounds, abandoning the second ground:—
- b*

1. Some material findings of fact were against the weight of evidence.

- c* 2. The judgment was wrong in law.

He dealt with these two grounds together, and his submissions for the purpose of convenience may be grouped under the following five headings:—

- d* 1. Question of verbal agreement with bank for overdraft in January, 1918.
- e* 2. Was the bank justified in charging 10 percent compound interest with monthly interest?
3. Was there acquiescence on the part of the plaintiff in regard to such charges?
- f* 4. Was the account closed on the 17th August, 1921?
5. Was the account closed on the 18th November, 1922?

- g* In arguing as to (1), Mr *Phipps* submitted that at the beginning, when the plaintiff started to negotiate with the bank for an overdraft, it was verbally agreed between the parties that for allowances covered by any fixed deposit, the plaintiff should pay to the bank interest at the rate of 6 percent per annum on any overdraft up to the limit of any fixed deposit they might hold for the plaintiff, and interest at the rate of 8 percent per annum on sums in excess of such limit. Instead of complying with that agreement, the bank charged him interest at the rate of 8 percent when the overdraft was below the amount of the plaintiff's fixed deposit, and they also charged him fluctuating rates of interest according to the instructions received from time to time from the head office, and capitalised this interest with monthly rests, which was a breach of the verbal agreement entered into between the
- h*
- i*
- j*

parties. In proof of his contention as to this agreement,  
learned Counsel referred the court to the evidence of the  
plaintiff at page 19 of the record in which he started as fol-  
lows:—

“The deposit was a fixed amount.”

“For any overdraft up to £2,500 I agreed to pay 6 percent per an-  
num and it was agreed that for any sum overdrawn beyond £2,500,  
8 percent whether it was secured or unsecured.”

He also referred to page 138 of the bank’s ledger, which was  
admitted in evidence as exhibit “AA” where the following  
entry in red appears at the top of the page:—

“Covering any overdraft in current account fixed deposit 25/168  
£2,000, interest 6 percent.”

The following note in pencil being made under this entry:—  
“8 percent excess.”

In dealing with this matter, the learned Chief Justice in the  
course of his judgment stated as follows:—

“It is at once apparent therefore that the course of business be-  
tween the parties as shown by the bank’s ledger is quite inconsis-  
tent with the agreement which plaintiff alleges was made with the  
defendants.

Yet we can hardly believe that had such an agreement been made  
preliminary to the granting of the overdraft, as the plaintiff alleges,  
it would not at once have been reflected in the defendants’ books  
unless they consciously and deliberately from the first intended to  
defraud him. Instead of being so reflected what do we find? Inter-  
est for the first 11 months at 8 percent then at rates varying be-  
tween 9 and 10 percent for a year. Only after that for the first time  
at 6 percent on the sum secured by deposit, 9 percent on the ex-  
cess. These figures are to mind significant.

...

On the very question of the amount of interest therefore I find, if  
we except the plaintiff’s statement made 13 years after the event,  
there is nothing to support the plaintiff’s claim that he made a spe-  
cial agreement with the bank as a preliminary to obtaining an  
overdraft at the rate he says he did, and that the probabilities of the  
case are decidedly against him.”



- a* Although the learned Chief Justice did not deal specifically with the entry in red ink and the pencil note at the top of page 138 of the ledger, it is clear that this entry cannot be regarded as forming evidence of any verbal agreement entered into between the parties.

*c* It does not form one of the entries in the ledger made in the ordinary course of the business of the bank. Although it is alleged by the plaintiff that this agreement was made in January, 1918, the entry in red ink appears for the first time in the ledger in the month of April, 1918.

*d* The fact that it represented an agreement made between the parties is completely refuted by the entries in the defendants' books showing that different rates of interest were consistently being debited by the defendants to the plaintiff's account.

*e* It is significant also that in a letter dated the 7th September, 1927, from the plaintiff to the defendants' Manager in Accra (exhibit "R"), he stated *inter alia* as follows:—

*f* "In reference to my account you will observe that from the business I have done with you from 1918 to 1923, sometimes my overdraft has stood up to a debit balance of between £25,000 to £50,000, bearing as you are aware a considerable money having interest running when the account was brought down to the agreed limit of £8,000 and from which it has been reduced to where it is today."

*g* No mention whatever was made as to the verbal agreement for a charge of 6 percent interest.

*h* Again when the plaintiff wrote the general manager of the bank in London on the 14th November, 1931, in which he went at some length into his accounts and dealt with the question of the interest charged, no mention whatever was made by him in this letter of the fact that there had been a verbal agreement as to a charge of 6 percent interest.

*i* In my opinion therefore the finding of fact of the learned Chief Justice as to the non-existence of this verbal agreement,

*j*

was amply supported by the evidence before the court and I see no reason to dissent from such finding of fact. a

In dealing with heading (2), Mr *Phipps* submitted that the defendants had no authority for charging fluctuating interest and capitalising such interest with monthly rests as had been done in the present case. He contended therefore that the learned Chief Justice was wrong in holding that the rates of interest charged and the practice adopted of charging compound interest with monthly rests were in accordance with the Universal Custom of Banks in the colony. He contended that in order to establish a custom, it was necessary to prove that the custom was notorious and also that it was reasonable and legal, and referred us to numerous authorities in support of his contention. b  
c  
d

The law is very clearly set out in Roscoe's *Evidence in Civil Actions* (19ed) at 21, as follows:– e

“The usage must be shown to be certain and reasonable and so universally acquiesced in that everybody in the particular trade knows it, or ought to know it, if he took the pains to enquire.”

In proof of custom the learned Chief Justice had before him the evidence of Mr Kirk, the Manager of the Accra Branch of the defendants' bank and also the evidence of the Mr Passells, accountant to the Accra Branch of Barclay's Bank Limited. f  
g

In the course of his evidence, Mr Kirk states as follows:–

“The usual rate of interest against overdraft accounts secured by mortgage would be 10 percent compound interest. Simple interest is never charged on such accounts. Compound interest is charged with monthly rests invariably – that is in accordance with the Bank's custom.” h

Mr Passells in the course of his evidence stated as follows:– i

“I have had 13 years experience of overdrafts in current accounts allowed by the bank secured by legal mortgages on local properties. 10 percent is the usual rate of interest charged on such overdrafts with monthly rests, interest at the end of each month is carried to the debtor's overdraft account and increases the capital j

- a* on which interest is charged for the following month. The same rule applies in Nigeria and Sierra Leone. Banking business is carried on, on same lines in all three West African Colonies.”
- b* Mr *Phipps* referred us to the case of *Moore v. Voughton* 1 Stark 487, in which in an action by bankers for money lent, the court held it was not sufficient to show that it was the general custom of the house to charge interest calculated upon half yearly rests without also showing that the defendant knew that such was the position, and to the Canadian case of *Standard Bank v. Brodrecht* referred to at page 255 of Volume 3 of the *British and Empire Digest*, where in an action to recover an overdrawn account compound interest
- c* at 6.5 percent per annum, with monthly rests, was disallowed. In the first case it will be seen that the action was not in respect of an overdraft, but was in respect of money lent. In the second case, not having the report, it is impossible to say upon what grounds the judgment was based.
- d*
- e*

In the recent case, however, of *Inland Revenue Commissioners v. Holder* (1931) 2 K.B. 81, where the previous cases on the subject were considered, Lord Hanworth, Master of the Rolls, in the course of his judgment stated as follows:—

*f*

“The decision of the Commissioners was based upon the Judgment in *Parr’s Banking Co Ltd v. Yates* (1898) 2 Q.B. 460. The case is important for it recognises the system of the bankers in turning interest into capital as usual and binding on the parties who have acquiesced in it. It seems to be a question in each case whether the customer did acquiesce in it (see *Fergusson v. Fyffe* 8 Cl. and F. 121, and *Spencer v. Wakefield* (1887) 4 T.L.R. 194). The plan of capitalising interest at the end of each half year was adopted by bankers in order to enable them in effect to secure what is usually termed compound interest, which could not have otherwise been claimed by reason of the usury laws.”

*g*

*h*

*i* It is clear from this judgment that the custom of charging compound interest with rests is a well recognised custom of bankers in England.

*j* In my opinion the notoriety of the custom in this colony was sufficiently proved by the evidence of the representatives

of the only two banks carrying on business in the Gold coast, and it is quite clear from exhibit “R,” to which I have previously referred, that the plaintiff must have been fully aware that he was being charged interest in accordance with this custom. a  
b

As to the question of the reasonableness of the custom, according to the evidence of Mr Kirk, the bank would gain only £23 a year by charging compound interest with rests instead of simple interest, on £5,000. c

By consent of Counsel on each side a document prepared by the manager of the defendants’ bank was admitted in evidence before us showing that the difference between the interest on £100 per one year at 10 percent per annum, and the compound interest with monthly rests at the rate of 10 percent on such sum for a similar period was only 9s. 8d. In view of the high rate of interest in accordance with native custom charged to natives of this colony, as stated by the learned Chief Justice in the course of his judgment, I agree with him that the rate of interest at 10 percent with monthly rests was not an unusually high rate of interest. d  
e  
f

This ground therefore fails.

Dealing next with heading (3). In dealing with this question, Mr *Phipps* referred to pages 54 and 57 of the record where the learned Chief Justice dealt in some detail with the question of the periodical rendering of the plaintiff’s pass-book as constituting acquiescence on his part, and whereafter considering the various authorities he came to the following conclusion:— g  
h

“I shall not, however, in view of the legal divergence of opinion in the matter take it to an estoppel, but it affords evidence and very strong evidence of the plaintiff’s knowledge of what was going on and acquiescence therein. In the case of *Bruce v. Hunter* 3 Camp. 467, where an agent who has advanced money for his principal in effecting insurances and other business had charged interest and at the end of the year had made a rest and added the interest due to the principal, Lord Ellenborough said it was fair and reasonable that the i  
j

*a* defendant should pay interest in the manner charged, and that the interest to which he had not objected for a number of years afforded sufficient evidence of a promise on his part to pay interest. These words apply ‘*mutatis mutandis*’ in their entirety in this case.”

*b* Learned Counsel then referred us to page 35 of the record, where Mr Kirk in the course of his evidence mentioned two instances in which it appeared from the bank’s ledger that the plaintiff’s passbook had been forwarded to him by the bank. He also submitted

*c* that there was nothing in the passbook to show that compound interest had been charged. He also referred to the case of *Chatterton v. London and County Bank*, referred to in Volume 3 of the *British Empire Digest* at 244, in which Lord Esher in the course of

*d* his judgment held that there was no duty on the part of a customer to refer to his passbook, which is sent to him by the bank.

He submitted that the only evidence in the court below as to acquiescence being the periodical rendering of the plaintiff’s passbook, unless knowledge on the part of the plaintiff could be presumed the finding of the learned Chief Justice as to acquiescence was not justified. In considering the question of the passbook, the evidence of the plaintiff which

*e* appears at page 23 of the record is as follows:—

*f*

*g* “I don’t deny I may have had my passbook out in March, 1918 – May, 1919 – June, 1919, December, 1919 – May, 1920, September, 1920, September, 1921 November, 1921, January, April, July, August, December, 1922, April, 1927 September, 1929. I used to have my passbook out every now and then but kept no date. I looked generally to my passbook when I had it out and saw the interest debited but did not check it.”

*h* And this must be considered together with the evidence of Kirk to which I have referred. It is clear from this evidence that the plaintiff received his passbook and had the opportunity of examining it on many other occasions than those

*i* mentioned by Mr Kirk.

On page 24 of the record, in the course of his evidence, the plaintiff admitted that he was an acute business man, and from the passage in exhibit “R” to which I have previously

*j* referred, it is clear that the plaintiff was fully aware of the

fact that heavy interest was running from 1918, and not only *a*  
was it running, but it was also running by the month. He  
must therefore have known of the monthly rests of interest.  
It is also clear from exhibit “F” a letter dated the *b*  
24th August, 1923, written by him to Mr Akiwumi barrister-  
at-law, that he knew as far back as far back as 1923 that he  
had to pay 10 percent interest. It is also clear from his letter  
to the London Office, exhibit “X” to which I have previ- *c*  
ously referred, that he knew he had to pay high interest with  
monthly rests.

Then again, on referring to a letter dated the 17th August,  
1921, from the bank to the plaintiff which was admitted in *d*  
evidence as exhibit “I,” which reads as follows:—

“S.D. PAPPOE ACCRA	BANK OF BRITISH WEST
	AFRICA LIMITED. ACCRA
	17th August, 1921.

*e*

“Dear Sir,

Sometime ago, our Head Office advised us that they were not will-  
ing to continue giving overdrafts against mortgage at rates of in-  
terest less than 10 percent. *f*

As your mortgages only permit us to charge 8 percent, we shall be  
obliged if you will confirm to us that you agree to the increased  
charge.

We hope to be able to advise you at an early date that the rates of *g*  
interest have been reduced again.

Yours faithfully,

JC PATRICK,

Manager.” *h*

And to the reply from the plaintiff dated the 18th August,  
1921 (exhibit “J”) in which the plaintiff stated as follows:—

“I accept and confirm the terms of your letter under reply, and will  
confine myself to the rate of 10 percent until your Head Office *i*  
directs the necessary reduction as they may think fit in the near  
future.

Yours faithfully,

S. DAVID PAPPOE.” *j*

*a* It will be seen that the plaintiff admitted the defendants' right to charge interest at the rate of 10 percent and this act on his part constitutes knowledge and acquiescence.

*b* In my opinion there was overwhelming evidence in the court below, apart from the question of the passbook, to justify the Chief Justice in coming to the conclusion that there was knowledge and acquiescence on the part of the plaintiff in regard to the interest, which was being charged him by the defendants.

I see no reason therefore to dissent from this finding of fact.

*d* Dealing next with heading (4), Mr *Phipps* referred to the three mortgages dated 11th July, 1919, 15th September, 1919 and 17th August, 1921, respectively which were admitted in evidence as exhibits "D", "E" and "H." He submitted that the wording of these deeds did not give the bank the right to charge capitalised interest with monthly rests, but they were only justified in charging simple interest at the rate of 8 percent per annum. Exhibit "H" was a mortgage to secure an overdraft of £2,000. He further submitted that before the execution of exhibit "H," the plaintiff's account so far as £6,000 was concerned, was closed.

*g* At the date of that deed the plaintiff had paid in the whole of his fixed deposit. As far as that amount of £6,000 was concerned, therefore, the position between the parties was of mortgagor and mortgagee, and the bank could not therefore charge more than 8 percent interest.

*h* As regards exhibits "I" and "J" he contended that a mere verbal agreement could not vary the terms of the mortgages which were deeds under seal.

*i* In dealing with the question of these mortgages, the learned Chief justice at page 58 of the record stated as follows:—

*j* "Now of course it is obvious that when a solemn deed has been entered into between banker and customer under which the customer conveys securities to the bank by way of mortgage for securing

a  
between the customer and the banker is '*prima facie*' one of mort-  
gagor, and the banker is precluded from charging more than the  
interest prescribed in the deed so long as it regulates the relations  
between the parties. The mortgages in this case, however, were all  
of them given not for the purpose of securing an ascertained bal-  
ance of an overdrawn account but to secure a further fluctuating  
overdraft up to a certain amount. The recitals of the deed did not  
correspond with the actualities since in both "D" and "E" it was  
expressly stipulated that the mortgagor should repay any sums  
advanced together with the usual interest, commission and lawful  
bank charges, and it was only if after the account was closed any  
balance remained due to the bank that it was stipulated that interest  
at 8 percent should be paid on that balance. The account had in  
fact never been closed and the condition had not therefore arisen  
under which interest at 8 percent became payable. The deed of  
17th August, 1921, moreover was expressed to be supplemental to  
the two previous deeds and provided for payment of interest in  
exactly the same manner as had been done in them. e

Construing the three deeds together, therefore, I am of opinion that  
notwithstanding the recitals in the deed of 17th August, 1921, I am  
bound to hold that the bank was entitled to charge interest on the  
whole of the current account." f

On referring to exhibit "A" which appears at page 97 of the  
record it will be seen that in April, 1921, the sum of £6,000  
was still shown in the plaintiff's current account as not being  
withdrawn. g

In my opinion therefore the learned Chief Justice was right  
in holding that at the date of the execution of exhibit "H" the  
plaintiff's account had not in fact been closed and therefore  
the position of mortgagor and mortgagee did not arise. h

As regards exhibits "I" and "J," the learned Chief Justice  
in the course of his judgment stated as follows:—

"In their view of what the mortgages permitted, both the plaintiff i  
and the defendants were, I consider, mistaken, but the important  
thing is that the plaintiff by letter "J" confirmed the previous charge  
of 10 percent and agreed to the same rate being charged in future  
until the Head Office directed the necessary reduction. Such an  
agreement was of course a perfectly valid variation of the contract j



- a* by mutual agreement, the consideration of which to the plaintiff was that the bank would not call in the money if he agreed to pay the interest, and it would avail to alter the deed whether the deed had the effect which plaintiff contends or that which I say it had, ie
- b* to allow the bank to charge the usual interest commission and lawful bank charges so long as the account was open; 8 percent when it was closed.”

- As the validity of the contract created by exhibits “I” and “J”
- c* has been questioned by Mr *Phipps*, it will be as well for me to refer to the case of *Nash v. Armstrong* 10 C.B. (N.S.) 259, in which it was held that parties to a deed can only discharge their obligations by deed, yet they may make a parol contract
- d* which creates obligations separate from the deed, and even substantially at variance with the deed. In the present case, the parol agreement created by exhibits “I” and “J” did not vary the contract as between mortgagor and mortgagee
- e* but only as between banker and customer, the rate of interest as between mortgagor and mortgagee still remaining the same as in the deeds.

- Dealing now with the last heading. It was contended by
- f* Mr *Phipps* that the plaintiff’s current account had been definitely closed on the 18th November, 1922, in view of the fact that the plaintiff stopped operating his account on that date. He contended therefore that the Chief Justice was
- g* wrong in holding that it had only been closed on the 11th February, 1932, when the plaintiff settled it by paying in the balance then standing in the bank’s ledger.

- Apart from the fact that five cheques were proved to have
- h* been drawn by the plaintiff as set out at pages 144 and 145 of the record after the 18th November, 1922, it is clear from Mr Kirk’s evidence which appears at page 35 of the record, where he states that the plaintiff took out his passbook in
- i* December, 1922, and to the plaintiff’s own admission at page 23, where he stated that he did not deny that he may have had his passbook out in December, 1922, among other dates, that he must have known that his account was not
- j* closed on the 18th November, 1922.

In conclusion, I may say that after carefully considering all *a*  
the evidence in the court below, notwithstanding the very  
able and lucid manner in which the case has been put in  
before us by Counsel for the appellant, I see no reason for *b*  
setting aside the judgment of the court below.

The appeal must therefore be dismissed with costs assessed  
at the sum of £48 0s. 6d.

The court below to carry out. *c*

**Kingdon CJ:** I have had the advantage of reading the judg-  
ment of the learned President of the court and I concur  
therewith.

**Barton AJ:** I concur. *d*

*a*

## Commissioner of Stamp Duties v Bank of British West Africa Limited

*b*

FEDERAL SUPREME COURT

BROOKE J

*c*

Date of Judgment: 9 AUGUST 1944

*d*

*e*

*Banking – Mortgage – Mortgage deed with clause appointing bank/mortgagee as attorney to recover rents from tenants of mortgaged property during continuance of mortgage – Whether clause appointing mortgagee as attorney distinct and separate matter from the mortgage as to render it liable to stamp duties – Section 7 Stamp Duties Ordinance No. 5, 1939 – Stamping of mortgage deed – Basis of – Principal and not subsidiary object liable to assessment for stamp duties*

*f*

### **Facts**

*g*

The Bank of British West Africa Limited were mortgagees under a mortgage deed dated 13th April, 1944. Clause 9 of the deed provided as follows:—

*h*

“The borrower hereby constitutes and appoints the bank “during the continuance of this security his attorney to recover from the tenants of the mortgaged hereditaments the rents from time to time payable by such tenants.”

*i*

*j*

When the mortgage deed was presented to the Commissioner for Stamp Duties, he assessed the duty payable in respect of the mortgage as £1 in respect of the Power of Attorney to collect rents. The bank appealed to the Supreme Court against the assessment by way of case stated by the Commissioner for Stamp Duties under section 20 of the Stamp Duties Ordinance No. 5 of 1939. The bank contended that the document was liable to stamp duty only in respect of

the leading and principal object which was the mortgage and that the power to receive rents was subsidiary and not liable to separate assessment. a

It was argued by the Commissioner for Stamp Duties that the leading object of the mortgage was to convey property to the mortgagee as security for banking transaction and the inclusion of a Power of Attorney to collect rents was not accessory to the covenants contained therein, and was therefore liable to assessment. b  
c

Section 7 of the Stamp Duties Ordinance No. 5 of 1939 provides:

“7. Except where express provision to the contrary is made by this or any other Ordinance:— d

(a) An instrument containing or relating to several distinct matters is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of such matters. e

(b) An instrument made for any consideration, or consideration in respect whereof it is chargeable with *ad valorem* duty, and also for any further or other valuable consideration, or considerations is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of the considerations.” f

**Held –**

1. There is no better established rule as regards stamp duty than that all that is required is that the instrument should be stamped for its leading and principal object and that this stamp covers everything accessory to this object. In the instant case, the leading character of the document is the mortgage and the clause which gives the bank power to recover the subject matter of the mortgagee in a certain way does not import a separate and distinct transaction which would render the document liable to be assessed in two separate categories and the words used – the clause “during the continuance of this security” emphasises the subsidiary nature of the transaction. g  
h  
i  
j

**a Case referred to in the judgment**

*Foreign*

- b** *Limmer Asphalte Paving Co v. Commissioner of Inland Revenue* (1872) L.R. 7 Ex 217

**Nigerian statute referred to in the judgment**

- c** Stamp Duties Ordinance No. 5 of 1939, section 7

*Appearances not stated.*

**d Judgment**

- BROOKE J:** This is an appeal under section 20 of the Stamp Duties Ordinance, No. 5 of 1939, and a case has been stated  
**e** by the Commissioner.

- The question to be determined, which is a short one and relates to the assessment for stamp duties of a mortgage deed, is whether a power to collect rents contained in that  
**f** deed is a distinct and separate matter which renders it liable to be charged not only with an *ad valorem* duty on the mortgage at the rate of 5s for every £100 or fractional part thereof, but also as a power of attorney under the schedule to  
**g** Ordinance No. 5 of 1939 (page A94 of the annual volume). The Commissioner of Stamp Duties assessed the document as follows:– £1.5s.0d in respect of the mortgage, with a limit of £500, and £1 in respect of the power of attorney, contained in the document, to collect rents. The duty has been  
**h** paid in conformity with the assessment.

- The deed of mortgage was presented on behalf of the Bank of British West Africa Limited and is dated the 13th April, 1944: it sets out that the borrower is carrying on banking  
**i** transactions with the appellants, and in pursuance of the agreement the borrower as beneficial owner conveys land described in the schedule thereto to the bank on the usual covenants to be found in such mortgages and also contains  
**j** the following Clause 9, which Counsel for the appellants

informed the court had been in use for years in this type of mortgage:— a

“The borrower hereby constitutes and appoints the bank during the continuance of this security his attorney to recover from the tenants of the mortgaged hereditaments the rents from time to time payable by such tenants.” b

The appellants have contended that the document is liable to stamp duty only in respect of the leading and principal object which is the mortgage and that the power to receive rent is subsidiary and not liable to separate assessment. c

Section 7 of the Ordinance No. 5 of 1939, differs from the corresponding section in the English Act and reads as follows:— d

“7. Except where express provision to the contrary is made by this or any other Ordinance:— e

- (a) An instrument containing or relating to several distinct matters is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of such matters. f
- (b) An instrument made for any consideration or consideration in respect whereof it is chargeable with *ad valorem* duty, and also for any further or other valuable consideration, or considerations is to be separately and distinctly charged, as if it were a separate instrument, ‘with duty in respect of each of the considerations.’ g

The court has had the assistance of the Commissioner of Stamp Duties and of Counsel for the Bank of British West Africa Limited, as appellants, in the argument before it. The case as stated by the Commissioner is that the leading object of the mortgage is to convey property to the mortgagee as security for banking transactions, that the mortgagee is not in possession and the mortgage does not contain an attornment clause: the mortgagee by obtaining in the deed a power to collect rents has thus placed himself in the position of a receiver and the power created in the mortgage to collect rents is not accessory to the covenants contained therein. h  
i  
j

- a* Counsel for the appellants has referred to a number of cases which are not identical with the case presented for the opinion of this Court, but they contain the principles on which the court should act in considering the question whether the clause is subsidiary or whether it is a separate and distinct matter.

- c* In order to determine what stamp duty is chargeable upon an instrument the rule is that “the real and true meaning of the instrument is to be ascertained and that the description given in the instrument itself is immaterial.”

- d* It was also pointed out that, in determining the liability to duty, the substance rather than the form of the document must be regarded and it was maintained by the respondent that in the case of the document before the court there arises by reason of Clause 9 another transaction outside the inherent matter of the mortgage and that there is here a distinct transaction whether the rents, which the appellants are empowered to recover from the tenants of the mortgaged hereditaments, go towards the reduction of the debt or not does not, he says, concern the legal aspect of the document.

- g* It is not material what amount is advanced by the bank if it goes beyond the limit of £500 the case is covered by section 80 of the Ordinance we are only concerned with the nature of the power given by the clause.

- h* The only question to be determined is whether the power to collect rents is a separate matter from the mortgage or accessory to it. The leading character of the document here is the mortgage and the clause which gives the bank power to recover the subject matter of the mortgage in a certain way does not, it would seem, import a separate and distinct transaction which would render the document liable to be assessed in two separate categories, and the words used in the clause “during the continuance of this security” emphasise the subsidiary nature of the transaction.

- j* Reference was made to the fact that the rents payable by the tenant go with the reversion and also that an attornment

clause in a mortgage does not render the deed liable to duty as a lease, and a separate attornment, if under hand only, is not liable to stamp duty unless it contains special stipulations in which case it must be stamped as an agreement.

As was said in the judgment in *Limmer Asphalte Paving Co v. Commissioner of Inland Revenue* (*supra*) there is no better established rule as regards stamp duty than that all that is required is that the instrument should be stamped for its leading and principal object and that this stamp covers everything accessory to this object.

The opinion of this Court is that the instrument is chargeable with a duty of 25s and it is assessed accordingly.



a

## Kano v. Bank of British West Africa

b

WEST AFRICA COURT OF APPEAL, GOLD COAST, ACCRA

FOSTER-SUTTON P; COUSSEY JA; KORSAH J

Date of Judgment: 23 MARCH 1953

c

*Banking – Trust account – Executor opening trust account – Drawing cheques in breach of trust – Negligence – Bankers duty of care in respect of trust account – Liability of – How arises*

d

### Facts

e

By the Will of Mohama Dantatin, Adamu Sokoto was appointed Executor and Trustee for which Probate of the Will was granted to the said Adamu Sokoto. He later opened an account with the defendant bank known as “Account of Estate of Mohama/Dantatin deceased.” Adamu Sokoto thereafter operated the said estate account by drawing

f

cheques on it from time to time, until his death. Plaintiffs as administrators *de bonis non* of the Estate of Mohama Dantatin deceased now instituted an action against the defendant bank claiming damages for negligence. The plaintiffs con-

g

tended that being an estate account, the defendant bank was duty bound not to allow the executor and trustee to draw money from the estate account for purposes inconsistent with the trust. The plaintiff/appellants’ claim was based on

h

the allegation that the defendant/respondents knew or should have known that the money with which Adamu Sokoto opened the estate account was trust money. The defendant bank admitted the said Will together with the probate was produced to a representative of their branch at

i

Kumasi, but denied that they thereby became aware of the provisions thereof before the opening of the account. They also claimed no knowledge of the purpose for which the drawings on that account were made. They further denied

j

any duty to control the executor in the discharge of his

duties under the said Will. The plaintiff/appellants' action was dismissed in the absence of express or implied notice of the trust. Dissatisfied, the plaintiff/appellant appealed to the West African Court of Appeal. a

### **Held –**

1. In the absence of evidence that at the time the estate account was opened it was expressly brought to their notice that the money was trust money and that a trust account should be opened, the defendants/respondent cannot be held to have known the object for which the account was being opened. b
2. The defendants as bankers were normally bound to discharge their indebtedness by honouring cheques drawn on the account, and they incur no liability to any third party with whom they had neither expressly nor impliedly entered into contract. c
3. By the terms of the contract between them, a banker is bound to honour his customers' drafts and doing so is freed from all responsibility to anyone. But if by the terms of the contract, expressed or implied, the banker takes into his possession monies of which the customer has become the owner in a fiduciary character, he contracts the obligation not to part with them for purposes which he knows are inconsistent with that fiduciary character. d

*Appeal dismissed.* e

### **Case referred to in the judgment**

#### ***Foreign***

*Adair Ex parte, In Re Goods* (1971) 24 L.T. 198 f

#### **Counsel**

For the appellants: *Cawston*

For the respondent/debtor: *Mead* g

### **Judgment**

**KORSAH J:** By the Will of Mohama Dantantin, who died on 6th December, 1943, Adamu Sokoto was appointed executor h

*a* and trustee, and on 6th January, 1944, probate of the said Will was granted to the said Adamu Sokoto. He later produced the said Will and probate to the defendants' representative in charge of their bank at Kumasi, with which branch the testator had, during his lifetime, an account. He was informed that the testator had the sum of £4,895.3s.2d standing to his credit in their books. At the request of the said Adamu Sokoto, defendants opened a new account in their books known as "Account of Estate of Mohama Dantantin deceased," and transferred the sum of £4,895.3s.2d balance then standing to the credit of the deceased, to that account. Thereafter the said Adamu Sokoto operated on the said estate account by drawing cheques on it, from time to time, until he also died on 1st June, 1948. It was then found that the balance standing to the credit of the Estate of Mohama Dantantin, deceased, was £90.10s.7d.

*e* Plaintiffs, as administrators *de bonis non* of the Estate of Mohama Dantantin, deceased, have sued the defendants claiming £5,513 damages for negligence. Plaintiffs contend that upon production of the Will and probate to the defendants on or about 7th January, 1944, defendants became aware of the trust created under the Will, and henceforth they were in duty bound not to allow the executor and trustee to draw money from the estate account of Mohama Dantantin for purposes inconsistent with the trust, and further that defendants should not have allowed the trust money to remain on current account yielding no interest.

*h* On his death, the testator left two sons and one daughter, all of whom were at the time minors; he therefore gave directions in his Will with respect to them. The relevant portions of the said Will are as follows:—

- i* "Clause 3 – I hereby devise to my executor in trust for my children, namely Ibrahim Kano, Mahaman Lawan Kano and Fati Kano my house situate on Plot No. 21, etc, Kumasi, and my house situate at Bogosu.
- j* Clause 4 – I hereby bequeath to my executor in trust for my children (names) my touring car.

Clause 6 – I hereby bequeath to my executor in trust for my said children (names) all my money in the Bank of British West Africa Limited, Gold Coast and Ashanti or elsewhere in British West Africa.

Clause 8 – I hereby charge my executor to use what money is reasonable out of my estate to look after my children until the eldest of them becomes of age.”

Defendants admit the said Will together with the probate annexed thereto was produced to a representative of their branch at Kumasi, but they deny that they thereby became aware of the provisions thereof, before this opening of the estate account, nor do they admit that the estate account was opened as a trust account. They further deny that they had knowledge of any of the purposes for which the drawings were made by the said Adamu Sokoto on the estate account, but say that they honoured the cheques presented by the said, Adamu Sokoto in the ordinary course of business without enquiry as to the purpose of the drawings, as they were bound to do that in honouring the said cheques they had no notice of any breach of trust by the said Adamu Sokoto. They also deny that upon the production of the Will to their representative aforesaid, they became *ipso facto* under a duty to control the executor in the discharge of his duties under the said Will.

There is evidence on record, which proves that the defendants have no trustee department in this country, that they did not regard themselves as trustees when the account was opened, and in fact the account was not opened as a trust account, but merely as an estate account. It was further proved that all the amounts withdrawn from the estate account were withdrawn by Adamu Sokoto.

Plaintiffs' claim is based on the allegation that the defendants either knew or should have known that the money with which Adamu Sokoto opened the estate account was trust money. To prove this they called two witnesses, the first was the manager of defendants, and the second witness was one

- a* of the plaintiffs. First witness for the plaintiffs *inter alia* testified as follows:–
- b* “On 7th January, 1944, balance transferred to estate account. Sokoto produced probate of the Will. A copy was filed. The bank was in a position at any time to look at the terms of the Will. It is the practice to open executor’s account named after deceased.”
- c* In my opinion, the main issues to be determined before deciding the liability or otherwise of the defendants in this suit are:–
- d* (a) Had the defendants knowledge at the time the account was opened that the money which was transferred to the estate account was trust money?
- e* (b) If not, should they have known, or was it their duty to have made enquiries to find out what the account was intended for, beyond the statement of the executor?
- f* (c) Was the mere production of the Will and/or probate to the defendants, prior to opening of the estate account, sufficient notice to defendants of the trust?

- g* Upon very careful consideration of the whole of the evidence, and the admissions of the defendants, I have no doubt whatsoever that the answers to these questions must be in the negative. The defendants had not held themselves out to the public that they had a “Trust Department,” there is no evidence that they had previously acted as trustees for anyone in this country. Upon the production of the Will and/or probate, they treated Adamu Sokoto merely as an executor; in that belief and acting upon his instructions defendants opened an ordinary estate account for the estate of Dantan-tin, deceased, according to their general practice. In the absence of evidence that at the time the estate account was opened it was expressly brought to their notice that the money was trust money and that a trust account should be opened, the defendants cannot be held to have known the object for which the account was being opened. Had this
- j* been brought to their notice they would in all probability

have advised the applicant what to do, as they had no Trustee Department in the country. a

Defendants as bankers were normally the debtors of Adamu Sokoto as executor of the estate of Dantantin, and they were bound to discharge their indebtedness by honouring his cheques issued in the name of the estate. In discharging this duty, they incurred no liability to any third person with whom they had neither expressly nor impliedly entered into any contract. In the case of *Ex parte Adair, In re Goods* (1871) 24 L.T. 198, which Counsel for plaintiffs cited in support of plaintiffs' claim, the following principles of law were enunciated: b

“By the terms of the contract between them, a banker is bound to honour his customers' drafts, and doing so is freed from all responsibility to anyone. But if by the terms of the contract, expressed or implied, the banker takes into his possession moneys of which the customer has become the owner in a fiduciary character, he contracts the obligation not to part with them for purposes which he knows are inconsistent with that fiduciary character.” c

When, therefore, a customer has opened with his bankers separate accounts, specially headed with the names of the trusts to which the monies paid into those accounts belong, the bankers are not at liberty, upon the bankruptcy of the customer, to apply those monies in payment of the customer's overdrawn account. d

A banker holding securities which have been deposited with him by way of equitable mortgage must deliver up the securities upon being paid the amount covered by the deposit. e

It will be seen that none of the principles enunciated in the above cited case is applicable to this suit. All the other cases cited were cases in which there was clear evidence of knowledge of the bankers of the existence of the trust. f

For these reasons I consider that this appeal should be dismissed. g

*Appeal dismissed.* h

Foster Sutton, P and Coussery, JA concurred in the judgment of Korsah J. i

j

a

## British and French Bank Limited v Owodunni Trading Company

b

FEDERAL SUPREME COURT

FOSTER-SUTTON FCJ, JIBOWU, ABBOTT FJJ

Date of Judgment: 8 MARCH 1956

c

*Banking – Banker/customer relationship – Banker's staff induced customer to advance loan to another customer – Indebtedness of borrowing customer to banker not disclosed – Whether banker entitled to deduct the indebtedness from the loan granted by the induced customer – Liability of banker for procuring breach of contract – Whether the conduct of banker amounts to an actionable wrong*

e

### Facts

Both the respondent and Obasuyi Bros Timber Development Corporation had separate current accounts with the appellant bank. The respondent stated that the appellant's manager informed its general manager that he had a good customer of the bank, Obasuyi Bros, who had no capital to enable them utilise the £16,000 letters of credit opened in their favour. The appellant's manager then requested the respondent to advance the sum of £2,000 to Obasuyi Bros in order to give them money to execute the business but did not disclose that Obasuyi Bros was indebted to the bank. The respondent entered into an agreement with Obasuyi Bros in the appellant manager's office. However, immediately the respondent disbursed the £2,000 loan into Obasuyi Bros current account, the appellant deducted the sum of £1,408.6s.0d already owed them by Obasuyi Bros. Prior to the agreement with the deductions, only £591.14s.0d was left as working capital and this reduced the respondents' profit under the agreement and made it impossible for Obasuyi Bros to repay the £2,000 on the agreed date. At the trial, it was established that the main purpose of the appellant's manager in negotiating the loan was to obtain repayment of Obasuyi Bros' debts to the bank.

The respondents sued the appellant for damages for wrong-<sup>a</sup>  
fully inducing Obasuyi Bros to commit a breach of contract  
entered into with the respondent and thereby broke a prom-  
ise made to Obasuyi Bros that their debit balance be liqui-<sup>b</sup>  
dated by their share of any profits made out of timber  
transactions financed by the loan of £2,000.

The learned trial Judge awarded the plaintiff/respondent  
damages of £3,500. The defendant appealed to the Supreme<sup>c</sup>  
Court contending that what they did was lawful banking  
practice.

### Held –

1. That based on the ordinary banking practice, the appel-<sup>d</sup>  
lant bank was legally entitled to deduct from any monies  
paid into the current account of Obasuyi Bros the  
amount of any debit balance which existed at the time of  
the payment in.<sup>e</sup>
2. That the conduct of the appellant bank did not amount to  
an actionable wrong.

*Appeal allowed.*<sup>f</sup>

### Obiter

“We are not in this case concerned with the propriety upon ethical  
grounds of anything that the appellants did. Questionable as their  
conduct appears to me to have been, as I have already said the<sup>g</sup>  
question with which we are concerned is whether there has been  
shown to be such an unlawful act upon the part of the appellants as  
entitles the respondents to relief in the present action.”

### Counsel<sup>h</sup>

For the appellants: *Gage* (with him *Ferguson*)

For the respondents: *Udochi*

### Judgment<sup>i</sup>

**FOSTER-SUTTON FCJ:** (*Presiding and delivering the judg-  
ment of the court*) This is an appeal from a judgment of  
Evelyn Brown J in favour of the plaintiffs awarding them<sup>j</sup>  
the sum of £3,500 by way of special and general damages.



- a* The action was brought by the respondents against the appellants, to recover damages for wrongfully inducing the firm of Obasuyi Bros and Timber Development Corporation
- b* to commit a breach of a contract entered into by the firm with the respondents on the 14th October, 1952.

The agreement, in respect of which it was alleged the breach was caused, reads as follows:

- c* “1. MESSRS OWODUNNI TRADING CO undertakes to place at the disposal of MESSRS OBASUYI BROS and
- d* TIMBER DEVELOPMENT CORPORATION, a working capital of £2,000 to allow the latter to realise Letters of Credit opened in their favour at the BRITISH AND
- e* FRENCH BANK (FOR COMMERCE AND INDUSTRY) LIMITED. This amount is to be immediately transferred into the account of MESSRS OBASUYI BROS and TIMBER DEVELOPMENT CORPORATION with the BRITISH AND FRENCH BANK (FOR COMMERCE AND INDUSTRY) LIMITED, LAGOS.
- f* 2. Every shipment made by OBASUYI BROS realised on letter of Credit at the above bank, 50 percent of the net profit as per statement of invoices submitted by MESSRS OBASUYI BROS and agreed by MESSRS OWODUNNI TRADING CO. will be time when the Letters of Credit are realised.
- g* 3. This agreement comes into force immediately and its expiry date for reimbursement is fixed at 31st December, 1952.

DATED THIS 14th day of October, 1952.”

- h* Both the respondents and Obasuyi Bros had current accounts in the appellants’ bank. The respondent alleged that on the 13th October, 1952, Mr Jean Le Ley, the appellants’ manager, went to the office of the respondents’ general manager at 59 Docemu Street, Lagos, and informed him that he had a
- i* good customer of the bank, Obasuyi Bros and Timber Development Corporation, who had letters of credit in their favour amounting to some £16,000, but no liquid capital to enable them to utilise the credits, that Jean Le Ley went on
- j* to recommend the respondents should advance the sum of

£2,000 to Obasuyi Bros in order to give them some working capital, that the agreement already referred to was drafted by Mr Jean Le Ley, and was finally entered into in the latter's office in the bank. a  
b

The respondents complained that as soon as they caused the £2,000 to be paid into the current account of Obasuyi Bros the bank deducted the sum of £908.6s.0d to cover a long outstanding overdraft in the account, and later deducted a further £500 to cover a transaction which had taken place before the loan was made by them, thus leaving only £591.14s.0d as working capital, thereby reducing the respondents' profit under the agreement and rendering it impossible for Obasuyi Bros to repay the £2,000 on due date. c  
d

Substantially, these were the facts found by the learned trial Judge. He also reached the conclusion that Mr Jean Le Ley's main object in negotiating the loan was to obtain repayment of Obasuyi Bros' debts to the bank which had been outstanding for a long time, and that the appellant bank had, by making the deductions referred to, broken a promise made to Obasuyi Bros that their debit balance could be liquidated by their share of any profits made out of timber transactions financed by the loan of £2,000. e  
f

There can be no doubt, upon the findings of fact made by the learned trial Judge, which I accept without reserve, since there was clearly evidence before him to justify his conclusions, and he had the advantage of seeing and hearing the witnesses, that the bank's action contributed to the breach of contract of Obasuyi Bros. g  
h

What we have to determine, however, is did the conduct of the appellant bank amount to an actionable wrong?

Mr Gage, who appeared for the appellants at the hearing of the appellant before us, cited a number of cases in support of his argument that, in the circumstances of this case, the appellants were not liable, since, as he submitted, they had acted lawfully carrying out the ordinary banking practice of i  
j

*a* deducting the amount of any debit balance from the current account of Obasuyi Bros as soon as it was credited with the £2,000.

*b* In my view the authorities we were referred to establish the proposition that, in an action for the tort of procuring a breach of contract, as this is, if a person acting lawfully and in all respect within his rights, causes, as a result of what he does, loss to another, that other has no remedy, though the  
*c* loss he suffers is the necessary and inevitable consequence of the acts of the first.

We are not in this case concerned with the propriety upon ethical grounds of anything that the appellants did. Questionable as their conduct appears to me to have been, as I have already said, the question with which we are concerned is whether there has been shown to be such an unlawful act upon the part of the appellants as entitles the respondents to relief in the present action.  
*d*  
*e*

Following the ordinary banking practice they were, in my view, legally entitled to deduct from any monies paid into the current account of Obasuyi 'Bros the amount of any debit balance which existed at the time of the payment in.  
*f* The answer to the question we have to determine must, therefore, be in the negative.

Having regard to the conclusion I have reached on this point there is no necessity to discuss the other matters raised during the hearing before us.  
*g*

I would, accordingly, allow this appeal, set aside the judgment of the court below, and enter judgment for the defendants with 45 guineas costs.

*h* The appellants must also have their costs on this appeal which I could fix at £55.0s.0d.

*Appeal allowed.*

*i* Jibowu, FJ and Abbott, AG FJ concurred in the judgment of Foster-Sutton FCJ.

*a*

## Official Receiver and Liquidator v. Moore

HIGH COURT OF LAGOS STATE

DICKSON J

Date of Judgment: 15 MAY 1959

Suit No.: L.D.13/1958

*b*

*Banking – Banker/customer relationship – Overdraft –  
Necessity for demand – When right of action accrues*

*c*

### Facts

The plaintiff's claims against the defendants the sums outstanding in the overdraft facilities granted to the defendants. The defendants had three accounts with the plaintiff and received three overdrafts. It was unable to pay, and the plaintiff filed the action. The defendant contended that the first account being more than six years since the overdraft was granted was statute barred.

*d*

*e*

### Held –

1. For practical considerations, there is an implied term between the banker and creditor where an overdraft is given, that there should be no right of action until notice was given and demand made. Therefore the claim in respect of No. 1 A/C is not statute barred.

*f*

*Judgment for plaintiff.*

*g*

### Cases referred to in the judgment

#### *Nigerian*

*Alawode v. Semoh* (Unreported judgment of the Federal Supreme Court dated 10th March 1957)

*h*

#### *Foreign*

*Ascherson v. Tredegar Dry Dock and Wharf Co Ltd* (1909) 2 Ch. 401

*i*

*Bradford Old Bank Ltd v. Sutcliffe* (1918) 2 K.B. 33

*Foley v. Hill* (1848) 2 H.L.C. 28

*Hartland v. Jukes* (1863) 1 H. and C. 667

*j*

- a Joachimson v. Swiss Bank Corporation* (1912) 3 K.B. 110  
*Lloyds Bank Ltd v. Margolis and others* [1954] 1 All E.R. 734  
*Norton v. Ellam* 2 M. and W. 464
- b Parrs Banking Co Ltd v. Yates* (1898) 2 Q.B. 460  
*Richmond v. Branson and Son* (1914) 1 Ch. 968  
*Rouse v. Bradford Banking Co* (1894) A.C. 586
- c Russian Commercial and Industrial Bank v. Comptoir  
D'Escompte de Mulhouse* (1925) A.C. 112  
*Walton v. Mascall* (1844) 13 M. and W. 452  
*Wright v. New Zealand Farmers Co-operative Association  
d of Canterbury* (1939) A.C. 439

### Counsel

For the plaintiff: *Robinson*

- e* For the defendant: *Thompson*

### Judgment

- f* **DICKSON J:** After considering the evidence in detail I have  
no hesitation whatever in finding that the bank gave the  
defendant overdrafts and reject entirely the arrangement put  
forward that whatever money he drew was remuneration for  
*g* professional services rendered. I am satisfied there have  
been no repayments.

- h* Counsel for the plaintiff, in my view, has correctly submit-  
ted that, even assuming there was such a transaction between  
the bank and the defendant, because the former had no money  
to pay in the ordinary way, and therefore the defendant was at  
liberty to draw on an account in the bank in his own name  
and the cheques met, unless he had put the account in credit it  
*i* would amount to an overdraft. It would seem a correct propo-  
sition that, if in fact there was such an arrangement and the  
bank not having any money to pay the 1,500 guineas, the  
arrangement would be a fraud on the customers of the bank,  
*j* and the defendant could not take advantage of it.

Defendant's Counsel submits that in view of section 146(1)(a) of the Companies Ordinance, Cap 38 of 1948 the statement of claim discloses no cause of action inasmuch as, there is no averment or evidence that the plaintiff has obtained the necessary sanction to bring these proceedings. The relevant enactment reads:

“146(1) The liquidator in a winding up by court shall have power, with the sanction either of the court or of the Committee of Inspection—  
(a) to bring or defend any action or other legal proceeding in the name and on behalf of the company.”

Plaintiff's Counsel submits that the title under which the plaintiff has sued is sufficient title to sue, unless at the appropriate time and in the appropriate way the contrary is shown. He says the basic principle is that all things are presumed to be done correctly until the contrary is established, and the question should not be raised as in paragraph 6 of the statement of defence.

In the 1959 Edition of *The Annual Practice* at 421, under the heading “Authority to Sue,” it is stated:

“But if the defendant desires to question the authority to sue in the plaintiff's name he must apply to strike out the plaintiff's name at an early stage; he cannot by his defence dispute the authority, nor can he do so at the trial.”

In *Richmond v. Branson and Son* (1914) 1 Ch. 968, where an action was brought by a plaintiff described as “of unsound mind not so found” by her next friend against a firm of solicitors for delivery-up of certain deeds and instruments of title which had been deposited with them by the plaintiff as her solicitors, the statement of claim alleged that the plaintiff was and had for many years past been a person of unsound mind not so found. The defendants by their defence stated that they did not admit that, either at the time when the deeds and documents came into their possession or at any time that they held the deeds and documents for her; and that she alleged that she was during the period in question, and still was, of full mental capacity and soundness of mind.

- a* On an application by the plaintiff to strike out so much of the defence as did not admit the unsoundness of mind of the plaintiff and for judgment on the admissions in the defence,
- b* it was held that the defendants by raising the issue as to the unsoundness of mind the plaintiff were in effect denying the authority of the plaintiff's solicitors to bring the action, and that was not an issue which was competent for them to raise at the trial.

*c* At page 973 (*ibid*) Warrington J said:

- d* "The application really raises an important question of practice or procedure, namely, whether it is competent to a defendant to insist on trying, as a relevant issue in the action itself and at the trial, the question whether or not the plaintiff's solicitors had sufficient authority to institute the action."

At page 974, the learned Judge continues:

- e* "In other words, they dispute the authority of the solicitors instructed by the next friend, and that of the next friend himself, to institute the action. Now is that an issue which it is competent to the defendants to raise at the trial? 'In my opinion it is not . . .'"
- f* The business of this Court could not be carried on if one were not entitled to assume the authority of the solicitor unless and until that authority has been disputed and shown not to exist in the proper form of proceeding, namely, a substantive application on the part of the parties concerned
- g* to stay the proceedings on the ground of want of authority.

- h* In *Russian Commercial and Industrial Bank v. Comptoir D'Escompte de Mulhouse and others* (1925) A.C. 112 it was held that it was not open to the defendants to raise by way of defence to the action the objection that the London Branch Manager had no authority to bring the action in the name of the plaintiff bank, but they ought to have moved to strike out
- i* the name of the bank as plaintiff.

Viscount Cave in delivering his opinion in that case says at page 130:

- j* "My Lords, I do not think that it is open to the defendants to raise this question by way of defence to the action. If the defendants

desire to dispute the authority of Mr Jones to commence these proceedings in the name of the plaintiff company their proper course was to move at an early stage of the action to have the name of the company struck out as plaintiff and so to bring the proceedings to an end.”

The decision of Warrington J in *Richmond v. Branson and Son* was approved.

It is quite plain from the authorities that it is not sufficient to raise the lack of authority to sue on the pleadings, but if the defendant desires to question the authority to sue in the plaintiff's name, he must apply in the appropriate way to strike out the plaintiff's name at an early stage in the proceedings. It is also clear that it cannot be done at the trial.

In passing, it is to be observed that the matter was not even raised expressly and precisely in the pleading. Paragraph 6 of the statement of defence is too general and vague, it reads:

“The defendant will contend at the trial that the statement of claim discloses no cause of action and should be dismissed.”

Finally, on this point, the allegation that the plaintiff sues as receiver and liquidator has not been specifically denied in the statement of defence, therefore it may be assumed that it was admitted, and in that event it would be otiose to call evidence.

Defendant's Counsel contends that the account No. 1 is statute barred and that the last advance was made on the 20th October, 1951, and the writ was not issued until the 17th January, 1958. It is inaccurate to say that the last advance was made on the date stated by Counsel: in fact the last advance on that account was made on the 20th September, 1950. He submits action must be deemed to have commenced not on the date of the application for the writ, but the date of issue. The application for the writ is dated the 7th January, 1958. It was filed on the 11th day of the same month, and issued on the 17th day. If the last advance was made in September, 1950, a period of six years would have



*a* elapsed in September, 1957. In the instant case, it is immaterial whether the time is to be computed at the date of issue, or date of application for the writ, as there is only a matter of  
*b* days between, and whatever date is taken, six years would have elapsed. In passing, it must be mentioned that the action must be deemed to have commenced at the date of application for the writ and not on the date when it was signed  
*c* by the Judge and therefore issued: see *Mufurau Alawode v. MA Semoh* (unreported judgment of the Federal Supreme Court dated the 10th March, 1957).

*d* As I understand it, plaintiff's Counsel does not refute the contention that six years had elapsed before action was taken in respect of account No. 1.

*e* Counsel for the defendant in support of his submission cites the case of *Parrs Banking Co Ltd v. Yates* (1898) 2 Q.B. 460. In that case action was brought to recover the sum of £1,000 upon a guarantee, which had been given to the plaintiff, a banking company, by the defendant to secure the overdraft of a customer of the plaintiffs. It was held that the  
*f* plaintiffs' right of action upon the guarantee in respect of the sums advanced by them to the customer was barred by the Statute of Limitations, but that the action was maintainable in respect of interest which had accrued due from the customer, whether six years before the action and had not been  
*g* paid.

*h* In 1848, in the case of *Foley v. Hill* (1848) 2 H.L.C. 28, it was fully established that the relationship between banker and customer was that of a debtor and creditor, viz, to regard the banker as himself having borrowed the money from the depositor, his customer. Lord Chorley, at page 22, in the 3ed of his treatise on the *Law of Banking*, says that such a conception involved a departure from the original objective of  
*i* the depositor which was simply the safe custody of his money, an aim which he probably shared with the majority of his descendants, since the average customer at a bank has  
*j* not the least idea that he is lending his money to a banker to

do what he likes with it. He goes on to say that such a conception having been adopted shows that the English law is on occasion capable of a bold and liberal policy. a

Mr *Harvey Robson* for the plaintiff says that there is little authority on this aspect of the case, and that whatever there is quite conflicting. As to when a cause of action accrues against a customer who has been given an overdraft as opposed to the guarantor is the point to be decided, in this case. b  
All the decided cases would seem to deal with guarantees. c

It will be seen in *Parr's* case that it was held that a cause of action arose as soon as any advance had been made, and that each item would be barred when six years had elapsed, d but in *Hartland v. Jukes* (1863) 1 H. and C., it was held that the mere existence of a debt without balance struck or demand made on the guarantor, did not make time run from that date. In *Ascherson v. Tredegar Dry Dock and Wharf Co Ltd* (1909) 2 Ch. 401 at 406 Swinfen Eady J says: e

“It was contended that until the guarantee had been determined and the overdraft called in no right of action accrued to the bank against the sureties, although, if the present accounts continued for more than six years, all claims against the deceased’s estate would be barred by the Statutes of Limitation under the decision in *Parrs Banking Company v. Yates*.” f

That contention is not well founded. Repayment of the overdraft may be enforced by the bank at any time; there is no evidence of any contract binding the bank to allow an overdraft for any definite time, or at all. g

See also Halsbury’s (3ed) at 240, paragraph 453. h

In *Wright v. New Zealand Farmers Co-operative Association of Canterbury* (1939) A.C. at 450, Lord Russell of Killowen, delivering the judgment of the Privy Council said this about *Parr's* banking case: i

“Their Lordships express no opinion whether that particular decision was right or wrong.

They would wish to keep that question open for further consideration should the necessity to determine it ever arises. They are, j

- a* however, satisfied that it has no application to the rights and liabilities of the parties to the guarantee which is under examination on this appeal.”
- b* The learned Editor of Paget’s *Law of Banking* (5ed) at page 31, seems to think that *Parr*’s case is overruled, so far as the guarantor is concerned by the judgment of the Court of Appeal in *Bradford Old Bank Ltd v. Sutcliffe* (1918) 2
- c* K.B. 33, but that the decision does not touch the liability of a principal or non guaranteed debtor. In that case, it was held *inter alia* that, the plaintiff’s case was not barred by the Statute of Limitations, as no cause of action arose against
- d* the surety until demand had been made by the plaintiff. All these cases, as we have seen, deal with guarantees.

- Until 1921, it was thought that even when a customer was in credit, time ran against him from the day he made his
- e* deposit. The whole matter was considered in *Joachimson v. Swiss Bank Corporation* (1921) 3 K.B. 110. In that case, it was held that where money is standing to the credit of a customer on a current account with a banker, in the absence
- f* of special agreement, a demand by the customer is a necessary ingredient in, the cause of action against the banker for money lent.

- Bankes LJ at page 116 reiterated what the general law is,
- g* with reference to payments to be made ‘on demand.’ He referred to *Walton v. Mascall* (1844) 13 M. and W. 452, 458 where Parke B. states the law thus:

- h* “Now it is clear that a request for the payment of a debt is quite immaterial unless the parties to the contract have stipulated that it shall be made; if they have not, the law requires no notice or request; but the debtor is bound to find out the creditor and pay him the debt when due.”

- i* The learned Lord Justice referred to *Norton v. Ellam* 2 M. and W. 464, where the same learned Judge says:

- “It is the same as the case of money lent payable upon request, with interest, where no demand is necessary for bringing the action.
- j* There is no obligation in law to give notice at all; if you choose to

make it part of the contract that notice shall be given you may do so. The debt which constitutes the cause of action arises instantly on the loan.” a

It was fully recognised in *Joachimson*’s case that although the relationship between banker and customer is that of a debtor and creditor, there are essentially implied terms between debtor and creditor. b

At page 115 in *Joachimson*’s case Bankes LJ said: c

“The question whether there was an accrued cause of action on the 1st August, 1914, depends upon whether a demand upon a banker is necessary before he comes under an obligation to pay his customer the amount standing to the customer’s credit on his current account. This sounds as though it was an important question. In a sense no doubt it is, but it is very rarely that the question will in practice arise. In most of the cases in which the question is likely to arise, even if a demand is necessary to complete the cause of action, a writ is a sufficient demand. It is only therefore in the unlikely case of a banker pleading the Statute of Limitations, or in a case like the present where the facts are very special, that the question becomes important. In the present case the writ was not issued till the 5th June, 1919. To succeed in the action, the plaintiffs had to prove a cause of action existing long before that date, namely, on the 1st August, 1914, Roch J, while recognising that at first sight the conclusion as a matter of business seemed startling, gave judgment in favour of the Plaintiffs holding that the point had been decided in *Foley v. Hill* and *Poll v. Cteg*.” d  
e  
f  
g

The learned Lord Justice continues at page 117: “In the ordinary case of banker and customer their relations depend entirely or mainly upon an implied contract.” h

In *Foley v. Hill*, the Law Lords expressed their opinions as to the ordinary relation existing between banker and customer and those opinions are summarised in the head note as follows: i

“The relation between banker and customer, who pays money into the bank, is the ordinary relation of debtor and creditor, with the super-added obligation arising out of the custom of bankers to honour the customer’s drafts; and that the relation is not altered by an agreement by the banker to allow interest on the balances in the bank.” j

- a* At page 126 of *Joachimson* case, Warrington LJ says:
- “All these matters seem to me to distinguish the Contract between banker and customer from the ordinary case of a loan of money,
- b* and having regard to the state of the authorities I think we are at liberty to hold, and ought to hold, that a demand, either by the issue of a writ or otherwise, is an essential ingredient in the cause of action, and that without such demand no cause of action accrues . . .”
- c* At page 128, Atkin LJ says:
- “The contention of the plaintiffs appears to me to ignore the fact that the contract between banker and customer contains special terms, and cannot in its entirety be expressed in the phrasing of an
- d* ordinary indebitatus count.”
- It is quite clear that the relationship between banker and customer is peculiar, and that of necessity there must be superadded obligations. The mutability of commerce and
- e* industry and their modern complexity are bound to give rise to superadded obligations in the relation between banker and customer.
- f* Bankes LJ at page 191 says:
- “It seems to me impossible to imagine the relation between banker and customer, as it exists today, without the stipulation that, if the customer seeks to withdraw his loan he must make application to the banker for it.”
- g* In *Lloyds Bank Ltd v. Margolis and others* [1954] 1 All E.R. 734, where a bank took a legal charge secured on a farm owned by its customer for an overdraft current account, it was contended that the claim was statute barred because in
- h* the case of advances made before the date of the charge, time ran from the date of the charge, and as regards subsequent advances time ran from the dates of the advances. The decision in that case turned on the construction of the document where the word ‘demand’ was used. At page 738,
- i* Upjohn J says:
- “As between a customer and a banker who are dealing on a current account, it seems to me impossible to assume that the bank were to
- j* be entitled to sue on the deed on the very day after it was executed

without making a demand and giving the customer a reasonable *a*  
time to pay. It is, indeed, a nearly correlative case to that decided  
in *Joachimson v. Swiss Bank Corporation*.”

The learned Judge continued by reading the headnote of that *b*  
case.

Mr Harvey *Robinson*, in what I may call an attractive ar-  
gument points out that the Court of Appeal in *Joachimson*’s  
case, gave cogent reasons for holding as they did, and sub- *c*  
mits the reasons are just as cogent when the boot is on the  
other leg. He submits it is common and proper for business  
to be financed by overdraft provided done properly, and if  
banks were free to issue a writs, in those circumstances *d*  
business would be ruined. He contends that in light of  
*Joachimson*’s case, and for practical considerations there is  
an implied term between banker and creditor, where an  
overdraft is given that there should be no right of action until *e*  
notice is given and demand made.

In view of the decision in *Joachimson*’s case, I would be  
inclined to take the view that it would be unreasonable for a  
bank, after having granted an overdraft to immediately pro- *f*  
ceed to sue for it, without making a demand, and giving the,  
customer a reasonable time to pay. I can hardly think that, it  
would be in the contemplation of a customer to whom an  
overdraft was given that the bank would without warning *g*  
issue a writ. If banks were at liberty to act that way, com-  
merce and industry would be greatly handicapped.

The point was left open in *Rouse v. Bradford Banking Co*  
(1894) A.C. 586. In my view the portion of the speech of *h*  
Herschell LC, commencing at page 595 and continuing at  
page 696 is relevant, and I will quote:

“It is not necessary to consider what the rights of the bank were  
with regard to their debtors when they had agreed to an overdraft. *i*  
The transaction is of course of the commonest. It may be that an  
overdraft does not prevent the bank who has agreed to give it from  
at any time giving notice that it is no longer to continue, and that  
they must be paid their money. This I think at least it does; if they  
have agreed to give an overdraft they cannot refuse to honour *j*

- a* cheques or drafts, within the limit of that overdraft, which have been drawn and put in circulation before any notice to the person to whom they have agreed to give the overdraft that the limit is to be withdrawn. That effect I think it has in point of law; whether it
- b* has more than that in point of law it is unnecessary to consider. Even if it has no greater effect in point of law it is obvious that neither party would have it in contemplation that when the bank had granted an overdraft it would immediately, without notice,
- c* proceed to sue for the money; and the truth is that whether there were any legal obligation to abstain from so doing or not, it is obvious that, having regard to the course of business, if a bank which had agreed to give an overdraft were to act in such a fashion, the results to its business would be of the most serious nature. It may
- d* be therefore that the parties simply contracted upon the basis of state of things, that there was a legal right throughout for the bank at any time to sue for the money. But whatever the right was, it seems to me that that right was in no way diminished, but continued in full force and effect notwithstanding the arrangement of the
- e* 16th February. That of course, is sufficient to dispose of that part of the case.”

- It will be seen that the learned Lord Chancellor, in 1894, thought that if a bank which had agreed to give an overdraft,
- f* and without notice proceeded to sue for the money, the results of its business would be of the most serious nature.

- In Paget’s *Law of Banking (ibid)* at page 31 *et seq*; although it is recognised that a course of business might be
- g* established by which a banker who has acquiesced for a reasonable period in overdrafts to a certain amount, would be precluded from withdrawing such accommodation and dishonouring cheques without notice; nevertheless, the
- h* writer of the text book is, however, of the opinion that those circumstances would not necessarily preclude the operation of the statute. He does not appear to be fixed in his opinion, and seems to entertain an element of uncertainty for he says
- i* at page 32, “in the absence of some definite agreement as to demand or date of repayment, it is best to consider the statute as running from the date of each advance.”

- It is my judgment that the term contended by Mr Harvey
- j* *Robinson* must be implied between banker and customer.

There will be judgment for the plaintiff for £1,586.18s.7d *a*  
in terms of the first claim as set out in the writ.

The defendant will pay the plaintiff costs assessed at  
60 guineas. *b*



*a*

## Inneh v. Commissioner of Police

HIGH COURT OF JUSTICE

*b*

THOMAS J

Date of Judgment: 27 MAY 1959

*c*

*Banking – Post-dated cheque – Cheque dishonoured as drawer has overdrawn account – Whether amounts to false representation; obtaining property by false pretence – For representation to be criminal it must relate to past or present – Such presentation must not relate to the future*

*d*

### Facts

*e*

The appellant was charged with and convicted in a magistrate court for obtaining a motor bicycle from the complainant by false pretences contrary to section 419 of the Criminal Code. The case for the prosecution was that the appellant purchased a motorcycle from the complainant and issued a post-dated cheque in part payment knowing that the cheque would not be honoured as he had overdrawn his account.

*f*

### Section 418

*g*

“Any representation made by words writing, or conduct, of a matter of fact, either past or present which representation is false in fact and which the person making it knows to be false or does not believe to be true is a false pretence.”

### Held –

*h*

1. That the use of post-dated cheque concerns payment in the future.

*i*

2. That the complainant having knowingly accepted a post-dated cheque from the appellant had elected to take the risk of payment in future.

*j*

3. That although the appellant did make some representation to the complainant which induced him to part with the motor bicycle, such representation did not relate either to the past or present under section 418 of the

Criminal Code but related to the future which is clearly outside the purview of the definition of a “false pretence” in section 418 of the Criminal Code.

*Appeal allowed.*

### **Nigerian statutes referred to in the judgment**

Criminal Code, Cap 42, section 418

### **Counsel**

For the respondent: *Eboh*

### **Judgment**

**THOMAS J:** The appellant was charged with obtaining a motor bicycle from one Patrick Obi by false pretences contrary to section 419 of the Criminal Code.

The short facts of the case were that on the 10th July, 1958, the appellant approached the complainant for the purchase of a motor bicycle valued at £102. He paid a £5 deposit and issued a cheque which was post-dated to the 12th July, 1958 and drawn on the Bank of West Africa. He further gave the sum of £6 for licensing fees to the complainant who on the following day delivered the motor bicycle to the appellant’s brother. On the 11th, the complainant paid the cheque into his bank account in Benin. On the 14th July, 1958, the complainant was contacted by the police, who took him to the bank where he was told to return on the 18th July. When he called at the bank that day, he found that the payment of the cheque had been stopped, as the appellant had an overdraft at the bank. The complainant then reported to the police whereupon the appellant was arrested and charged for obtaining the machine under false pretences.

The appellant in the court below admitted issuing the cheque for £97; explained that he had an account with the bank which had been overdrawn to the sum of £226.0s.9d and that he did not stop the cheque.

It is quite clear from the Record that payment was stopped by the bank because the appellant’s account had been overdrawn.

- a* The respondent's Counsel has argued that the appellant knew that on the 12th July, he had no means of meeting his obligation in respect of the sum of £97 and that by issuing  
*b* that cheque at that material time, he had induced the complainant to part with the motor bicycle.

- Although the appellant has not been represented by Counsel in the argument of this appeal, Counsel did file the  
*c* Grounds of Appeal.

The first ground reads as follows:

- d* "The decision is erroneous in point of law. The learned trial Magistrate erred in law in holding that the circumstances under which the appellant obtained the motor bicycle from the owner amounted to a felony or that the motor cycle was obtained by false pretences."

- e* It is patent that the appellant did make some representation to the complainant who induced him to part with the motor bicycle, but such representation must be such as is defined and contemplated in our Criminal Code. Section 418 defines it as –  
*f*

"Any representation made by words, writing, or conduct, of a matter of fact, either past or present which representation is false in fact and which the person making it knows to be false or does not believe to be true, is a false pretence."

- g* Now the appellant approached the complainant on the 10th July, and gave him a post-dated cheque for the 12th July, which the complainant knowingly accepted. He was thus not  
*h* influenced to part with the machine by any representation relating either to the past or present but by one relating to the future and which is clearly outside the definition in section 418 of the Criminal Code.

- i* The complainant elected to take the risk of payment in the future and he might quite properly have some other remedy.

- But it is clear that a prosecution under section 419 cannot succeed against the appellant on the facts disclosed in this  
*j* appeal.

The appellant had been convicted in the lower court and sentenced to 18 months' imprisonment with hard labour and ordered to receive ten strokes of the cane. He was also placed under police supervision for 18 months as he had three previous convictions.

For the reasons given above I hereby set aside the conviction and sentence of the court below and order that the appellant be discharged and acquitted. The court below to carry out the order.

*Appeal allowed.*

*a*

## R v. Logun and others

HIGH COURT OF LAGOS STATE

*b*

ONYEAMA J

Date of Judgment: 29 MAY 1959

Suit No.: L.A./11C/1995

*c*

*Banking – Banker's books – Credit entry in customer's account – Whether transfers property to the customer in any particular notes – When property is actually transferred to customer*

*d*

*Criminal law and procedure – Obtaining money by false pretences – Bank account of customer credited with the amount of forged cheques – Whether amounts to obtaining money by false pretences by customer*

### Facts

*e*

The three accused persons were charged on information with several offences including one of obtaining money by false pretence against the first accused. The allegations in support of this charge were that two forged cheques endorsed “Account payee only” and “Not negotiable” and stolen from the

*f*

Nigeria Railway Corporation, were paid into the bank account of one Rex Electrical Engineering company. As a result of these cheques being paid into the bank account of the company, book entries were made debiting the bank

*g*

account of the Nigerian Railway Corporation with the sums on the cheques and crediting the company's bank account with them. No physical delivery of the sums on the cheques was made to the person (assumed to be the first accused)

*h*

who had paid the cheques into the company's bank account.

The defence of the first accused was an alibi.

### Held –

*i*

1. When a bank makes an entry in a customer's account it does not thereby transfer property to him in any particular specie or notes but merely shows the state of the account between the bank and the customer. If the account is in the customer's favour the customer has the legal right to

*j*

demand payment in accordance with the terms and

conditions of the account; if as very often happens, the customer's account is in debit, the bank has the right to demand payment. But until money has actually been handed over to the customer, property in the money in the custody of the bank, no matter how much the customer may be in credit, is in the bank.

*Accused discharged and acquitted.*

### **Cases referred to in the judgment**

#### ***Foreign***

*Anderson* (1843) 2 Moo R. 469

*Evan* (1833) 5 C. and P. 353

#### **Counsel**

For the prosecution (Crown Counsel): *Agoro*

For the first accused: *Lardner*

For the second accused: *Makanju*

For the third accused: *Thanni*

#### **Judgment**

**ONYEAMA J:** The three accused persons are charged on information with conspiring to defraud Barclays Bank (DCO) Yaba, in 1958. In addition to this charge of conspiracy, there are other charges of forgery against the third accused, and uttering forged cheques against the first accused. There are also two counts of obtaining money by false pretence against the first accused.

The case for the Crown is that some time in April, 1958, the first accused approached the Manager of Barclays Bank, Yaba Mr Thompson, and applied for an account to be opened in the bank for a firm called Rex Electrical Engineering Company. This firm had already been registered in its business name in the department of Commerce and Industries. After all formalities had been completed, including the written introduction of the first accused and his firm by one SB Bakare and the filling of certain forms, an account was duly opened in the bank for the firm.

*a* Two cheques which the Crown contends were forged and which purported to have been drawn by the Nigeria Railway Corporation, were paid into the firm's account. They were for a total sum of £5,473.9s.10d. Almost immediately after  
*b* these cheques had been paid in, a bearer cheque drawn on the firm's account for £5,050 was handed in and cashed.

The first and second accused persons were dealers in electrical equipment, and the first accused was, at the material  
*c* time, employed as an electrician by the West African Airways Corporation. The third accused was a clerk in the Nigerian Railway Corporation and was attached to a section  
*d* where he had access to the Corporation's chequebooks. The address of the firm, Rex Electrical Engineering Company, was at the material time, the same as the first accused's address namely, 5 George Street, Lagos.

*e* These facts clearly mark out the accused persons as likely perpetrators of the offences charged. It appears to me an irresistible inference from the facts and circumstances that any of the accused persons shown to be a member of the firm Rex Electrical Engineering Company or to be associated with it must be privy to the foregoing and uttering of  
*f* the two railway cheques. It would, in my view, be contrary to reason to think that, unknown to the partners or associates of the firm, a large sum of money would be paid into the  
*g* firm's account without their knowledge and by unknown person. This view is fortified by the fact that the firm drew out a considerable part of the proceeds of the railway cheques on the day after the cheques were paid in: see exhibit "11." This, in view, clearly shows that the members of  
*h* the firm knew that their account was in fund as a result of two forged cheques paid in on the firm's paying slip, (exhibit "10") which was signed by the firm's director, it follows that the director, at least, uttered the forged cheques and was privy to the forgery. I am satisfied that the two  
*i* cheques "8" and exhibit "9" were forged.

It, therefore, appears to me that the main question in this case is who the members of Rex Electrical Engineering  
*j* Company are. The Crown has called several witnesses on

this issue and their evidence falls under two heads. Firstly, <sup>a</sup>  
the direct evidence of Thompson, Bakare and William who  
identify the first accused as the person who opened the ac-  
count in the bank or to whom letters addressed to Rex Elec- <sup>b</sup>  
trical Engineering Company, 5 George Street, Lagos, were  
delivered. Secondly, the evidence of Ijoma suggesting that  
certain writings connected with the application for registra-  
tion of the firm and the opening of the account were similar <sup>c</sup>  
to admitted writings of the first and second accused persons.

I leave out of consideration, at this stage, the evidence  
against the third accused. The effect of the evidence regard- <sup>d</sup>  
ing the second accused under the first head has been consid-  
erably diluted by the honest admission by Thompson that he  
is not now sure that the second accused was the person who  
had come with the first accused to the bank. This leaves the <sup>e</sup>  
issue in doubt.

In his evidence Thompson did not state the date in April  
1958, on which the accused persons came into his office.  
Under cross-examination he stated that he stamped a date on <sup>f</sup>  
the introduction card (exhibit “2”) before handing it over to  
the first accused. He does not say that it was on that day that  
the first accused first came into his office, but he says that  
the date on the card was the date on which the account was <sup>g</sup>  
supposed to be opened. He adds also that the card was  
stamped, ie dated, three or four days before the account was  
actually opened. There is evidence that the account was  
opened and money paid into it on the 29th April, 1958. This <sup>h</sup>  
would fix impression of the date stamp on exhibit “2” be-  
tween the 25th and the 26th April, 1958. If Thompson date-  
stamped exhibit “2” when he handed it to the first accused,  
he must have handed it to the first accused on the 25th or <sup>i</sup>  
26th April, 1958. If Bakare came to sign the introduction  
about three days after the first accused first came to Thomp-  
son to ask to be allowed to open an account, then he Bakare  
came to sign the introduction about the 28th or 29th April,  
1958, two dates very close to the opening of the account and <sup>j</sup>



*a* in keeping with the dates on exhibit “3” and exhibit “4.” If Thompson’s memory can be relied upon his evidence clearly points to the 25th April, 1958, as the date on which the first accused came to see him. In any case, it is a date stamped in  
*b* his own hand as a date on which the first accused received the card from him, and, therefore, a date on which the first accused was in person before him.

*c* The evidence of Bakare I consider completely worthless and, possibly perjured, I cannot recall a witness who has made a worse impression on me. His evidence that it was Thompson who prevailed on him to introduce to the bank  
*d* whoever it was that he introduced is I am convinced, perjured evidence. I suspect that this false evidence was got up between him and the defence. What his prize was for this foul and offensive lie, I do not know. I cannot rely on his  
*e* evidence for any purpose.

The witness Jacob Taiwo Williams I consider substantially truthful. He was a timid youth, not very clever or quick, but, in my opinion, reliable. Certain discrepancies exist between  
*f* evidence at the preliminary inquiry and his evidence now, but I consider them, on the whole, inconsequential. I am satisfied that the witness spoke to the best of his recollection and, in particular, that he spoke the truth when he said that  
*g* he handed two letters addressed to Rex Electrical Engineering Company to the first accused.

The other witness of any importance is the handwriting analyst. He has drawn attention in his chart to certain similarities between the accused persons’ writings and writings on the forged cheques and other pertinent documents. His  
*h* evidence is the only evidence connecting the second and the third accused persons with the case. As against this evidence  
*i* there is the evidence of clerks who work with the third accused and who are familiar with his writing. They do not recognise the third accused’s writing on the forged cheques. I refer particularly to the evidence of Mr Dateme, a witness  
*j* of standing and palpable honesty called by the Crown. It is

also to be noted that though there are similarities as pointed out by the analyst, there are a good deal of dissimilar letters in the writings compared. *a*

In this state of the evidence the only conclusion I can reach is that the evidence of the handwriting analyst, helpful, though it is, is inconclusive, and leaves a wide margin of doubt. *b*

It becomes unnecessary to examine the evidence further in so far as it affects the second and the third persons since there is nothing in it which points to either of them which could not point to several other persons in Lagos or in the pay office of the Nigeria Railway Corporation. *c*  
*d*

They are found not guilty on all counts affecting them and they are acquitted and discharged.

At the conclusion of the case for the Crown, I ruled that, as a matter of law, the charge of obtaining money by false pretences made against the first accused was not supported by the available evidence and was misconceived. The first accused was, therefore, not called upon to answer to it. *e*  
*f*

The facts on which the charge was based were, at their highest, that somebody, (assumed to be the first accused), had paid two forged and crossed cheques into the account of the Rex Electrical Engineering Company. The cheques were marked "Account payee only" and "Not Negotiable" (exhibit "8" and exhibit "9"). *g*

The account of the Rex Electrical Engineering Company with the bank was credited with the sum shown on the cheques, while a contrary debit entry was made against the account of the Nigeria Railway Corporation by whom the cheques purported to be drawn, in respect of each of the forged cheques for the sum shown on it. No sum was actually paid out to the person (assumed to be the first accused) who paid in the cheques on account of the cheques, and all that happened was the entry in the various bank ledgers of the state of the accounts of the Nigeria Railway Corporation *h*  
*i*  
*j*

*a* and the Rex Electrical Engineering Company as a result of the payment of the cheques which the bank had delivered were genuine.

*b* It was contended for the Crown that when the account of Rex Electrical Engineering Company was credited with the several sums on the forged cheques, the firm had “obtained” the money, and since this resulted from false cheques held out as genuine, there was a case of obtaining money by false pretences.

I did not consider this argument attractive or convincing. In my view when a bank makes an entry in a customer’s account it does not thereby transfer property to him in any particular specie or notes but merely shows the state of the account between the bank and the customer. If the account is in the customer’s favour the customer has the legal right to demand payment in accordance with the terms and conditions of the account; if, as very often happens, the customer’s account is in debit, the bank has the right to demand payment. But until money has actually been handed over to the customer, property in the money in the custody of the bank, no matter how much the customer may be in credit, is in the bank.

*g* When money was paid over in obedience to the demand on the bearer cheque (exhibit “11”), a sum of £5,050 was obtained by whoever it was who received payment of this sum. The charge of obtaining money by false pretences was, however, not based on this cheque or this payment.

*h* I think, I ought also to draw attention to two cases which suggest that when goods are obtained by means of forged papers the offender should be charged with forgery and not with obtaining by false pretences: *Evan* (1833) 5 C. and P. 353 and *Anderson* (1843) 2 Moo R. 469.

*j* The decisions in these cases appear to turn on the point that at common law forgery was a felony and false pretences a misdemeanour and the need at that time for strict accuracy in

the form of indictment, since at common law a person charged with misdemeanour could not be convicted of felony and vice versa. a

It may be that the importance of these decisions has been destroyed in this country by section 172 of the Criminal Procedure Ordinance, but it may be useful to bear them in mind. b

For these reasons I have stated I ruled a *prima facie* case of obtaining money by false pretences as charged on the information had not been made out. For the same reasons the possibility of an alternative verdict of guilty of stealing did not exist. c

The defence of the first accused is an alibi. It is that from the 23rd April, 1958, to the 27th April, 1958, he was in Jos. This defence has been established. I accept the evidence of the defence witnesses. This negatives the possibility of the first accused being before Thompson on the 25th April, 1958, and throws doubt on Thompson's powers of observation or memory for faces. He himself admits that he is probably mistaken about the identity of the second accused. Could he not also be mistaken about the first? d

The evidence that letters for the Rex Electrical Engineering Company were delivered to the first accused does not, of itself, establish that the first accused was a partner of the firm. That is only one of several possibilities. It may be that he received the letters for the members and that he knows who they are without himself being one of them. e

The facts proved point shaky fingers of suspicion at the first accused but not the straight, unwavering finger of certainty. In my own mind, I believe the first accused was privy to the offences charged but in the state in which the evidence is, I am bound, even though it be with reluctance and in the firm belief that the meshes of the law have provided a wide gap for a guilty man to escape, to find the first accused not guilty also. f

g

h

i

j

*a*

## Oguntonade v. Commissioner of Police

HIGH COURT OF JUSTICE (WESTERN REGION)

*b*

TAYLOR J

Date of Judgment: 25 SEPTEMBER 1959

*Banking – Admissibility of “bankers book” – Primary and secondary evidence thereof*

*c*

### Facts

*d*

The appellant was charged with conspiracy attempt to obtain money by false pretence and stealing. During the trial the officials of the bank were called upon to tender banks statement of accounts with the bank. There was no compliance with section 96(2)(e) of the Evidence Ordinance (Cap 163).

### Held –

*e*

1. That the bank statements tendered were primary evidence. They are part and parcel of what constitutes “bankers books” which are used in the ordinary business of the bank – they are therefore admissible.

*f*

*Appeal allowed in part.*

### Cases referred to in the judgment

#### *Nigerian*

*Alhadi v. Allie* 13 W.A.C.A. 323 at 325

*g*

*R v. Albutt and Screen* 6 C.A.R. 55

### Counsel

For the appellant: *Ayoola*

*h*

For the respondent: *Fasinro, Senior Crown Counsel*

### Judgment

*i*

**TAYLOR J:** The accused was on the 16th June, 1959 convicted of the following offences:– On count 4 of stealing the sum of £423.18s.9d the property of the Western Region Production Development Board, Ibadan; on count 5 with stealing the sum of £398.18s.9d the property of the aforementioned and on count 7 with attempting to obtain from the African Continental Bank Limited, Lagos, the sum of £60 by

*j*

falsely pretending that you had full power and authority to

draw cheque No. 14LS4265 of 1st July, 1958 for £60 upon <sup>a</sup>  
the African Continental Bank Limited, Lagos in settling  
your account with the Western Region Production Development Board, Ibadan contrary to section 509 of the Criminal Code. <sup>b</sup>

I shall deal firstly with the charge and conviction under this latter count of attempting to obtain by false pretences and grounds 1 and 2 of the additional grounds of appeal <sup>c</sup>  
which relate thereto. I must confess my inability to understand the conviction on this count when read in light of the evidence before the learned Chief Magistrate. At the close of the case for the Crown and on a submission of no case to answer this is what the learned Chief Magistrate had to say <sup>d</sup>  
on this count:—

“The sixth and seventh counts are based on the African Continental Bank cheque No. 4265 of 1st July, 1958. The second accused is charged with conspiring with person or persons unknown, with intent to defraud by falsely presenting the said cheque for payment to the Western Region Production Development Board. According to the teller exhibit ‘EE,’ the cheque was paid in by the second accused in favour of the Western Region Production Development Board as part payment of the amount found short in his account. The cheque was found to be worthless as the drawer had no account in the bank. During the course of proceedings in this Court it was discovered that the cheque in question was issued by one, Ninedeys (fourth prosecution witness) who gave evidence that although he prepared and signed the cheque, he did not give it to anyone and could not explain how it left his possession, and here again the way and manner in which the cheque got into second accused possession is shrouded in mystery which the second accused should explain.” <sup>e</sup>  
<sup>f</sup>  
<sup>g</sup>  
<sup>h</sup>

The appellant did not offer any evidence after the ruling and the learned Chief Magistrate proceeded to give judgment, again on this count, as follows: <sup>i</sup>

“The second accused has given no explanation as to how he got the cheque and on the face of the evidence of Ninedeys, the only inference is that the second accused stole it, and by paying it into a Bank he falsely represented to the Production Board that the <sup>j</sup>

- a* cheque had value. I hold that there is no evidence to support the sixth count of conspiracy; there is evidence to support the seventh count of attempting to obtain money by false pretences.”
- b* I must and do agree with the finding of the learned Chief Magistrate, that and I quote him again; “by paying it into a bank he falsely represented to the Production Board that the cheque had value,” but unfortunately the learned trial Chief
- c* Magistrate did not proceed further to examine the charge before him in order to see whether it tallied with his findings. The finding is not only different from the charge but it is also different to the pretence proven by the evidence of
- d* prosecution witness 1. At page 4 where speaking of exhibit “A” the cheque for £60 he says this:—
- “I was informed that the cheque was paid into National Bank of Nigeria by the Western Region Production Development Board and the National Bank sent it for clearance with the African Continental Bank.”
- e*
- By paying this cheque to the National Bank surely not only was the representation made to the National Bank that the
- f* cheque paid to the account of the Western Region Production Development Board had value, but the attempt to obtain the money was from the National Bank. On the whole I am far from satisfied that the learned Chief Magistrate was right
- g* in convicting the appellant on this count in view of the variations in the pretence, as laid and that proven. In my view this appeal must succeed on this count.
- h* Before passing on to the conviction on the other counts I should perhaps mention that Mr *Ayoola* contended that the offence being committed in Lagos as laid in the charge, the Chief Magistrate had no jurisdiction. This was ground 5 of his grounds of appeal. Suffice it to say that the representation
- i* was made in my view on the evidence before the court to the National Bank, Ibadan as the teller exhibit “EE” clearly showed and not the African Continental Bank, Lagos. There was therefore jurisdiction in the Chief Magistrate.
- j*

Now on counts 4 and 5 for stealing the two sums set out above, Mr *Ayoola* has argued with great force, ground 3 of his grounds of appeal which sets out seven matters as being inadmissible evidence received by the learned Chief Magistrate as a result of which he submits the conviction be set aside on those counts. a  
b

The first passage appears at page 6, lines 1 to 2 in the evidence of the first prosecution witness in which he is reporting the findings of the Auditors of the Western Region Production Development Board, Messrs Cooper Brothers. Such evidence is obviously hearsay and inadmissible and this also applies to the third passage at page 11, lines 14 to 16 where the sixth prosecution witness John Atkinson Russell was reporting a statement made to him by a certain Mr Clee, the accused not being proved to have been present. The other two passages forming grounds 3(ii) and 3(iv) will be lumped together and taken with 3(v) to 3(vii). On these grounds it is Mr *Ayoola's* contention that by virtue of the Evidence Ordinance Cap 63, sections 95 and 96, the evidence admitted on those grounds are inadmissible in law being secondary evidence which does not comply with the aforesaid provisions. The sections provide as follows: c  
d  
e  
f

“95. Documents must be proved by primary evidence except in the cases herein after mentioned. g

96(1) Secondary evidence may be given of the existence, condition or contents of a document in the following cases:—

...

(h) When the document is an entry in a banker's book. h

96(2) The secondary evidence admissible in respect of the original documents referred to in the several paragraphs of subsection (1) is as follows: i

(a) The copies cannot be received as evidence unless it be first proved that the book in which the entries copied were made was at the time of making one of the j



- a* ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody and control of the bank, which proof may be given orally or by affidavit by a partner or officer of the bank, and that the copy has been examined with the original entry and is correct, which proof must be given by some person who has examined the copy with the original entry and may be given orally or by affidavit.”
- b*
- c*

- Mr Ayoola contends that subsection (2)(e) has not been complied with and in the course of his address referred me to the definition of what is a “banker’s book” as contained in the same Ordinance in the interpretation section. The books the subject matter of grounds 3(v) to 3(vii) are exhibits “R,” “S” and “FF.” Exhibit “R” was the statement of account of the Western Region Production Development Board for the months of April, 1957 to May, 1958 with the National Bank, Ibadan. This statement of account was tendered by an officer of the said bank, an accounts clerk, prosecution witness No. 7. Exhibit “S” was a statement of account of the same board but with Bank of West Africa, Ibadan tendered in evidence by the eighth prosecution witness, the Assistant Chief Clerk, Bank of West Africa also an officer of the bank. Finally exhibit “FF” represented the bank statements of the account of the same board covering January, 1957 to October, 1957 with the National Bank, Ibadan tendered by the seventh prosecution witness on his recall. The first question that arises is whether these exhibits are primary or secondary evidence within the meaning of the Ordinance. To do this I think it necessary to digress a little and enquire into the object of the Ordinance which is obviously taken from the Banker’s Books Evidence Act of 1879 of England. This object is stated in Halsbury’s *Laws of England* (1ed) Volume 1 at 645, paragraph 1301 as follows:
- d*
- e*
- f*
- g*
- h*
- i*

- “The main object of these provisions is to enable evidence to be procured and given; to relieve bankers from the necessity for attending and producing their books. They enable a party who formerly had the right to issue a *subpoena duces tecum* to compel
- j*

bankers to produce their books and to attend and be examined on them, to obtain an order for leave to inspect and take copies of the books.” a

The same provision will be found in Halsbury’s *Laws of England*, (3ed), Volume 2 at page 243, section 454. The object of the provision is therefore to allow third parties to make copies of entries in banker’s books and when such copies have been made to allow them to be tendered in evidence but subject to the very strict provisions contained in section 96(2)(e) of the Evidence Ordinance. The case of *R v. Albutt and Screen*, 6 C.A.R. 55 is an authority supporting this, though the case goes further to interpret who is “some person who has examined the copy with the original entry” which words will also be found in our own Ordinance. There can be no room for doubt that on these authorities these exhibits are not copies or secondary evidence within the meaning of the Ordinance. They are in fact primary evidence. They are a part and parcel of what constitutes bankers books, books which are used in the ordinary business of the bank produced on *subpoena duces tecum* issued on the bank, the prosecution not having availed itself of the benefit of this section by inspecting such books and having extracts made, grounds 3(v) to 3(vii) must therefore fail. b  
c  
d  
e  
f

I now proceed to ground 3(ii) which attacks the tendering of exhibit “G.” This exhibit was tendered at page 6 of the record and consisted of a statement of account prepared by prosecution witness No. 3 from a check of the receipt books and entries in cash received books. This witness went on to say on the same page at lines 19 to 20 that, “The statements of account are supported by cash books and receipt books already tendered.” g  
h

With the other books from which this statement of account was compiled in evidence there can be no substance in this ground of appeal. Different considerations might apply had these books not been in evidence but merely this compiled statement of accounts. i  
j

*a* Finally ground 3(iv) attacks the admission of the evidence of the sixth prosecution witness at page 15, lines 28 to 29 that –

*b* “the amounts shown in the receipt books were all entered in the cash received book in the office; but I discovered that what was paid into the banks was less than what was shown in the books.”

Once the appeal fails on grounds 3(v) to 3(vii) this ground must also fail for this is a deduction from a perusal of the  
*c* bank statement after comparison with the receipt books and bank tellers all of which are in evidence.

I have held earlier that there is substance in grounds 3(i) and 3(iii). I must now go on and enquire into whether such  
*d* receipt of inadmissible evidence is sufficient grounds for quashing the conviction on those two counts. The principle to be observed here is whether there is other evidence to support the conviction, if there is, then the misperception  
*e* does not affect the judgment – *Alhadi v. Allie* 13 W.A.C.A. 323 at 325.

In my view there was ample evidence on record without these passages complained of on which a conviction was  
*f* rightly based.

The last ground, ie 4 was abandoned at the hearing of the appeal and there is therefore no need to consider it.

*g* This appeal must therefore fail on counts 4 and 5 and I dismiss it, upholding the conviction and sentence of the Chief Magistrate on those counts. The appeal however succeeds on count 7 and I quash the conviction and sentence on  
*h* that count and in its place I enter a verdict of not guilty and discharge the accused on it.

I would however in passing again note that the two sums of £423.18s.9d and £398.18s.9d the subject matter of these  
*i* two counts 4 and 5 add up to £822.17s.6d and not £822.15s.6d as appears in the evidence at page 7 and the judgment of the Chief Magistrate at pages 32 to 33. The correct figure however will be found in the evidence of  
*j* prosecution witness 6, at page 16 lines 1 to 5, ie, £398.16s.9d and £423.18s.9d. I am convinced that the figure

18s wherever it appears on the record in the sum of *a*  
£389.18s.9d is a typographical error for £398.16.9d for apart  
from the fact that exhibit “G” makes this quite clear the total  
sum with which the accused was charged with stealing both *b*  
at pages 48 and 38 of the record has always been the same. I  
therefore correct such error in count 5 accordingly.

*Appeal allowed on count 7.*

*Appeal dismissed on counts 4 and 5.*

*c*

*a*

## African Continental Bank Limited v Agbanyim

*b*

FEDERAL SUPREME COURT

ADEMOLA FCJ, BRETT FJ, HUBBARD AG FJ

Date of Judgment: 3 MARCH 1960

F.S.C.: 267/1959

*c*

*Banking – Fraud – Committed by branch manager of a bank  
– Liability of bank thereto*

### Facts

*d*

The respondent was a customer to the appellant bank. The appellant claimed that on 1st May, 1958, the balance of the current account of the respondent was a debit of £8,150.8s.8d while the respondent claimed that it was a credit of £3,561.17s.10d. The difference of £11,712.6s.6d

*e*

was composed of two sums which the respondent alleged, but the appellant denied, that he paid in, namely £1,666.18s.8d and £9,240, together with the sum of £805.9s.10d, being bank charges from 14th June, 1957 to

*f*

30th April, 1958.

*g*

At the trial Court the respondent gave evidence that he had deposited the two sums in issue by handing them to Mr Onwuteaka, the then manager of the appellant's branch at Calabar. He said he did this on the verbal instructions of the manager, both deposit having been made after public banking hours and indeed, only a short while before the bank closed at 5:00 pm. The respondent testified that on each

*h*

occasion his paying-in-book was returned to him by the manager apparently duly stamped, by means of a rubber stamp giving the date of the payment, marked "Cashier Number 1" and bearing what appeared to be initials. The learned trial Judge found that the plaintiff/respondent did pay two sums into the bank and gave judgment in favour of the plaintiff/ respondent.

*i*

*j*

On appeal, it was contended by the appellant that assuming that the respondent had paid the money into the bank, and

Mr Onwuteaka had embezzled it, the bank would not have been liable, because Mr Onwuteaka while receiving the money was not acting as agent of the bank. a

**Held –**

1. A bank would be held liable for the fraud of its manager, if in fact he had been fraudulent, since the manager is the general agent of the bank. b

*Appeal dismissed.* c

**Cases referred to in the judgment**

***Nigerian Case***

*Enitan v. Edun* 14 W.A.C.A. 642 d

***Foreign***

*Barwick v. English Joint Stock Bank* (1967) 2 Ex. 259

**Counsel** e

For the appellant: *Nonyelu*

For the respondent: *Onyiuke*

**Judgment** f

**HUBBARD AG FJ:** This is an appeal from the judgment of Horace Stanley Palmer J in the High Court of the Eastern Region, sitting at Calabar, given in two consolidated civil actions (Suit Nos. C/30/1958 and C/33/1958) in which the African Continental Bank Limited, the present appellants, claimed that on 1st May, 1958, the balance of the current account of Mr Agbanyim, the present respondent, was a debit of £8,150.8s.8d, while the respondent claimed that it was a credit of £3,561.17s.10d. The difference between these two figures, namely £11,7126s.6d, is composed of two sums which the respondent alleges, but the appellants deny, that he paid in, namely £1,666.18s.8d and £9,240, together with the sum of £805.9s.10d, being bank charges from 14th June, 1957 to 30th April, 1958. The sums for bank charges were claimed in paragraph 21 of the appellants' statement of claim in Suit No. C/33/1958 and denied in paragraph 10 of the respondent's statement of defence in that action. It was not again referred to at the trial or on appeal, although it g  
h  
i  
j

- a* appears, in the form of a series of monthly debits, in the appellants' ledger sheets giving the respondents' account (exhibit "D"). The validity of this claim for bank charge was
- b* obviously dependent on the success of the appellants' claim regarding the other two sums.

At the trial the respondent gave evidence that he had deposited the two sums in issue by handing them to Mr Onwuteaka, the then manager of the appellants' branch at Calabar. He said he did this on the verbal instructions of the manager, both deposits having been made after public banking hours, and, indeed, only a short while before the bank

*c* closed altogether at 5:00 pm. On each occasion his paying-in-book was returned to him by the manager, apparently

*d* duly stamped, on the following morning. It was stamped by means of a rubber stamp giving the date of the payment-in,

*e* marked "Cashier No. 1," and bearing what appeared to be initials, although the initials were different in the two cases (exhibits B and C). The learned Judge, who had the opportunity of seeing the respondent in the witness box and under

*f* cross-examination, found, "that the plaintiff did pay these two sums into the bank and that he received exhibits B and C as receipts." There was not one word in the evidence of the two witnesses for the appellants which directly contradicted the evidence of the respondent, and the learned Judge,

*g* on the evidence before him, was clearly entitled to make this finding.

- h* It was contended before us by Mr *Nonyelu*, for the appellants, that, assuming that the money had been paid in and that Mr Onwuteaka had embezzled it, the appellants would not be liable, and he cited *Barwick v. English Joint Stock Bank* (1967) 2 Ex. 259. With respect, it is difficult to see
- i* how that case can help him, since the court there held that the bank would be liable for the fraud of its manager, if in fact he had been fraudulent – the case was before the Exchequer Chamber on a bill of exceptions after the trial court
- j* had non-suited the plaintiff – and Willes J, in differentiating

the *Barwick* case from an earlier one which had been cited to him, pointed out that in the earlier case the agent whose conduct was complained of was not “their general agent in business, as the manager of a bank is.” In my view, on the evidence before him, the learned Judge was right in holding the bank liable.

There was, however, one matter with which the learned Judge did not deal, namely, an allegation of forgery. This allegation, which was to the effect that exhibits B and C are forgeries and do not come from the bank, and consequently are forgeries emanating from the respondent, was made for the first time by Counsel for the appellants in his final address to the court below, although the suggestion that they were forgeries, but not that the respondent forged them, was put to the respondent in cross-examination. Just before his final address in the court below, Counsel for the appellants had applied for an adjournment to call other witnesses. This application was rejected. The record does not show what witnesses he wished to call, but Mr *Nonyelu* told us it was desired to call Mr Onwuteaka, the appellant’s Calabar Manager at the relevant time, and an expert to testify as to the genuineness or otherwise of exhibits B and C.

The granting of an adjournment is a matter within the discretion of the trial Judge. Is there any reason why we should interfere with his exercise of it? Mr *Nonyelu* has cited to us the case of *Enitan v. Edun* 14 W.A.C.A. 642, but there can be no suggestion that Palmer J acted towards the appellants’ Counsel in this case as the learned Judge in *Enitan v. Edun* did towards the plaintiff’s Counsel in that case. In the actions from which this appeal arises pleadings were completed on 25th July, 1958. On 12th August, 1958 the actions were consolidated and adjourned to the next sessions. On 2nd December, 1958, the actions were adjourned on the appellant’s application.

There were two further adjournments, and on the 9th July, 1959, Palmer J, began the hearing, having previously warned



- a* Counsel that there would be no further adjournment, since he was going on transfer to Enugu and did not wish to leave any part-heard cases in the Calabar Division, and Counsel  
*b* having stated that they were ready to go on with the case.

Mr *Nonyelu* contends that the learned Judge should have allowed a further adjournment in the interests of justice since the appellants were taken by surprise when exhibits B  
*c* and C were produced at the trial. Now, undoubtedly, there may be cases where, in spite of a warning that no further adjournment will be granted, the interests of justice do require that the court should grant an adjournment. The pre-  
*d* sent case, however, in my view, is not such a case.

In the first place, for a party successfully to contend that a piece of evidence has taken him by surprise, the evidence, in my view, must not be such that he should have anticipated it  
*e* and taken steps to make himself acquainted with it. The respondent had alleged that two payments-in had not been credited to him (see paragraphs 6 and 7 of his defence in Suit No. G33/1958). It is quite incredible that the appellants  
*f* should not have anticipated that the respondent would produce some written evidence in support of his claim. To ask for discovery is not a recondite use of the Rules of Court, and the most recently called member of the bar would know  
*g* that this course was open to him. It is difficult to resist a suspicion that the appellants were merely engaging in delaying tactics and knew that they had no answer to the documents which would be produced against them.

*h* Secondly, after exhibits B and C had been put in by the respondent, the evidence led on behalf of the appellants was quite insufficient to raise even a *prima facie* case of forgery. The only evidence from the present manager of the bank  
*i* was that the rubber stamps on exhibits B and C were not the bank's cashier's stamps. He did not deny that the rubber stamps on exhibits B and C were produced by a stamp in the possession of the bank. As regards the initials on exhibits B  
*j* and C he merely said that the initials on exhibit C were not

those of the bank's cashier. He did not say that they were not the initials of Mr Onwuteaka. He presumably knew the initials of the former manager, and in any case the action was tried in Calabar where the branch concerned was situated, and numerous examples of Mr Onwuteaka's initials must have been readily available. The evidence of the bank's cashier was that his initials were not on exhibits B and C. He did not deny that the initials on these exhibits were those of Mr Onwuteaka, although he, too, presumably knew the initials of a manager under whom he had worked. Further, in answer to questions put by the court, he said:

"I do not know if the Manager had a stamp with 'Cashier' marked on it. When the manager took money he would sometimes stamp the book himself. I cannot say if the stamp on exhibit C is one of the bank stamps, because the bank has many stamps, but that stamp is not the one I used."

Finally, as regards Mr Onwuteaka, it is clear from exhibit A that he has already made one false and serious accusation against the respondent, and his evidence in this case would have been worthless.

Taking all these matters into consideration, I am of opinion that there is no justification whatsoever for interfering with the learned Judge's refusal to allow any further adjournment. I would add that no application was made to call fresh evidence before us, although this course was suggested by the court. Had the appellant filed an affidavit naming the witnesses they wished to call and setting out precisely the evidence which each would give, this would at least have given us some ground to suppose that the allegation of forgery by the respondent had been seriously put forward.

I would, therefore, dismiss this appeal with 20 guineas costs to the respondent.

*Appeal dismissed.*

Ademola FCJ and Brett FJ concurred in the judgment of Hubbard AG FJ.

*a*

## Rickett v. Bank of British West Africa Limited

*b*

FEDERAL SUPREME COURT OF NIGERIA

ADEMOLA FCJ, BRETT, HUBBARD FJJ

Date of Judgment: 10 MAY 1960

F.S.C.: 363/1959

*c*

*Banking – Overdrafts – Liability therefore by an executor de son tort – Compound interest is chargeable where customer has consented or acquiesced*

*d*

### Facts

*e*

Mr FJ Wilson was a tin miner and a customer of BWA Limited. He died in 1955, but Mr RC Ricketts continued to deal with Mr FJ Wilson's businesses as tin miner. Consequent upon this, he opened a current account entitled "RC Ricketts Estate of FJ Wilson." The said account was overdrawn but the appellant denied any liability for the overdraft. The High Court ordered Mr RC Ricketts to pay to the bank the sum of £3,871.15s.7d as overdraft and interest thereon.

*f*

The appellant appealed against this judgment, while the bank cross-appealed on the question of interest allowed. The respondent bank contended that the learned trial Judge should have held that they were entitled to charge interest on the overdraft at the rate of 8 percent with monthly rests resulting in compound interest.

*g*

*h*

### Held –

*i*

1. The appellant who is admittedly an *executor de son tort* is personally liable on his overdraft contract with the respondent.
2. The appellant is not liable to pay to the respondent compound interest on the overdraft because he has neither consented nor acquiesced in its payment.

*j*

*Appeal and cross-appeal dismissed.*

**Cases referred to in the judgment**

*a*

***Foreign***

*Coulter's Case* 5 Co. Rep. 30A; 77 E.R. 98

*Farhall v. Farhall* L.R. 7; Ch.D. 123

*b*

*Laouchere v. Tupper* (1857) 9 Moore 198

*Mellis v. Shirley Local Board* (1885) 16 Q.B.D. 446

*Sharland v. Mildon* (1846) 5 Hale 469; 67 E.R. 1997

**Nigerian rules of court referred to in the judgment**

*c*

High Court Rules Northern Region, Order 48, rule 2

**Books referred to in the judgment**

*Executors and Administrators* by Williams (13ed), page 1028

*d*

*Halsbury's Laws of England* (3ed), Volume II, page 229

**Counsel**

For the appellant: *Hull*

*e*

For the respondent: *Bentley*

**Judgment**

**HUBBARD AG FJ:** This is an appeal by Mr RC Rickett against a judgment of the High Court of the Northern Region sitting at Jos by which he was ordered to pay to the Bank of West Africa Limited in respect of an overdraft on a current account and interest thereon the sum of £3,871.15s.7d. That the account was overdrawn is not disputed, but the appellant denies any liability for the overdraft. The respondent bank has cross-appealed on the question of the interest allowed by the learned Judge.

*f*

*g*

The contentions of the parties may, I think, be briefly and correctly summarised as follows:

*h*

- (1) The respondent bank states that it has at all times dealt with the appellant as its customer in respect of the account entitled "RC Rickett Estate of FJ Wilson deceased" which the appellant opened on 28th May, 1955.
- (2) To this the appellant replies that he was not the customer of the bank, but acted solely as the agent of the beneficiaries under the intestacy of FJ Wilson.

*i*

*j*

- a* (3) The respondent bank counters the allegation of agency by contending that as the appellant has intermeddled with the estate he is an executor *de son tort*, and, as
- b* such, cannot be the agent of the beneficiaries, since there can be no relationship of principal and agent between wrongdoers.
- c* (4) Finally, the appellant contends:
- d* (a) that since the banking contract between himself and the respondent was entered into in order to render possible and facilitate his intermeddling in the estate, and since
- e* (b) that since the respondent bank itself intermeddled by dealing with tin from the deceased's tin mine, it was itself an executor *de son tort*, and the appellant and the respondent bank being *in pari delicto*, the bank cannot
- f* recover.

It will be convenient to deal with these contentions in the reverse order. With regard to the contention that the bank intermeddled with the tin, it appears to me that this is due to

*g* a misconception of the bank's function. The late Mr FJ Wilson was the proprietor of a tin mine. He ran a current account with the respondent bank. The bank was also his agent, as it was for certain other tin producers, for

*h* the purpose of arranging shipment and sale of his tin, which was physically delivered to and handled by the bank. The current account was debited with the costs of the bank's operations on Mr Wilson's behalf and credited with the

*i* sums paid by purchasers of the tin.

Cheques were drawn on the account for the payment of the mine wages bill. The appellant admits that the bank did nothing more in connection with the tin after Mr Wilson's

*j* death than it had been in the habit of doing before. It cannot

be suggested that the bank was interfering in the running of the tin mine before his death, and, in my view, it cannot be said that by merely performing the same functions after his death it was doing any act which amounted to an intermeddling with the estate. On the day Mr Wilson died his account with the bank was closed and the new account “RC Rickett Estate of FJ Wilson” was opened. No balance from the deceased’s account was carried forward to this new account. It is possible that there might have been a technical intermeddling by the bank if it had had in its possession any tin at the time of Mr Wilson’s death, but there is no evidence of this, nor can any inference be properly drawn from the statement of the account “RC Rickett Estate of FJ Wilson deceased” (exhibit BW8) that any sum already due at the date of Mr Wilson’s death was credited to the new account. In my view, the contention that the bank was an executor *de son tort* is without foundation.

The contention that the banking contract between the parties was illegal and unenforceable depends upon the effect of Order 48, rule 3 which reads as follows:

“If any person other than the person named executor or administrator, or an officer of the court or person authorised by the court, takes possession of and administers or otherwise deals with the property of any such deceased person, he shall, besides the other liabilities he may incur, be liable to such fine not exceeding fifty pounds as the court, having regard to the condition of the person so interfering with the property, and the other circumstances of the case, may think fit to impose.”

In *Melliss v. Shirley Local Board* (1885) 16 Q.B.D. 446 at 451, Lord Esher M.R. said:

“Although a statute contains no express words making void a contract which it prohibits, yet, when it inflicts a penalty for the breach of the prohibition, you must consider the whole Act as well as the particular enactment in question, and come to a decision, either from the context or the subject matter, whether the penalty is imposed with intent merely to deter persons from entering into the contract, or for the purposes of revenue, or whether it is intended that the contract shall not be entered into so as to be valid at law.”

*a* Although this passage deals with prohibited contracts, I apprehend that it is equally applicable to non-contractual acts, and *a fortiori* in a case where the act is not expressly prohibited, but merely made subject to a fine. I have no hesitation in  
*b* holding that the fine is imposed in Order 48, rule 3 with intent merely to deter persons from intermeddling, and that the enactment does not absolutely prohibit intermeddling, which,  
*c* if it did, all acts of an executor *de son tort* would, presumably, be void, whereas it was held as long ago as 1598 in *Coulter's Case* (5 Co. Rep. 30A; 77 E.R. 98) that "all lawful acts, which an executor *de son tort* doth, are good," and it is not to  
*d* be supposed that the legislature, still less a subordinate legislator (ie, the Chief Justice of the former Supreme Court) would alter this ancient rate of the law without more express words. I am of opinion, therefore, that although the opening of the new account did assist the appellant in intermeddling in  
*e* the testator's estate and the fact that he was so intermeddling was known to the bank, the contract between the parties was valid and subject, to the question of agency, the appellant was liable on the overdraft.

*f* The remaining questions are – was the appellant in law an executor *de son tort*, and did he act as agent for the beneficiaries under the intestacy of the deceased? To these questions  
*g* the answers appear to me to be those given by the learned Judge. He said:

*h* "The defendant has admitted that he intermeddled in the estate of the late Mr FJ Wilson; and on the evidence there is no doubt that he did. He said that he acted as agent for the beneficiaries and they ratified what he did. Each of the next of kin (who are also the beneficiaries) knew the defendant was continuing to run the mining business of the late Mr FJ Wilson. . . But assuming, as the defendant alleges, he ran the mining business and incurred the  
*i* overdraft with the full knowledge and consent of the next of kin, what is the legal position as between the defendant and the next of kin? Mr Wilson and Mr WA Wilson by purporting to act as Managers of the deceased's mines have intermeddled in the estate. Mrs. Pidgeon by participating in the appointment and dismissal of  
*j* managers has also intermeddled. The defendant has intermeddled.

Each of them is an executor *de son tort*. It has long been settled law that the relationship of agent and principal has no application in the case of a wrongdoer (*Sharland v. Mildon* (1846) 5 Hale 469; 67 E.R. 1997).”

I would point out here, with respect to the learned Judge, that the intermeddling of the beneficiaries themselves is not strictly necessary for the application of the principle to which he refers. Clearly, if the appellant himself is an executor *de son tort*, he can have no principal, since the principal would then also be a wrongdoer, and where they are both wrongdoers there is no agency. I am of opinion, therefore, that the learned Judge correctly found that the appellant was an executor *de son tort*, that he was not the agent of the beneficiaries, and that he was liable on the overdraft.

The same result appears to me to follow from another line of argument, which was not raised in the court below, but was put forward for the first time by Mr Bentley, for the respondent bank, in this Court, namely, that an executor *de son tort* can be in no better a position than a legal personal representative, and a legal personal representative, apart from certain exceptions, is always personally liable on the contracts he makes. The exceptions would appear to be (1) where a personal representative has statutory authority to enter into a contract (*Williams*, 13ed at 1028), and (2) where the consideration for the promise of the personal representative is a contract or transaction with the deceased (*Farhall v. Farhall* L.R. 7 Ch.D 123 at 127). In other cases the authorities are clear that the personal representative is personally liable on his contracts. *Farhall v. Farhall* (*loc cit*) is a case where an executrix kept an executorship account on which she drew cheques signed “Mary Farhall for executors of Richard Farhall.” This account was overdrawn. A decree of administration having been made, the bank claimed to prove for the overdraft. It was held that no debt was due from the estate to the bank. Sir WM James, LJ said: “The contract is with the executrix; there is no loan to the estate; there is no credit given to the estate; the credit is given to the person



- a* who borrows, though the money may be borrowed for the purposes of the estate” (at page 126). In *Laourchere v. Tupper* (1857) 9 Moore, 198; 14 Eng. Rep. 670) it was held that
- b* an executor of a trader carrying on the trade after his death is personally liable for all the debts contracted in the trade after testator’s death, whether he is entitled or not to be wholly, or to any extent, indemnified by the testator’s personal estate.
- c* On these authorities also the appellant is liable to the respondent bank for the overdraft.

I must add in fairness to the appellant that there is no suggestion that there was anything reprehensible in his

*d* carrying on the mining business as an executor *de son tort*. As he himself said: “I was the business manager in this country and it was my duty as I see it to do what I did, and I was acting as any other person in my position would have

*e* done.” An executor *de son tort* I can properly do for the benefit of the estate anything which a legal personal representative can do (*Williams*, 13ed at 34) and although the general rule is that a personal representative has no authority

*f* to carry on the business of the deceased (*Williams*, 13ed at 1036), yet where the business is a valuable asset, he is entitled to carry it on for such reasonable time as may be necessary to enable him to sell it to the best advantage of the estate

*g* (*ibid* 1037). The year 1955, in which Mr FJ Wilson died, was far from favourable for a sale. The appellant regarded himself as “agent for a prospective administrator,” to whose lot it would have fallen to deal with the mining concern as an

*h* asset of the estate. Why no administration had been taken out by November 1958, when this action was commenced, was not made clear in the course of these proceedings, and I do not propose to comment on the fact.

- i* I come now to the question of the interest on the overdraft. The respondent bank appeals against the judgment under review on the ground that the learned judge should have held that the bank was entitled to charge interest on the overdraft
- j* at the rate of 8 percent with monthly rests. Compound

interest on an overdraft is chargeable only where the customer has agreed to it or where he is shown or must be taken to have acquiesced in the account being kept on that basis. (Halsbury's *Laws of England*, 3ed at 229). The learned Judge said:

“There is no evidence of an express agreement between the parties that interest should be charged at this rate with monthly rests; nor is there evidence from which I can infer that the defendant acquiesced in interest being charged in this way.”

The learned Judge was clearly right as to an express agreement, and, in my view, he was right also in the second finding. The appellant himself was never cross-examined as to the receipt of monthly statements which, over a period of three and half years would, I think, have been some evidence of acquiescence, and all that the Bank's Manager, Mr Musgrove, said, was, at one place: “Interest on overdrafts is calculated monthly and entered in the account, and shown in the monthly statement,” and at another place, in reference to certain cheques signed “JC Ticehurst Estate of FJ Wilson” which the bank had cashed on the written authority of the appellant: “Statements have been sent out. No queries have been received on these cheques.” In my view, such evidence is quite insufficient to establish acquiescence.

In conclusion we should like to express to Mr *Hull*, who appeared for Mr Rickett, and to Mr *Bentley*, our appreciation of the great assistance they have rendered us in dealing with this lengthy appeal.

For the reasons I have given, I would dismiss the appeal with 125 guineas costs to the respondent bank and I would dismiss the cross-appeal with 10 guineas cost to Mr Rickett.

Ademola, FCJ and Brett, FJ concurred in the judgment of Hubbard AG FJ.

*a*

## Adediran v. R

*b*

FEDERAL SUPREME COURT

ABBOTT AG CJF, BRETT FJ, HUBBARD AGFJ

Date of Judgment: 24 MAY 1960

F.S.C.: 57/1960

*c*

*Banking – Cashier – Authority of cashier in acceptance of cheques*

*Banking – Fraud – Cashier paying out money without superior officers authority – Whether evidence of fraud*

*d*

*Banking – Fraud – Whether issuance of cheque when insufficient fund in account amounts to obtaining by false pretences*

*e*

*Criminal law and procedure – Obtaining money by false pretences – Whether issuance of cheque when insufficient fund in account amounts to obtaining by false pretences*

*f*

### **Facts**

*g*

The appellant in this case and a man named Stephen Bolaji John, a cashier at the Bank of West Africa were charged on an information containing account alleging conspiracy to obtain the sum of £3,065 by false pretences and one alleging actual obtaining of that sum. The facts of the case put succinctly were as follows. In May, 1958 Stephen Boalji John

*h*

was a cashier at the Marina Branch of Bank of West Africa. The appellant had no account at that branch at any material time, but between January and June, 1958 eight cheques drawn by the appellant on the Yaba Branch of the National

*i*

Bank of Nigeria were cashed at the Marina Branch of the Bank of West Africa.

*j*

On 12th May, 1958, cheque No. 25665 for £3,065, drawn by the appellant was cashed by John and when the cheque was presented to the National Bank for acceptance, it was

returned marked “Refer to Drawer.” That was not the first *a*  
cheque drawn by the appellant that was dishonoured. How-  
ever previous cheques so dishonoured had been met when  
presented a second time. The present cheque was never met *b*  
and Bank of West Africa lost the sum of £3,065. At the  
material time, the appellant did not have sufficient funds in  
his account, neither had he made any arrangement for over-  
draft to cover the amount of the cheque. The evidence ad- *c*  
duced by the appellant did not suggest that he had any  
reasonable grounds for believing that the cheque would be  
met when presented. Some of his previous cheques cashed at  
Bank of West Africa were crossed and had been made pay- *d*  
able to bearer and were therefore payable only to a banker.  
There was no evidence that the cheque in question or any  
other cheque drawn by the appellant was presented by the  
appellant in person.

The appellant and John were consequently charged with *e*  
conspiracy to obtain the value of the cheque by false pre-  
tences and actually obtaining the said sum. The trial Judge  
acquitted them on the charge of conspiracy but them con- *f*  
victed of stealing pursuant to section 174(3) of the Criminal  
Procedure Act. The trial Judge held that since John was not  
authorised to cash the cheque without the approval of his  
superiors which approval was not obtained, the bank did not *g*  
intend to part with the property in the money through its  
authorised officials.

The appellant being dissatisfied with the judgment of the *h*  
trial court appealed against same.

**Held –**

1. It was the duty of any cashier in the Bank of West Africa *i*  
to whom a cheque drawn on another bank was presented  
for cashing to obtain the authority of one of his superiors  
before paying cash but a breach of this duty in any par-  
ticular case is not conclusive evidence of fraudulent in- *j*  
tent.

- 
- a* 2. The rule is incorrect that every cashier who makes an unauthorised payment is guilty of stealing or that the property in the money paid out without authority never passes. The two questions are quite distinct. Assuring good faith on the part of the recipient, a payment made within the ostensible authority of the cashier will serve to pass the property, because the bank will be estopped from denying the cashier's authority. On the other hand, a payment made without authority might in certain circumstances not only be a breach of contract on the part of the cashier but also amount to stealing; it is a question of state of mind of the cashier when he made the unauthorised payment.
- b*
- c*
- d*
- e* 3. A person who gives a worthless cheque to another may be either defrauding that other person or merely duping him and it does not follow that he is guilty of obtaining anything from any third party whom the recipient of the cheque may induce to accept as a valid order for the payment of money.
- f*
- g* 4. Where the party presenting a worthless cheque and the recipient both know of its worthlessness but intend that the recipient shall pass it off on some third party as valid, then the presenter will be liable for the offence committed by the recipient because the presenter has done something for the purpose of enabling the recipient to commit the offence.
- h* 5. The trial judge having taken for granted that the appellant was party to whatever offence John committed which resulted in his failure to sufficiently consider what was proved to have taken place between the appellant and John, or which of the categories of principal offenders set out in section 7 of the Criminal Code the appellant was proved to have come within, had clearly misdirected himself, the conviction must be quashed.
- i*
- j* *Appeal allowed.*

## Cases referred to in the judgment

*a*

### *Nigerian*

*Horvat v. Police* (1952) 20 N.L.R. 52

*b*

*Reg v. Nwagbo Igwe* (1959) S.C.N.L.R. 524

*West v. Police* (1952) 20 N.L.R. 71

### *Foreign*

*R v. Cohen and Bateman* Cr. App. R. 207

*c*

*R v. Oster-Ritter* (1948) 32 Cr. App. R. 191

## Nigerian statutes referred to in the judgment

*d*

Criminal Code, Cap 42, section 7(b)

Criminal Procedure Ordinance, section 174(3)

## Counsel

For the respondent: *Walker, Senior Crown Counsel*

*e*

## Judgment

**BRETT FJ:** The appellant, with a man named Stephen Bolaji John, was charged on an information containing one count alleging conspiracy to obtain the sum of £3,065 by false pretences and one alleging an actual obtaining of that sum. It was clearly unnecessary to include both of these counts, and the trial Judge Dickson entered a verdict of acquittal on the first at the close of the case for the prosecution. On the second he exercised his powers under section 174(3) of the Criminal Procedure Ordinance and convicted each of the accused of stealing the sum of £3,065.

*f*

*g*

John has not appealed against his conviction, and the only ground of appeal filed by the appellant in relation to his conviction simply states “I am not guilty of stealing.” There were, however, a number of unsatisfactory features about the trial, and certain passages in the judgment contain misdirection of law or fact; and although the appellant was not represented in this Court we thought it right to call for a full argument from Mr *Walker* on behalf of the Crown. The evidence in the court below was exceedingly complex, involving the examination of a large number of documents,

*h*

*i*

*j*

*a* and the consideration of a number of points of banking practice, and it is only fair to the learned Judge to say that he did not receive as much assistance as could be wished from  
*b* prosecuting Counsel. In particular, it is almost impossible in a case of this kind, for the court to understand the significance of the evidence as it emerges if Counsel declines to  
*c* open the case for the prosecution. No doubt it was these deficiencies on the part of the prosecution that led the Judge to make such a free use of his power to call or recall witnesses, according to the record he called two witnesses to  
*d* supplement the case for the Crown and recalled four of the prosecution witnesses. He did this before the prosecution closed its case, so that the warnings given in *Horvat v. Police* (1952) 20 N.L.R. 52 and *West v. Police* (1952) 20 N.L.R. 71 do not apply, but reference may be made to the  
*e* recent judgment of this Court in *Reg v. Nwagbo Igwe* (1959) S.C.N.L.R. 524. We do not wish to say anything that would unduly fetter the discretion of the trial Judge in the exercise of the power of calling and re calling witnesses, but if the  
*f* Judge gives the impression that he is virtually taking over the conduct of the prosecution it cannot be said that the accused persons have been seen to have a fair trial, and the power is one to be exercised with caution. In the present  
*g* case the interventions of the learned Judge only just stopped short of the stage at which we should have had to consider whether justice had been seen to be done.

*h* No doubt the Counsel who appeared for the Crown did his best but we regret that it was not found possible for the Crown to be represented by Counsel of sufficient experience to give the court the assistance to which it is entitled in a case such as this one. A final matter on which some comment is called for is that although investigations started in  
*i* June 1958, the trial in the High Court did not begin until the session starting in December, 1959.

*j* Though the evidence was complex, the issues, when stripped of irrelevancies, are comparatively simple. The

essential facts are these. In May, 1958, John was a cashier at the Marina Branch of the Bank of West Africa. The appellant did not have an account at that branch at any material time, but between January and June 1958, eight cheques drawn by him on the Yaba Branch of the National Bank of Nigeria were cashed at the Marina Branch of the Bank of West Africa. On the 12th May, 1958, cheque number 25665 for £3,065, drawn by the appellant was cashed by John, and when the cheque was presented to the National Bank for acceptance it was returned marked "Refer to Drawer." It was not the first cheque drawn by the appellant to be dishonoured, but previous cheques had been met when presented a second time. This one was never been met and the Bank of West Africa has lost the sum of £3,065. There were not at the time when the cheque was drawn or at the time when it was presented sufficient funds in the appellant's account with the National Bank to meet it, and he had made no arrangement with the bank for an overdraft, nor was there any evidence to suggest that he had any reasonable grounds for believing that the cheque would be met when presented. If he intended the cheque to be presented as valid, he had a fraudulent intent as explained in *R v. Oster-Ritter* (1948) 32 Cr. App. R. 191.

Much time was taken up in the court below on questions of banking practice which are not now material to the issue whether or not the appellant was guilty of an offence. Most of his cheques which were cashed at the Bank of West Africa were made payable to Bearer and crossed, and were therefore payable only to a banker. However that in itself, formed no part of any fraud on the Bank of West Africa, and may be disregarded. It was the duty of a cashier in the Bank of West Africa to whom a cheque drawn on another bank was presented for cashing, to obtain the authority of one of his superiors before paying cash. This duty seems to have been neglected habitually, and no adequate steps seem to have been taken to enforce it. A breach of it in any particular case was not conclusive evidence of a fraudulent intent.



- a* Finally, there is the question of the handling of the cheques at the Bank of West Africa. There is no evidence that the cheque which formed the subject of the charge, or of any
- b* other cheque drawn by the appellant, was presented for payment by the appellant personally. It was stated in evidence and accepted by the Judge that John was the cashier who dealt with all the eight cheques drawn by the appellant
- c* which were cashed at the Bank of West Africa, and this Court was invited to infer that if, as the appellant said in his statement to the police, the cheques were issued to a number of different persons with whom he had business dealings,
- d* this could only have happened as a result of a pre-concerted arrangement between the appellant and John. An examination of the cheques themselves and the books of the bank, does not bear out the statement which was made. The cashier who deals with any cheque can be identified by a distinguishing number on the rubber stamp with which he marks the cheque. Of the cheques on which the distinguishing number is legible, a number were not cashed by John, and
- e* we are not prepared to infer, as Mr *Walker* invites us to do; that where the number is too faint to be legible it is a consequence of the deliberate act of John.
- f*
- g* The reason given by the learned Judge for holding that the offence was stealing and not obtaining by false pretences was that since John was not authorised to cash the cheque without the approval of his superior, which was admittedly not obtained, the bank, through its authorised officials, did
- h* not intend to part with the property in the money. As a general proposition this is too widely stated, and it is not correct to say that every cashier who makes an unauthorised payment is guilty of stealing, or that the property in money paid out
- i* without authority never passes. The two questions are quite distinct. Assuming good faith on the part of the recipient, a payment made within the ostensible authority of the cashier will serve to pass the property, because the bank will be estopped from denying the cashier's authority. On the other
- j*

hand, a payment made without authority might, in certain *a*  
circumstances, not only be a breach of contract on the part of  
the cashier but also amount to stealing. It is a question of the  
state of mind of the cashier when he made the unauthorised *b*  
payment.

It is, however, correct to say that if John was guilty of any  
offence at all it can only have been stealing, since it is clear  
that no pretence as to the validity of the cheque can have *c*  
operated on the mind of anyone in the bank except the per-  
son who cashed it, namely John himself.

In his statement to the police the appellant admitted that he  
drew the cheque in question and handed it to John, and said *d*  
that he did so by way of a personal loan to John. When con-  
sidering the case against the appellant; the Judge said:

“If a man draws a crossed bearer cheque as in this case, and any  
other cheque for that matter, knowing full well that he has not suf- *e*  
ficient funds in the bank to meet it and gives it to another, it is my  
view that in so far as the criminal law is concerned, by virtue of  
section 7 of the Criminal Code, it could not be said that he did not  
‘obtain.’ This also is too widely stated. A person who gives a *f*  
worthless cheque to another may be either defrauding that other  
person, if he receives some benefit in return, or merely duping him  
if he gives the cheque as a loan or a gift. It does not necessarily  
follow that he is guilty of obtaining anything from any third party  
whom the recipient of the cheque may induce to accept it as a *g*  
valid order for the payment of money. That will depend on the  
state of mind of the person who gives and the person who first  
receives the cheque. If they both know the cheque to be worthless,  
and intend that the second person shall pass it off on some third *h*  
party as valid, then the first person will be liable, under section  
7(b) of the Criminal Code, for the offence committed by the sec-  
ond, because he has done something for the purpose of enabling  
the second person to commit the offence. If the second person be-  
lieves the cheque to be valid he will not be guilty of any offence in *i*  
parting with it for value, and the first person will only be guilty  
under the last paragraph of section 7 if it can be said that he has  
procured the second person to part with the cheque for value.”

This being the true legal position, it was essential that the  
learned Judge should consider carefully not only the facts *j*

- a* going to prove that John had committed an offence, but also the inferences to be drawn from the evidence as to what passed between the appellant and John, and the extent to which the appellant could be said to have procured John to commit the offence, or to have done some act for the purpose of enabling John to commit the offence. The consequence of the misdirection was that the Judge took it for granted that the appellant was a party to whatever offence John committed, and did not sufficiently consider what was proved to have taken place between the two men, or which of the categories of principal offenders set out in section 7 of the Criminal Code the appellant was proved to come within.
- d* In the circumstances, while the case is undoubtedly one of grave suspicion, we are of the opinion that the conviction cannot be upheld. We are unable to say that on a right direction the Judge would inevitably have come to the same conclusion, and, in the words of the Court of Criminal Appeal in *R v. Cohen and Bateman* Cr. App. R. 207, “There has been not only a miscarriage of justice, but a substantial one because the appellant has lost the chance which was fairly open to him of being acquitted.”

The appeal is allowed, the conviction and sentence are set aside, and a verdict and judgment of acquittal are entered.

- g* Abbott, AG CJF and Hubbard, AG FJ concurred with the judgment of Brett FJ.

## Kanu v. R

FEDERAL SUPREME COURT

BAIRAMIAN, ADEMOLA, BRETT FJJ

Date of Judgment: 8 DECEMBER 1960

F.S.C.: 2601/1960

*Banking – Fraudulent entry – Making false entry in payment-slip – Implications – Section 438(b) of Criminal Code*

### Facts

The appellant was convicted in the High Court of the Northern Region on the 29th July, 1960, on count 2 of the information, which states that contrary to section 438(b) of the Criminal Code:—

“Sunday Kanu, on the 28th day of March, 1959, in the Province of Plateau, being clerk or servant to the Barclays Bank DCO Jos, with intent to defraud, made a false entry in a document belonging to his said employer namely Barclays Bank DCO’s paying slip No. 9614 dated 28th day of March, 1959 purporting to show that Barclays Bank DCO’s cheque No. 63/L37467 drawn by Mr D.R. Carlton was to be paid into the account of R.N. Egbe.”

The appellant was an assistant accountant at Barclays Bank, Jos, also in charge of the Foreign Exchange Department and responsible for customer’s travel requirements besides. The paying-slip No. 9614 was in the name of one Egbe, a Maternal uncle of the appellant while the cheque was drawn by one Carlton. According to the appellant’s evidence Mumford, the Sub-Manager, gave him the cheque at the counter; then Egbe came to the bank to pay in £10 at the counter in notes, and gave him the £10 to pay in for him to the cashier.

The appellant to augment his relation’s credit paid in the cheque of £50 on that paying-in-slip.

### Held –

1. The effect of entering the £50 cheque of Carlton on Egbe’s slip for paying in his £10 was to augment Egbe’s credit by £50 and this constituted a fraudulent entry.

**a Nigerian statute referred to in the judgment**

Criminal Code, section 438(b)

**Counsel****b** For the appellant: *Aniagolu*For the respondent: *Henderson, Senior Crown Counsel***Judgment****c** **BAIRAMIAN FJ:** The appellant was convicted in the High Court of the Northern Region on the 29th July, 1960, on count 2 of the information which states that contrary to section 438(b) of the Criminal Code:—**d** “Sunday Kanu, on the 28th day of March, 1959, in the Province of Plateau, being clerk or servant to the Barclays Bank DCO Jos, with intent to defraud, made a false entry in a document belonging to his said employer namely Barclays Bank DCO’s paying slip No. 9614 dated 28th day of March, 1959 purporting to show the Barclays Bank DCO’s cheque No. 63/L37467 drawn by Mr D.R. Carlton was to be paid into the account of R.N. Egbe.”  
**e**

We dismissed his appeal on the 1st of December, and now give our reasons.

**f** The appellant was an assistant accountant at Barclays Bank, Jos, and also in charge of the Foreign Exchange Department and responsible for customers’ travel requirement besides. The payslip No. 9614 was in the name of one Egbe, a maternal uncle of the appellant while the cheque was  
**g** drawn by one Carlton. According to the appellant’s evidence, Mumford, the Sub-Manager, gave him the cheque at the counter; then Egbe came to the bank to pay in £10 at the counter in notes, and gave him the £10 to pay in for him to  
**h** the cashier; and the appellant’s evidence continues thus:—**i** “I entered the £10 in the bank duplicate of the slip and he signed it. Egbe came and left the £10 with me before I received the cheque exhibit S.K. 10 from Mumford. Egbe took his paying-in-book away with him and left the duplicate payslip with me. Before I pass the £10 to the cashier, Mumford gave me the cheque S.K. 10 while entering the £10 for Egbe, I entered the £50 Carlton’s cheque – on the pay slip in error. I paid in both cheque and the cash to the cashier. All this happened on 28th March, 1959.”**j** The effect of entering the £50 cheque of Carlton’s on Egbe’s slip for paying in his £10 was to augment Egbe’s credit by £50,

and the trial Judge, upon consideration of the evidence, concluded that the appellant made by that entry fraudulently. *a*

Learned Counsel for the appellant submitted that, until the paying slip got to the cashier, it was not the property of the bank. The appellant in his evidence called it the *bank* duplicate. The fact was that he received the £10 and the slip at the counter, where he was functioning as an employee of the bank, and he must be deemed to have received them as an officer of the bank, and they both became the property of the bank. Either earlier, or later, than Egbe left the slip with him, the appellant was given Carlton's cheque, and it was his duty to enter it in some book or document of the bank; he entered it on Egbe's slip, himself treating the slip as a document of the bank. It was argued that the position was similar to receiving the slip from Egbe at home; but the appellant's evidence was that he received it at the counter in the bank. *b*  
*c*  
*d*  
*e*

Those were our reasons for dismissing the appeal.

Ademola CJF and Brett FJ concurred in the judgment of Bairamian FJ. *f*

*a*

## Khatoun v. Holland West Africa Line and another

*b*

FEDERAL SUPREME COURT OF NIGERIA

BRETT, UNSWORTH, TAYLOR FJJ

Date of Judgment: 15 JUNE 1961

*c*

*Banking – Customer – Contract – When the relationship commences – Whether contract by bank to act as clearing agent for customer may be implied without formal contract*

### Facts

*d*

The plaintiff claims against the defendants' damages for negligence.

*e*

The plaintiff ordered some goods and the goods were shipped by the first respondents who the appellant alleged did not discharge the goods at the designated port and also delayed in the discharging the goods while the bank was in breach of its duty as clearing agent to clear the goods within a reasonable time.

*f*

### Held –

1. Since the plaintiff/appellant did not prove the contract and its term, the court is not entitled to read or infer the terms that the goods were to be cleared within a reasonable time into something which was not before the court.

*g*

*Appeal dismissed.*

### Cases referred to in the judgment

*h*

#### Foreign

*Coggs v. Bernard* (1703) 2 Ld. Raym. 909; 1 Com. 133; Holt, K.B. 131; 3 Salk. 11; 92 E.R. 107

*i*

*Turner v. Stalibrass* (1898) 1 Q.B. 561; 67 L.J. Q.B. 52; 77 L.T. 482; 46 W.R. 81; 42 Sol. Jo. 65

*Ultzen v. Nicols* (1894) 1 Q.B. 92; 63 L.J. Q.B. 289; 70 L.T. 140; 58 J.P. 103; 42 W.R. 58; 10 T.L.R. 25; 38 Sol. Jo. 26

*j*

*Woods v. Martin's Bank Ltd* (1958) 1 W.L.R. 1018; (1958) 3 All E.R. 166; (1959) 1 Q.B. 55; 22 Sol. Jo. 655

**Counsel**For the appellant: *Oakey*For first respondent: *Thomas*For second respondent: *Garrick***Judgment**

**TAYLOR FJ:** This is in appeal from the judgment of Bate J of the High Court of the Kano Judicial Division, dismissing the plaintiff/appellant's claim for £1,705.11s.2d against both respondents, jointly and severally, being special damages alleged to have been suffered by the appellant as a result of the respondents' negligence. The appellant also claimed general damages.

I shall here set out very briefly only those facts that are necessary to a full understanding of the legal point involved in this appeal. The appellant is a general merchant. The first respondents, a shipping line, are the agents of the carriers of the appellant's goods, and the second respondents are bankers. The appellant placed an order for certain goods with his suppliers, and the latter shipped the goods on one of the vessels of the first respondents' principal. The appellant contends that the goods were manifested for Lagos, but were discharged at Apapa, and, some two months later, were transferred by the first respondents to Lagos. By reason of this, and their failure to notify the appellant or the second respondents of the discharge of the goods at Apapa, the appellant says that the first respondents were negligent, and claims damages for the loss of profit, etc., as contained in the particulars filed with the statement of claim. There is no claim made for, nor is it alleged that there was any physical damage to the goods or that any portion of same was lost.

The learned Judge, after hearing evidence adduced at the trial, held *inter alia*, as follows:—

“In order to succeed in an action for negligence the plaintiff must in the first place establish a duty to take care on the part of the defendant. But the duty to take care for a breach of which an action for negligence will lie is restricted to the duty to take care to avoid physical injury to person or property; no action for (negligence will lie where the injury is merely pecuniary damage.



- a* In the present case there is no claim for or evidence of physical injury to the person or property of the plaintiff. His claim is solely in respect of the pecuniary loss which he alleges he has suffered from the defendants' negligence. No authority has been cited to show that this case should be treated as an exception to the general rule which I have already stated."
- b*

Against this judgment five grounds of appeal were filed with the notice of appeal, but were abandoned at the hearing, and in their place learned Counsel argued the following ground:—

- c* "The learned Judge erred in not considering the fact that the first defendants were bailees and the second defendants were bankers, and that an action for negligence will lie against bailees and bankers notwithstanding that the plaintiff suffers only pecuniary damage as a result of that negligence."
- d*

- In arguing the appeal as against the first respondents, Mr *Oakey* conceded that no contractual relationship existed between the appellant and the first respondents. He argued that since the latter had possession of the goods as bailees for a particular purpose, there was a duty placed on them to land the goods within a reasonable time; and that any loss occasioned by their failure to perform their duty should be compensated for in damages. In support of this contention reliance was placed on two cases to wit:—
- e*
- f*

*Turner v. Stallibrass* (1898) 1 Q.B. 561; 67 L.J. Q.B. 52.

- g* *Ultzen v. Nicols* (1894) 1 Q.B. 92.

- Before I deal with these two authorities it is as well to observe that in the appellant's statement of claim paragraphs 2 and 5 (as amended) set out the capacity in which the first respondents are sued as follows:
- h*

- "2. The first defendant is a Shipping Line having its business in Lagos and elsewhere in West Africa.
5. The first defendant was acting as agent for carriers of the plaintiff's suppliers of a consignment of 100 cases poplin the property of the plaintiff."
- i*

- It is therefore clear from these two paragraphs of the statement of claim that the first respondents are sued not as shippers or carriers, but as the agent for the carriers; further, they
- j*

are not carriers of the plaintiff's goods, in any sense which would create a bailment between the two parties, but of goods shipped by the plaintiff's suppliers, and with whom they have that relationship. In the leading case of *Coggs v. Bernard* (1703) 2 Lord Raymond 909, Lord Holt CJ at page 912 described the various types of bailments as follows:–

And there are six sorts of bailments. The first sort of bailment is a bare naked bailment of goods, delivered by one man to another to keep for the use of the bailor; and this I call a *depositum* and it is that sort of bailment which is mentioned in *Southcote's* case. The second sort is, when goods or chattels that are useful, are lent to a friend *gratis* to be used by him; and this is called *commodatum* because the thing is to be restored in specie. The third sort is, when goods are left with the bailee to be used by him for hire; this is called *locatio et conductio* and the lender is called *locator*, and the borrower *conductor*. The fourth sort is, when goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor; and this is called in latin *vandim*, and in English a *pawn or a pledge*. The fifth sort is when goods or chattels are delivered to be carried, or something is to be done about them for a reward to be paid by the person who delivers them to the bailee who is to do the thing about them. The sixth sort is when there is a delivery of goods or chattels to somebody, who is to carry them or do something about them *gratis*, without any reward for such his work or carriage, which is this present case.

The fifth sort of bailment is the one set up by learned Counsel for the appellant but he fell short of it in two respects to wit–

- (i) The plaintiff/appellant is not the bailor, and
- (ii) The first respondents are not the bailees but agents of the bailees.

In these two respects and a further one which I shall shortly mention, the present case on appeal differs from *Turner v. Stallibrass*, to which our attention was drawn. In that case the action was brought by the bailor against the bailee for physical injury done to his horse, the subject matter of the bailment. It is in this latter respect that a third point of differentiation arises, ie in the nature of the injury. The same

*a* considerations apply to the case of *Ultzen v. Nicol*, with this exception that the article bailed was lost and not damaged.

*b* There is therefore neither a contractual relationship between the appellant and the first respondents, nor is there a bailment between them which would give rise to a duty on the part of the first respondents, of the kind alleged by Mr *Oakey*.

*c* For these reasons the appeal as against these respondents must fail and is dismissed.

*d* In arguing the appeal against the second respondents, Mr *Oakey* contended that these respondents were bankers and clearing agents; that as such it was their duty to clear these goods within a reasonable time; and that they were in breach of this duty.

*e* Mr *Oakey* relied for his submissions as to the liability of the second respondents on the case of *Wood v. Martins Bank Ltd* (1958) 1.W.L.R. 1018. In this case the Manager of a branch of the defendant bank undertook to take care of the plaintiff's financial affairs. The plaintiff was induced to make certain investments in consequence of advice given him by the manager. Further investments were made by the plaintiff relying on further advice by the manager of the bank. There were no grounds on which the manager could reasonably have advised the plaintiff as he did. The plaintiff lost the sum of £14,800 which he had invested on the advice of the manager. He failed in his claim on fraud but succeeded on negligence. At page 1030 Salmond J said that:—

*h* “In my judgment, the limits of a banker's business cannot be laid down as a matter of law. The nature of such a business must in each case be a matter of fact and accordingly cannot be treated as if it were a matter of pure law.”

*i* And at page 1032 the learned Judge went on to say this:—

*j* “The next point taken by the defendants is that the plaintiff was not a customer of the defendant bank at the date of the first transaction in May, 1950, in that no current account had then been opened by the plaintiff and that, therefore, they owed the plaintiff

no duty of any kind, at any rate in respect of this transaction of May, 1950. I have already stated that, in my judgment, the plaintiff was a customer of the defendant bank on May 9, 1950. Nevertheless, even if he did not become a customer, the defendants would still, in my judgment, have been under a duty to exercise ordinary skill and care in advising him in relation to the £5,000 transaction. I have found that it is part of the defendant's business to advise customers and potential customers on financial matters of all kinds."

Mr *Garrick* for the respondents, argued that the presence of a contract between the parties was necessary to establish proximity; that once that was established the appellant must then show that there was a duty on the respondents to take care in its performance; and finally he must show that there was a breach of that duty resulting in *damnum* to him. He submitted that such duty had not been shown to exist and that even if it had, the *damnum* complained of was not such as was cognisable in this type of action.

It is, in my view, important at the outset to settle the nature of the action, the subject matter of this appeal. Mr *Oakey* has argued on the basis of its being an action in tort though he did submit that in spite of certain statements made by Counsel for the plaintiff in the lower Court, this Court should look to the substance of the matter before it. The learned trial Judge has treated the matter as being an action in tort relying on the statements of Counsel for the plaintiff/appellant to this effect – *Per Curiam*: "There is no allegation in the statement of claim of breach of contract." Grey: "I agree. My action against both defendants is in tort and not in contract."

Further, in his address at the close of the case, Mr Grey is recorded as saying, when dealing with the case against the present second respondents that:– "Plaintiff may sue in tort, although relationship contractual."

In *Turner v. Stallibrass*, 67 L.J. Q.B. 52, Smith, LJ said that the rule which has been laid down for determining whether

*a* an action was founded on tort or contract within the meaning of section 116 of the County Courts Act, 1888 was this:—

*b* “If the action is in respect of a cause of action, in order to make out which it is not necessary for the plaintiff to rely on or prove a contract, then the action is founded on tort; if, on the other hand, the action is one for the successful maintenance of which it is necessary for the plaintiff to rely on or prove a contract then the action is founded on contract.”

After quoting some authorities, the learned Judge goes on to say that:—

*d* “These cases show that the determination of the question does not depend upon the pleadings in the action, nor in my judgment upon the way in which the plaintiff opens and conducts his case, nor upon the way in which the Judge directs the jury . . . .”

*e* The question then is, using that rule as a guide, whether the cause of action can be maintained without proving a contract? The breach alleged here is not one of non-feasance, for the goods were in fact cleared; nor is it one of misfeasance. What the appellant in short says is this:— I agree you have cleared the goods as you were bound to do by virtue of our contractual relationship. I concede that there has been no physical damage to the goods, but you were to clear the goods within a reasonable time and you failed to do so. By your failure to do so, I have suffered pecuniary damage. I am of the view that in order to maintain such an action between the appellant as the owner of the goods and the second respondents in their capacity as clearing agents of the goods in the ship, the appellant must prove the contract. He has made no endeavour to allege the contract and its terms in his statement of claim, and under such circumstances I do not think this Court is entitled to read or infer the term that the goods were to be cleared within a reasonable time into something which was really never before the court.

*j* I would therefore uphold the judgment of the trial Judge, though for different reasons. I would dismiss this appeal

with costs in favour of each respondent in the sum of thirty <sup>a</sup>  
three guineas.

*Appeal dismissed.*

Brett FJ and Unsworth FJ concurred in the judgment of <sup>b</sup>  
Taylor FJ.

*a*

## Barclays Bank DCO v. Adigun

HIGH COURT OF NORTHERN NIGERIA

*b*

SMITH SPJ

Date of Judgment: 1 JULY 1961

J.D.: 15/1961

*c* *Banking – Judgment debt – Interest on – Judgment debt arising from overdraft facilities*

### Facts

*d* The plaintiff claims against the defendant was for (1) the sum of £3,989.9s.8d being money due from the defendant to the plaintiff on account of overdraft facilities granted by the plaintiff's bank to the defendant, (2) interest on the aforesaid money at 5 percent per annum from date of judgment pursuant to Order XLVI, rule 7 of the Supreme Court (Civil Procedure) Rules and lastly, (3) an order requiring the defendant to execute a legal mortgage pursuant to the undertaking to do so in a memorandum of deposit of deed dated 30th October, 1956.

*f*

*g* The suit originally appeared on the undefended list and on the 10th March, 1961 the defendant admitted liability on claim (1) and judgment was consequently entered against him for the sum of £3,989.9s.8d. The defendant was thereafter given leave by the court to defend claims (2) and (3) respectively and pleading were filed in due course.

*h* The plaintiff before the trial of the suit withdrew claim (3) against the defendant and same was consequently struck out by the court leaving only claim (2) for the court to determine.

*i* The defendant at the trial contended that the plaintiff was not entitled to interest after judgment under Order XLVI, rule 7 whilst the plaintiff equally submitted that the plaintiff was entitled to interest on the Judgment debt under the second limb of Order XLVI, rule 7. The Court at the conclusion of trial gave judgment in favour of the defendant.

*j*

**Held –**

1. Under Order XLVI, rule 7 of the Supreme Court (Civil Procedure) Rules, the court may grant time within which to pay a judgment debt and may when making such an order also order interest to be paid thereon from the date of judgment or afterwards.

**Foreign statute referred to in the judgment**

Judgment Act 1838 (1 and 2 vict; c. 10), section 17

**Nigerian rules of court referred to in the judgment**

Supreme Court (Civil Procedure) Rules, Order XLVI, rule 7

**Foreign rules of court referred to in the judgment**

Rules of the Supreme Court (England), Order 42, rule 16

**Counsel**

For the plaintiff: *Grant*

For the defendant: *Agbakoba*

**Judgment**

**SMITH SPJ:** In this action the plaintiff claimed from the defendant:—

1. The sum of £3,989.9s.8d as money due from defendant on a bank overdraft.
2. Interest thereon at 5 percent per annum from date of judgment pursuant to Order XLVI, rule 7 of our Civil Procedure Rules.
3. An order requiring the defendant to execute a legal mortgage pursuant to his undertaking, to do so in a memorandum of deposit of deed dated 30th October, 1956.

Initially, the action appeared in the undefended list. On 10th March, 1961, the defendant admitted liability on item (1) of the claim and judgment was entered against him for the sum of £3,989.9s.8d. He was given leave to defend items (2) and (3) of the claim; and pleadings were filed in due course.



*a* Item (3) of the claim has been withdrawn and struck out at the instance of the plaintiff.

*b* There remains item (2) of claim. The defendant has averred that the plaintiff is not entitled to interest after judgment under Order XLVI, rule 7.

*c* Mr *Grant* for the plaintiffs has submitted that by Order XLVI, rule 7, the court has a discretion to order interest to be paid and in support has cited authorities on the practice in England and in particular Order 42, rule 16 of the English Rules at page 1010 of Annual Practice, 1961.

*d* In England a judgment ordering payment of a sum of money carries interest by virtue of section 17 of the Judgments Act 1838, Order 42, rule 16 provides for the procedure of indorsing the writ of execution for recovery of the judgment debt and interest thereon from the date of judgment, if sought to be recovered.

*e* In the matter now before me Counsel has not shown any similar statutory authority in Nigeria for the recovery of interest on a judgment debt. I have referred to Order XLVI, rule 7 of our Civil Procedure Rules. The rule reads:

*f* “The court at the time of making any judgment or order, or at any time afterwards, may direct the time within which the payment or other act is to be made or done, reckoned from the date of the judgment or order or from some other point of time, as the court thinks fit, and may order interest at a rate not exceeding five pounds *per centum* per annum to be paid upon any judgment commencing from the date thereof or afterwards.”

*g* Mr *Agbakoba* for the defendant has submitted that this rule only gives the court discretion to order interest to be paid on a judgment debt when the court grants time within which to pay a judgment debt.

*h* Mr *Grant* has urged that the rule gives the court two distinct powers, each independent of the other: (1) the power to direct the time within which a judgment debt is to be paid: (2) the power to order interest to be paid upon any judgment debt.

*i*

*j*

If each of these powers were set out in a separate rule I <sup>a</sup>  
would be inclined to agree with Mr Grant's submission. But  
they are not. It is one rule not two. And it will be observed  
that rule 7 consists of a single sentence. By the normal can- <sup>b</sup>  
ons of construction that sentence must be read as a whole,  
each part of it being dependent upon the other. When so  
read, it means that the court may grant time within which to  
pay a judgment debt and may when making such an order <sup>c</sup>  
also order interest to be paid thereon from date of judgment  
or afterwards, but not otherwise. I therefore enter judgment  
for the defendant on item (2) of the claim.

*Judgment for defendant on claim for interest on judgment.* <sup>d</sup>

*a*

## Barclays Bank DCO V. Olofintuyi and another

*b*

HIGH COURT (WEST)

SOMOLU J

Date of Judgment: 9 OCTOBER 1961

Suit No.: 1/173/60

*c*

*Banking – Mortgage – Equitable mortgage – Mortgagor agreeing not to lease property without consent of the mortgagee – Sale by mortgagor without consent of the mortgagee – Right of mortgagee to have the sale and conveyance set aside*

*d*

*Banking – Mortgage – Purchaser for value without notice – Need to plead the defence – Section 181(2), Property and Conveyancing Law, Cap 100, Western Nigeria, 1959*

*e*

*Banking – Mortgage – Sale of mortgage property to third party – Privity of estate between mortgagee and purchaser – Whether exists*

*f*

### **Facts**

The second defendant obtained certain facilities from the plaintiff. As security for the facilities, he deposited a title deed to registered land with the bank. He also executed a

*g*

memorandum of deposit indicating that the purpose of the deposit was to create equitable mortgage upon all the hereditaments and property in dispute “for securing the payment and discharge on demand of all moneys and liabilities now

*h*

or hereafter done from” the second defendant to the plaintiff. Clauses 3 and 5 of the memorandum expressly prohibited the second defendant from leasing the property in dispute or to get someone else to become the registered proprietor of it

*i*

during the continuance of the security without the written consent of the plaintiff.

Later the plaintiff obtained judgment against the second defendant for his indebtedness to the bank. When the plaintiff

*j*

took out a writ of *fifa* to levy execution against the second

defendant, certain sums of money were recovered but not sufficient to meet the judgment debt. Although the second defendant obtained an order for stay of execution on the condition that he paid £500.00 down and £250.00 every month, he defaulted. It later transpired that during the subsistence of the security, the second defendant sold the property in dispute to the first defendant. He sold and conveyed as one entitled to it “according to native customary law and seized in absolute customary ownership free from encumbrances of the landed and house property.”

With the default by the first defendant to pay the instalments, the plaintiff attempted to sell the property but was met with the claim of the second defendant. The plaintiff therefore brought the action seeking an order to set aside the deed of conveyance dated 13th February, 1960 between the first and second defendants on the ground that the deed was made in favour of the first defendant to defraud the plaintiff, and an injunction to restrain the defendants from participating in further dealings with the property in dispute.

**Held –**

1. Where a mortgagor executes a memorandum of deposit of title deeds with a clause that he will not lease the property or allow any person to become the registered proprietor of the said hereditaments or any part thereof without the written consent of the mortgagee, during the continuance of the security, the mortgagor thereby deprives himself of the power to deal with the mortgaged property without such consent. If however where he deals with the property without such consent the conduct will be a clear fraud of the rights of the mortgagee to have the property held in an unencumbered condition until the debt is liquidated a part from the fact that it is also a breach of the undertaking in the memorandum.
2. A bona fide purchaser for value without notice of a property subject to mortgage must specifically plead as a defence to an action to set aside the sale that he purchased

*a* the property for value without notice of the encum-  
*b* brance. Where the purchaser fails to so plead, it will be  
 presumed that he purchased the property with notice of  
 the prior mortgage.

3. There is privity of estate between an equitable mort-  
*c* gagee of a property and a purchaser for value with notice  
 and where fraud is alleged and proved in relation to the  
 sale, the remedy of the mortgagee lies in an action to set  
 aside the sale and conveyance to the purchaser.

*Judgment for the plaintiff; Conveyance set aside; Injunction  
 granted.*

*d* **Cases referred to in the judgment**

***Nigerian***

*e* *Wright v. Ahmadiya Movement in Islam* (1949) W.A.C.A.  
 2886 (unreported)

***Foreign***

*f* *Oliver v. Hinton* (1899) 2 Ch.D. 264; 68 L.J. Ch. 583; 81  
 L.T. 212; 48 W.R. 3; 15 T.L.R. 450; 43 Sol. Jo. 622

**Nigerian statute referred to in the judgment**

Property and Conveyancing Law, Cap 100, Laws of Western  
 Nigeria, 1959, section 181

*g* **Counsel**

For the plaintiff: *Okubadejo*

*h* For the first defendant: *Bolarinwa*

For the second defendant: *Ayoola*

**Judgment**

*i* **SOMOLU J:** The plaintiff's writ of summons reads as follows:–

“The plaintiff seeks for:

(1) An order setting aside a deed of conveyance dated the  
*j* 13th February, 1960, registered as No. 14 at Page 14 in  
 Volume 364 of the Lands Registry at Ibadan made between  
 G.A. Ibironke of SW7/205A. Oke Ado, Ibadan, on behalf

of himself and other members of his family as Vendors of the one part and Benjamin Ade Olofintuyi of SN6/34 Amnigun Street, Ibadan as Purchaser of the other part which deed of conveyance was made by the second defendant in favour of the first defendant to defraud the plaintiff to whom the subjects described in the deed are mortgaged by a memorandum of deposit of deeds dated the 27th July, 1954, registered as No. 47 at page 47 in Volume 15 of the Lands Register kept at Ibadan.

- (2) An injunction to restrain the defendants from participating in further dealings with the subject described in the said deed of conveyance.”

Pleadings were filed and it appears to me that the relevant portions of the statement of claim are paragraphs 2, 3, 4, 5, 6 and 7, in so far as the issues in the case are concerned, and the relevant portions of the defence are paragraphs 1, 3, 6 of the statement of defence of second defendant and paragraph 3 of the statement of defence of the first defendant. At the hearing the only witness called testified for the plaintiff, and the defendants neither testified on their own nor called witnesses.

The manager of the plaintiff/bank in his evidence said that the second defendant deposited exhibit A with his bank in July, 1954 by means of exhibit B with intent to create equitable mortgage upon all the hereditaments and property in dispute “for securing the payment and discharge on demand of all moneys and liabilities now or hereafter due from” the second defendant to the plaintiff. Clauses 3 and 5 of the document, exhibit B, are, in my view, very important in this case, and they deprive the second defendant of the power of leasing the property in dispute, and also of allowing any person to become the registered proprietor of the said hereditaments or any part thereof without the written consent of the plaintiff during the continuance of the security.

On 5 May 1959, the plaintiff obtained judgment against the second defendant for the sum of £9,670.4s.3d. plus 75 guineas costs and on 22 June 1959 a writ of *fifa*, was taken

*a* out in respect of the judgment/debt and costs. As a result the sum of £42 was realised, but it would appear that the second defendant paid a further £2,000; at the time of the writ in  
*b* this case, a total of £7,747.9s.3d was still outstanding and due to be paid by the second defendant to the plaintiff, and it is true to say that nothing more has been paid by him up to the time of hearing. The second defendant obtained an order  
*c* for stay of execution on the condition that he paid £500 down and £250 every month, but plaintiff's witness says that he had defaulted. The order in question was not produced, but when this evidence was given no objection was taken by  
*d* the learned Counsel for the defendants and it is difficult for me to close my eyes to it, especially in view of exhibit E which was sent to the plaintiff's Counsel by the Registrar, and the evidence of plaintiff's witness that upon the default of second defendant the plaintiff made efforts to sell the  
*e* property in dispute but was met with the claim of the first defendant. The second defendant has not challenged this piece of evidence and I accept it as the true version of the events. Now, it is not disputed that the second defendant  
*f* sold the property in dispute to the first defendant and conveyed it to him by means of exhibit D, and the sole question to be determined is whether that disposition is in fraud of the plaintiff who is not only his mortgagee by means of exhibit  
*g* B and the deposit of exhibit A, but is also a judgment creditor. Learned Counsel for the defendants has submitted with some force that the second defendant never lost his right to sell the property, and that the only qualification of that right  
*h* is that such a sale will be subject to the right of the mortgagee. He of course, has not been able to cite a single authority to buttress this apparent novel proposition of law. It is quite possible to envisage a situation in which this proposition may be appropriate, but I cannot accept it as applying  
*i* to the unchallenged facts in this case. When the second defendant executed exhibit B and deposited exhibit A with the plaintiff, what did he think he was doing? When he  
*j* agreed to Clauses 3 and 5 of exhibit B prohibiting him from

even leasing the property in dispute, or to get someone else to <sup>a</sup>  
become the registered proprietor of it during the continuance  
of the security without the written consent of the plaintiff,  
what did he think those provisions meant? Or has the security <sup>b</sup>  
been terminated? In my view, the conduct of the second de-  
fendant in selling the property in dispute as admitted by him  
is in clear fraud of the rights of the plaintiff in it, apart from  
the fact that it is also a breach of his undertakings under ex- <sup>c</sup>  
hibit B. At the time he purported to have power to sell it to  
first defendant, he had no such power at all and he was guilty  
of obtaining money under false pretences. He should thank  
his stars that the process of the criminal law has not been set <sup>d</sup>  
in motion against him. In my opinion, the fraudulent intent of  
the second defendant is made more patent, upon a careful  
consideration of exhibit D. Exhibit A makes it clear that the  
second defendant held the property in dispute as fee simple <sup>e</sup>  
owner, but he sold and conveyed it to first defendant as one  
entitled to it “*according to native customary law and seized in  
absolute customary ownership free from encumbrances of the  
landed and house property.*” Was he holding it under native <sup>f</sup>  
customary law? Was the property free from encumbrances at  
the time of the purported sale to the first defendant? The  
answers to these questions must be no, and it is not surprising  
that he has not got the courage to explain these things to the <sup>g</sup>  
court. In paragraph 6 of his statement of defence the second  
defendant claimed that he had a right to deal with the property  
by virtue of his equity of redemption and that he informed the  
plaintiff “before he concluded the transaction which was to <sup>h</sup>  
raise money to liquidate instalments ordered him to be paid  
by the High Court on the judgment debt.” But I must say that  
no one impedes him in the exercise of his right to the equity  
of redemption; he is the one who ties his own hands in ex- <sup>i</sup>  
hibit B, and if he has any quarrel over that issue, that quarrel  
should be with himself and no one else. As to informing the  
plaintiff about the transaction, that is false and that is why he  
cannot give any evidence to prove it; it was not even sug-  
gested to plaintiff’s witness. I reject the defence of the second <sup>j</sup>



- a* defendant and the submissions made on his behalf. I find as a fact that when he sold the property in dispute to first defendant and conveyed it to the latter by virtue of exhibit D,
- b* he did so with the intent to defraud the plaintiff, as such transaction could not but be to the prejudice of the right of the plaintiff to hold it in an unencumbered condition to satisfy the debt the second defendant was owing the bank.
- c* The case of the first defendant is, however, slightly different. He is a purchaser for valuable consideration, because he paid £2,250 for it. In normal circumstances, it will be difficult for the first defendant to show that he had no notice of the rights of
- d* the plaintiff in it at the time he was buying it. But he has not set up the defence that he is a *bona fide* purchaser without notice, and I am not permitted to set up a case for him which he does not make out. Now, when he was negotiating to buy the property,
- e* did he investigate the title of the second defendant to it? If he did not, why? If he did, what did he discover? It is not easy to find answers to these questions, but exhibit B shows that the second defendant held a registered title to the property and it is my view that if the first defendant got to know this after he had
- f* bought; he would still be put on enquiry as to its whereabouts. If he knew of this at the time of the negotiation, wisdom would have compelled him to call for it. If he called for it during negotiation, he would have known that it was with the plaintiff
- g* as deposit for equitable mortgage. If he discovered the fact after he got exhibit D, what did he do? However, since the first defendant has not set up a defence of being a *bona fide* purchaser without notice, so as to bring himself within the provisions of section 181(2) of the Property and Conveyancing
- h* Law, Cap 100, Laws of Western Nigeria, I must presume that he called no evidence or set up that defence because he knew that he could not sustain it. Therefore, I hold that he was not without notice of the rights of the plaintiff in the property when
- i* he was negotiating to buy it. If he was, it would have been the easiest thing to plead it and give evidence on it. Alternatively, I hold that he was negligent in not being able to discover that the title deed, exhibit B, was with the plaintiff. I find it hard to
- j* believe that a man paying £2,500 for a property will fail to

investigate the title to it. In my judgment the first defendant *a*  
investigated the title to the property, and I find as a fact that  
he knew that the second defendant was not in possession of  
the title deed, exhibit A, but did not bother to press on him *b*  
to produce it. I am of the opinion that the decision in the  
case of *Oliver v. Hinton* (1899) 2 Ch.D. 264 applies to this  
case, and also that section 181(1) of the Property and Con-  
veyancing Law, Volume V, Laws of Western Nigeria, is *c*  
applicable. There is privity of estate between the plaintiff  
and first defendant, and since fraud has been alleged and  
proved, it follows that the remedy of the plaintiff lies in this  
action to set aside the sale and conveyance of the property to *d*  
second defendant, as laid down in the decision of the West  
African Court of Appeal in *R.A. Wright v. Ahmadiya Move-*  
*ment-in-Islam* 1949 W.A.C.A. 2886 (Cyclostyled Report,  
February–May, 1949) and a long line of similar cases fol- *e*  
lowing it.

It follows therefore that the plaintiff succeeds in this case. I  
hereby set aside the conveyance of the property in dispute  
by the second defendant to the first defendant as sought. I *f*  
order injunction against defendants rest restraining them  
from further dealings with the said property.

I assess costs against the second defendant at 45 guineas in  
favour of the plaintiff, and 20 guineas in favour of first de- *g*  
fendant. I order 10 guineas costs against first defendant in  
favour of the plaintiff.

*Judgment for plaintiff: Deed of conveyance set aside: In-* *h*  
*junction granted.*

*a*

## Merchants Bank Limited v. Federal Minister of Finance

*b*

FEDERAL SUPREME COURT

ADEMOLA CJF, MBANEFO CJER, BRETT, UNSWORTH, TAYLOR FJJ

Date of Judgment: 27 OCTOBER 1961

F.S.C.: 197/1961

*c*

*Banking – Banking licence – Power of the Minister under section 14 of Banking Ordinance, Cap 19 – Nature of*

*d*

*Banking – Revocation of banking licence – Revocation done in accordance with Banking Ordinance, Cap 19 – Whether “Civil rights” of complainant can be said to be infringed, Nigeria (Constitution) Order in Council, 1954, Sixth Schedule, Clause 5*

*e*

*Banking – Status of banking licence – Whether it confers a right or privilege on the grantee*

### Facts

*f*

On 23rd September, 1960, the Federal Ministry of Finance made an order revoking the banking licence granted to the appellant bank and ordered its winding-up. The plaintiff, now appellant, contested the decision of the Minister of Finance in the High Court of Lagos seeking (a) a declaration that the revocation of its banking licence *vide* Legal Notice No. 152 of 1960 and dated 23rd September, 1960 was void and of no effect and (b) an injunction restraining the Minister of Finance and its agent from giving effect to the order.

*g*

*h*

In the High Court, the appellant contended that the licence issued under the Banking Ordinance 1952 conferred a right which, under the 1954 Constitution could be revoked only by an order of court or other tribunal established by law. The High Court dismissed the claims of the plaintiff/appellant.

*i*

*j*

On appeal, the appellant contended that the trial judge erred in holding that the Banking Ordinance did not confer a right upon the appellant bank to carry on banking business. The

respondent argued that the banking licence only conferred a privilege and not a right to carry on banking business. a

**Held –**

1. That the banking licence did not confer on the appellant the right to carry on banking business. b
2. Since the revocation of the banking licence of the appellant by the Federal Ministry of Finance was done in accordance with the provisions of the Banking Ordinance 1952, the plaintiff/appellant bank cannot say that though it acquired the right to do business under the ordinance, that right by virtue of the Constitution, can only be revoked in the manner provided for the determination of a person's "civil rights and obligations." c
3. That the right or licence to do banking business under the Banking Ordinance did not come within the meaning of "civil rights" and the powers under section 14 of the Banking Ordinance are administrative powers which are properly vested in the Minister of Finance and it is for the Minister, and not the courts, to exercise those powers. d

*Appeal dismissed.*

**Obiter**

"In these circumstances, the functions of the courts only begins if and when it is alleged (which is not the case here) that the administrative powers have not been exercised in accordance with the Ordinance; it is these functions of the courts which are protected by the Constitution." e

**Cases referred to in the judgment**

***Foreign***

*Citizens Insurance Co. of Canada v. Parsons* (1881) 7 A.C. 96; 51 L.J.P.C. 11; 45 L.T. 721

*Russell v. R* (1882) 7 A.C. 829; 51 L.J.P.C. 77; 46 L.T. 89 f

*a* **Nigerian statutes referred to in the judgment**

Banking Ordinance, Cap 19, sections 3(1), 3(5)(b)(ii), 14

*b* Nigeria (Constitution) Order in Council, 1954, Sixth Schedule (L.N. 228/1959), Clause 5

*Appearances not stated.*

**Judgment**

*c* **TAYLOR FJ:** This is an appeal from the Judgment of the High Court of Lagos dismissing the plaintiffs/appellants' claims for:—

- d* “(a) A declaration that the Order published as Legal Notice No. 152 of 1960 and dated 23rd September, 1960 is void and of no effect
- (b) An injunction restraining the defendants, their servants and/or agents from giving effect to the said Order and also from winding up the banking business of the plaintiffs.”
- e*

There were no pleadings ordered by the lower Court nor was evidence adduced. The trial Judge stated the issue before him in the following words:—

- f* “No oral evidence was offered in the case and the single question submitted for a decision is whether an order made by the Minister of Finance of the Federal Government of Nigeria impinged on the plaintiffs' constitutional rights.”

*g* It would appear from the arguments of Counsel on record that the following facts are common ground:

- “(a) That the appellant bank was duly licensed to carry on banking business, and
- h* (b) That on the 23rd September, 1960, the Federal Minister of Finance made an order, which is the subject-matter of action in the lower court, revoking the licence granted to the appellant bank and ordering its winding-up.”

At the hearing of this appeal, Chief Williams QC, urged that:—

- i* “(a) The trial Judge erred in holding that the Banking Ordinance does not confer a right upon the appellant bank, for, he contended, the question as to whether a licence confers a right is dependent on the relevant statutory provisions and not on the general conception of what is a licence .
- j* (b) That if he is correct in the above contention, then by virtue of

Clause 5 of the Sixth Schedule of the Nigeria (Constitution) Order in Council, 1954, (which will be hereafter referred to as the 1954 Constitution) the appellant bank is entitled to have that right determined or revoked only “by a court or other tribunal established by law” in accordance with the above Constitution.”

Mr *Adebiyi*, who appeared for the Federal Minister of Finance, the second defendant in the High Court not having been served, contended that the appellant bank did not possess any “civil rights” within the meaning of the 1954 Constitution, then in force, and that all they possessed was the privilege to carry on banking business within the meaning of the Banking Ordinance and no more. Further, that such a privilege was determinable in the manner provided by that Ordinance.

The grant of a licence to do banking business is governed by section 3 of the Banking Ordinance which provides *inter alia* that:—

“3(1) No banking business shall be transacted in Nigeria except by a company which is in possession of a valid licence, which shall be granted by the Minister after consultation with the Central Bank, authorising it to carry on banking business in Nigeria: Provided that a valid licence granted under the provisions of the Banking Ordinance, 1952, shall be deemed to be a licence granted under the provisions of this section.”

The revocation of licences is governed by section 3(5)(b) which provides that:—

“The Minister may by Order revoke any licence –

- (i) if the holder ceases to carry on banking business in Nigeria or goes into liquidation or is wound up or otherwise dissolved; or
- (ii) in circumstances and in the manner provided for in section 14.”

Section 14 provides that:—

“If, in the opinion of the Minister, an examination shows that the licensed bank is carrying on business in a manner detrimental to the interests of its depositors and other creditors or has insufficient assets to cover its liabilities to the public or is contravening the

- 
- a* provisions of this Ordinance, the Minister may take such one or more of the following steps from time to time as may seem to him necessary—
- b* (a) require that Bank forthwith to take such steps as he may consider necessary to rectify the matter; or
- (b) appoint a person who in his opinion has had proper training and experience to advise the Bank in the proper conduct of its business and fix the remuneration to be paid by the bank to such person; or
- c* (c) report the circumstances to the Governor-General in Council who, unless satisfied that the bank is taking adequate measures to put its affairs in order, may direct the Minister to make an order revoking the bank's licence and requiring its business in Nigeria to be wound up; Provided that he shall not so report the circumstances without giving the bank reasonable prior notice of his intention to do so and an opportunity of submitting a written statement in reply.”
- d*
- e* It is stated in the Order impugned that the Minister purported to act under this section 14. It has not been contended here, nor was it contended in the lower court, that the Minister did not comply with the requirements of this section. In
- f* fact, this was conceded by Chief Williams in the course of his argument. As I understand Counsel's argument, his complaint is with the words “in the opinion of the Minister” appearing at the commencement of this section. As the section stood, contended Counsel, the Minister was made the
- g* final arbiter, whereas the 1954 Constitution, Clause 5 of the Sixth Schedule, made the courts or a tribunal established by law the final arbiter in respect of the determination of a
- h* person's “civil rights.” As a result, Counsel urged that the revocation was void as was the Order concerned.
- Clause 5 of the Sixth Schedule of the 1954 Constitution provides that:—
- i* “In the determination of his civil rights and obligations a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality:
- j* Provided that nothing in this sub-paragraph shall invalidate any

law by reason only that it confers on any person or authority power to determine questions arising in the administration, of a law that affect or may affect the civil rights and obligations of any person.”

The first point that comes up for consideration is whether a right or licence, to use the words of the Banking Ordinance, granted under such Ordinances, comes within the meaning of civil rights in the context in which it appears in the fifth clause to the Sixth Schedule to the 1954 Constitution? If it does not then this appeal must be dismissed. If it does then I must proceed to a discussion of the effect of the proviso in relation thereto.

On the first issue, and without in any way attempting to define that most controversial term “a right,” or in this case a “civil right,” it seems to me that it cannot be contested that the appellant bank has not by virtue of the Banking Ordinance, a right to carry on the business of banking within the terms of that Ordinance. Further, that so long as the revocation takes place within the exercise of the powers granted under section 14 of that Ordinance, the appellant bank cannot be heard in effect to say that though it acquired the right to do business under the Ordinance, that right by virtue of the fifth clause to the Sixth Schedule of the 1954 Constitution can only be revoked in the manner provided for the determination of a person’s “civil rights and obligations.”

The cases of *Citizens Insurance Co. of Canada v. Parsons*, 7 A.C. 96 at page 110, and *Russell v. R* (1882) 7 A.C. 829 at page 838, show that in the determination of what are civil rights the important point to bear in mind is the context in which they appear. The Banking Ordinance was passed with a view to regulate and control the business of banking. It states the terms under which a licence to do such business shall be granted. It provides for the supervision of such a business and lays down penalties to be imposed on the violation of or the failure to comply with the provisions of the Ordinance. Finally, it also makes provision for the revocation



*a* of licences under certain circumstances. I am of the view  
 that, from the context in which the words “civil rights and  
*b* obligations” appear, from the matter that the Sixth Schedule  
 purports to deal with, it is clear that a right or licence to do  
 banking business under the Banking Ordinance does not  
 come within the meaning of “civil rights.” It seems to me  
*c* that the argument of Chief Williams breaks down with his  
 admission that if section 14 of that Ordinance had empow-  
 ered the Minister to revoke a licence at will, he would have  
 been unable to contest the revocation, for, if the bank was  
 possessed of “civil rights” under Clause 5 of the Sixth  
*d* Schedule of the 1954 Constitution, surely such “civil rights”  
 would be determinable only as provided therein, regardless  
 of whether the Ordinance made it revocable at the will of the  
 Minister. Such a provision would clearly be inconsistent  
 with the provisions of the Constitution.

*e* This first issue must, in my judgment, be resolved against  
 the appellant bank and for the reasons already set out I  
 would dismiss this appeal with costs which I would assess at  
*f* 20 guineas in favour of the respondents.

Ademola CJF and Mbanefo CJER concurred in the judg-  
 ment of Taylor FJ. Brett FJ concurred with the judgments of  
 Taylor FJ and Unsworth FJ.

*g* **UNSWORTH FJ:** I agree. The only right obtained by the ap-  
 pellants was the right to carry on banking in accordance with  
 their licence under the Banking Ordinance, and there can be  
*h* no infringement of paragraph 5 of the Sixth Schedule to the  
 1954 Constitution if that right is terminated in accordance  
 with the provisions of the Ordinance. In this respect the ap-  
 pellants are in much the same position as a lessee of land  
 under the Crown’s Land Ordinance, whose lease can be ter-  
*i* minated in accordance with the provisions of that Ordinance;  
 or as a lessee or licensee under a contract whose lease or  
 licence can be terminated in accordance with the terms of the  
 contract. I do not think that the fact that certain matters are  
*j* within the opinion of the Minister is material, any more than

it would be if a provision of this kind were to be inserted in a contractual lease or licence. *a*

The powers under section 14 of the Ordinance are administrative powers which are properly vested in the Minister, and it is for the Minister, and not the courts, to exercise those powers. In these circumstances, the functions of the courts only begin if and when it is alleged (which is not the case here) that the administrative powers have not been exercised in accordance with the Ordinance; it is these functions of the courts which are protected by the Constitution. *b* *c*

*Appeal dismissed.*

*a*

## Barclays Bank DCO v. Kuye and others

HIGH COURT OF LAGOS STATE

*b*

SOWEMINO J

Date of Judgment: 6 NOVEMBER 1961

L.D.: 313/1961

*c*

*Banking – Guarantee – Unilateral variation – Validity thereof*

### Facts

*d*

The plaintiffs instituted this action against the defendants jointly and severally for the recovery of the overdraft facilities and interest thereon granted by the plaintiff to the first defendant, who was at all material times to this action a customer of the plaintiff bank and a proprietor of the first defendant. The second and third defendants by separate bond of guarantee in writing acted as guarantor to the first defendant.

*e*

*f*

The second defendant by two different bonds of guarantee dated 8th September, 1956 and 15th February, 1958 respectively agreed with the plaintiffs that in consideration of the plaintiffs making advances or banking facilities available to the first defendant, he agreed to guarantee the repayment of all sums that might become due or owing to the plaintiffs from the first defendant together with interest and bank charges thereon. The third defendant also executed bond of guarantee dated 28th August, 1956 in support of the overdraft facilities granted by the plaintiff to the first defendant.

*g*

*h*

*i*

*j*

The guarantees respectively provided *inter alia*, that “the total amount recoverable hereon shall not exceed in the case of guarantee executed in 1956, £2,000, and in the case of that executed in 1958, £4,000.” When the 1956 guarantee was executed, first defendant was trading under the name and style of “Good Transport Contracts” and on 5th November, 1957 when the first defendant closed his bank account with the plaintiff bank, he had a debit balance of £2,574.17s.10d,

thereafter on the 28th November, 1957 he opened another account with the plaintiff in the name of “Kojumaribi Transport Contracts” which showed a debit balance of £2,574.17s.10d, the same amount as the outstanding debit balance on Good Transport Contracts account.

The first and third defendants based on the plaintiff action submitted to judgment for amount due on the overdraft facilities, whilst the second defendant refused to submit to judgment and contended that by transferring the debit balance of Good Transport Contract to Kojumaribi Transport Contracts the two guarantees executed by him in favour of the plaintiffs had merged and consequently his liability was only to the extent of £4,000 which was the amount specified in his guarantee dated 15th February 1958. The second defendant further argued that he was not liable because the first overdraft of £2,000 was exceeded by the first defendant, secondly that the overdraft sum of £2,000 covered by the first guarantee had been liquidated and thirdly that the plaintiffs by allowing the first defendant to exceed the first and second guaranteed amount of £2,000 and £4,000 respectively without notice of the excess to the second defendant had consequently been released from liability under the guarantee contract.

The court after reviewing the documentary evidence presented by the plaintiff in support of his claims as well as the second defendant’s defence subsequently gave judgment in favour of the plaintiffs.

### **Held –**

1. The guarantee by the second defendant has not been unilaterally varied by the banker because a guarantee for an advance not exceeding a certain sum is construed as merely limiting the liability of the guarantor to that amount and not, unless it appears clearly to be the intention, as making the liability conditional upon the advance being limited to that amount.

- a* 2. There has been no merger of one bond of guarantee in the other because where a person executes at different times more than one bond of guarantee in respect of liabilities, or proposed liabilities, of another to a third person, such bonds do not merge unless it is the intention of the parties that there should be a merger, and such intention should be clearly expressed.
- b*
- c* 3. Grant of amount exceeding that recoverable from the Guarantor is no alteration of the guarantee.

*Judgment for plaintiff.*

*d* **Case referred to in the judgment**

***Foreign***

- Blest v. Brown* (1862), 4 De G.F. and J. 367, 6 L.T. 620; 8 Jur. N.S. 602; 10 W.R. 569; 45 E.R. 1225
- e*

**Book referred to in the judgment**

Rowlatt on *Principal and Surety* (3ed) at 102

*f* **Counsel**

For the plaintiff: *Bentley*

For the defendants: *Moore*

*g* **Judgment**

- h* **SOWEMIMO J:** The first and third defendants have submitted to judgment in this case and the claim which is outstanding is that in respect of the second defendant. It is as against the second defendant as a guarantor for the first defendant for the sum of £6,000 jointly and severally with the first and third defendants on two written contracts dated
- i* the 18th September, 1956, and 15th February, 1958, respectively whereby in consideration of the plaintiffs making advances or banking facilities available to the first defendant, the second defendant agreed with the plaintiffs to
- j* guarantee the due payment of all sums due or owing to the

plaintiffs from the first defendant together with interest and bank charges thereon to a maximum of £6,000. *a*

In view of the nature of the defence set up, no evidence was led and the following documents were admitted as exhibits: *b*

1. The affidavit sworn to by Mr Hurst, a bank Official.
2. Guarantee dated 18th September, 1956, signed by second defendant in respect of Good Transport Contracts for £2,000. *c*
3. Guarantee dated 28-8-56 signed by third defendant – exhibit “C.”
4. Guarantee dated 15th August, 1958 signed by second defendant in respect of Kojumaribi Transport Contracts for £4,000 – exhibit “D.” *d*
5. Bank Statement in respect of Good Transport Contracts – exhibit “E.” *e*
6. Bank Statement in respect of Kojumaribi Transport Contracts – exhibit “F.”
7. Affidavit in support of notice of intention to defend – exhibit “G.” *f*

Paragraphs 3-5 of the Statement of Claim are as follows:–

- “3. The first defendant was at all times material to this action, the customer of the plaintiff bank and the Proprietor of the firm known as Kojumaribi Transport Contracts, formerly known as Good Transport Contracts. *g*
4. By a contract in writing dated the 18th day of September, 1956, the second defendant, in consideration of the plaintiffs making advances or banking facilities available to the first defendant, agreed with the plaintiffs to guarantee the due payment upon demand up to a maximum of £2,000 of any advances made by the plaintiffs to the first defendant. *h*
5. By a further contract in writing, dated the 15th February, 1958, the second defendant agreed with the plaintiffs, in addition to the guarantee referred to in paragraph 4 above, to guarantee the due repayment of a further sum of £4,000, such guarantee being in consideration of the plaintiffs granting further overdraft and banking facilities to the first defendant.” *i* *j*

- a* In the defence filed by second defendant, paragraphs 2 to 6 read as follows:
- b* “2. The second defendant admits paragraphs 1, 2 and 3 of the Statement of Claim.
3. The second defendant in reply to paragraph 4 of the statement of claim avers that if any guarantee was made by him in respect of an overdraft of £2,000 granted by the plaintiff to the first defendant, which is denied, such sum was exceeded by the first defendant in running his account.
- c* 4. Further that such excess of the guaranteed amount was never at any time notified by the plaintiff to the second defendant; that in any case, that amount of £2,000 had been fully liquidated.
- d* 5. The second defendant denies each and every allegation of fact contained in paragraph 5 of the statement of claim and will require strict proof thereof at the trial.
- e* 6. In further reply to paragraph 5 of the statement of claim the second defendant avers that, if he guaranteed advances made by the plaintiff to the first defendant, which is denied, the amount so guaranteed was in fact exceeded by the first defendant in the running of his account without such fact being made known to the second defendant who will contend at the trial that such an action by the plaintiff in failing to notify the second defendant of the excess of the overdraft guaranteed releases the second defendant from any obligation to the plaintiff if any.”
- f*
- g*

Three defences were thereby set up by the second defendant viz.

- h* (a) That the first overdraft of £2,000 was exceeded by the first defendant.
- (b) That the amount of £2,000 had been liquidated.
- i* (c) That the first defendant was allowed to exceed the guaranteed amount of £4,000 without notice being given to the second defendant. It is the contention of the second defendant that failure to notify excesses as per (a) and
- j* (c) above would release the latter from any liability.

Before discussing (a) and (c), I would first of all deal with (b) which is that the amount of £2,000 had been liquidated. It is not in dispute that first defendant was at one time, proprietor of the Good Transport Contracts which later on was changed to Kojumaribi Transport Contracts. According to exhibit E the Good Transport Contracts had a bank credit balance of £20.0s.0d on 3rd November, 1955 and on the 5th November, 1957, when its accounts seemed to have closed there was a debit balance of £2,574.17s.10d. The Statement of account of Kojumaribi Transport Contracts showed on 28th November, 1957, when the account was opened a debit of £2,574.17s.10d. This amount is the same as the outstanding debit of the Good Transport Contracts. The inference is that the debit of the former firm was transferred to the account of the second firm. If that is so it is second defendant's contention that the guarantee – exhibit "B" merges with exhibit "D" in the sense that the liability of the second defendant is to the extent of that shown in exhibit "D." If the statement of account of the two firms has been kept as a continuing one, there would have been no necessity for exhibits "E" and "F." There is nothing in exhibit "F" to show that in spite of the amount of £2,574.17s.10d debited against Kojumaribi Transport Contracts, the firm, had ever been in funds. The account, exhibit "F" has always been on the debit side – always overdraft. I can therefore not accept the contention, however, one considers this case, that the amount of £2,000 covered by the first guarantee had, at any time, been liquidated. With regard to the change of name and its effect, I refer to paragraph 12 of the guarantee.

With regard to (a) and (c) the contention, which is a legal one, is that since the plaintiffs have granted an overdraft over and above that guaranteed by exhibits "B" and "D" respectively, therefore the second defendant is released from his liability. The guarantees in both cases are in identical terms save the change in the name of the firms and amounts guaranteed. Paragraph 2 of the guarantee reads as follows:–

"This guarantee is to be a continuing security for the whole amount now due, or owing to you or which may hereafter at any



- a* time become due or owing to you as aforesaid by the Principal until the expiration of three months after the receipt by you from the undersigned or any one or more of them or their respective executors or administrators of notice in writing to discontinue it
- b* (but notwithstanding the discontinuance as to one or more of the undersigned the guarantee is to remain a continuing security as to the other or others) but nevertheless the total amount recoverable thereon shall not exceed the sum (of two thousand pounds in the
- c* case of exhibit “B” and four thousand pounds in the case of exhibit “D”) in addition to such further sum for interest thereon and other banking charges in respect thereof and for costs and expenses as shall accrue due to you within six months before or at any time after the date of demand by you upon the undersigned or
- d* any one or more of the undersigned for payment.” The operative words regarding the limitation of liability are “but nevertheless the total amount recoverable hereon shall not exceed . . .”

- The authorities cited by Chief Moore go to show that where
- e* there is any variation in any terms of a contract of guarantee, to which the guarantor did not consent, that is sufficient to set aside the obligation of the surety. On page 102 of *Rowlatt on Principal and Surety* (3ed) the principle is set out thus:

- f* “A guarantee will only extend to a liability precisely answering the description contained in the guarantee. And the onus is upon the creditor to show that the surety consented to any alteration. But the surety can afterwards ratify his liability, though the principal contract has been varied or only partly performed. It must always be
- g* recollected, said Lord Westbury in *Blest v. Brown* in what manner a surety becomes bound. You bind him to the letter of his engagement. Beyond the proper interpretation of that engagement you have no hold upon him. He receives no benefit and no consid-
- h* eration. He is bound, therefore, merely according to the proper meaning and effect of the written engagement that he entered into. If that written engagement be altered in a single line, no matter whether it be altered for his benefit, no matter whether it be innocently made, he has a right to say, the contract is no longer that for
- i* which I engaged to be a surety: you have put an end to the contract that I guaranteed and my obligation is at an end.”

- In the case before the court, plaintiff’s case is that there has been no alteration whatsoever. The obligation of the second
- j* defendant remains the same. The terms have not been altered.

It is a fact that the overdraft of the debtor has been increased <sup>a</sup>  
over and above that amount recoverable. But on a proper con-  
struction of the document there is no limit placed on amount of <sup>b</sup>  
the overdraft to be granted. All the guarantor contracted for is  
that “but nevertheless the total amount recoverable hereon  
shall not exceed” either £2,000 or £4,000 as the case may be. It  
is my contention therefore that to grant any amount exceeding  
that recoverable from the guarantor is no alteration of the guar- <sup>c</sup>  
antee. All the authorities cited by Mr Bentley support this  
contention. Even where the contract provides that advances  
should not exceed a certain amount, the law is “a guarantee for  
advance not exceeding a certain sum is construed as merely <sup>d</sup>  
limiting the liability of the surety to that amount, and not,  
unless it clearly appears to be the intention as making, the  
liability conditional upon being limited to that amount. And  
this construction has been adopted, even where grammatically, <sup>e</sup>  
the limit seems imposed, not upon the liability, but upon the  
advance.” The law as I have just stated has been followed in all  
authorities cited by Mr Bentley.

I have earlier discussed that there is no merger of one bond <sup>f</sup>  
of guarantee in the other. If it is the intention of the parties  
that that should be so, it would have been clearly stated.

In the circumstances therefore, there would be judgment <sup>g</sup>  
against the second defendant jointly and severally with the  
first defendant, and with the third defendant, subject to the  
limit of his liability, for the sum of £6,000, and costs as-  
sessed at 60 guineas. The plaintiff is awarded a further sum  
of 20 guineas costs in addition to the 60 guineas costs to <sup>h</sup>  
which the second defendant and the other defendants are  
jointly and severally liable.

I am not disposed to grant the interest claimed.

*Judgment for the plaintiff.* <sup>i</sup>

*a*

## Barclays Bank DCO v. Hassan

*b*

HIGH COURT (WEST)

CHARLES J

Date of Judgment: 9 NOVEMBER 1961

Suit No.: AB/4/61

*c*

*Banking – Mortgages – Equitable mortgage – Memorandum of deposit prepared by mortgagee’s agent executed by illiterate mortgagor without compliance with Illiterates Protection Ordinance – Validity or enforceability of memorandum – Illiterates Protection Ordinance Cap 88, 1948*

*d*

*Overdraft – Interest – Customer receiving statement of account showing interest without protest – Effect – 10% (ten percent) compound interest – Reasonableness of in*

*e*

*West Africa – Interest rate – From “closing of account pre-judgment and post-judgment”*

### Facts

*f*

The plaintiff’s claims were for:–

*g*

(a) £2,268.19s.0d being the balance of money owing by the defendant by way of loan on overdraft up to the 14th December, 1960.

*h*

(b) Compound interest calculated at monthly, rest at 10 percent per annum for the 5th December, 1960 until payment.

*i*

(c) Execution of a legal mortgage in favour of the plaintiff in respect of certain land by way of specific performance of an equitable mortgage by the defendant to the plaintiff to secure payment of the said overdraft.

*j*

The defendant admitted liability for the principal sum of £2,268.19s.0d but denied liability for the compound interest. She also denied having granted an equitable mortgage on her landed property.

On the second claim for compound interest calculated of compound interest of 10 percent per annum from 15th December, 1960 until payment, Counsel for the plaintiff conceded that it cannot recover interest at a higher rate than simple interest of 5 percent per annum.

**Held –**

1. Compound interest of 10 percent on an overdraft is not unreasonable in West Africa.
2. Where a customer of a bank receives statement of accounts from time to time showing the appreciable amounts being charged for interest and did not query those amounts in any way he would be deemed to have accepted those charges and the rate at which they were calculated.
3. A bank is entitled to interest from the date of the closing of the account until payment on the sum adjudged due at the date of the issue of the Writ, but from the date of judgment to payment at no higher rate than simple interest of 5 percent per annum.
4. Where a memorandum of deposit of title deeds is prepared by a bank/mortgagee's agent on behalf of an illiterate mortgagor, failure to comply with the Illiterates Protection Ordinance renders the memorandum of deposit unenforceable against the illiterate mortgagor, but not void.

*Judgment for plaintiff on all three items of claims.*

**Cases referred to in the judgment**

***Nigerian***

*Akohwere of Okan v. Emayabor and another* (1959) W.R.N.L.R. 83

*Ntiashagwo v. Amodu and another* (1959) W.R.N.L.R. 273

*Pappoe v. Bank of British West Africa* (1933) 1 W.A.C.A. 287

- a Paul v. George* (1959) 4 F.S.C. 198  
*S.C.O.A. v. Okon* (1959) 4 F.S.C. 220
- b Nigerian statutes referred to in the judgment*  
 Illiterates Protection Ordinance Cap 88 (1948 Edition)  
**Counsel**
- c For the plaintiff: Okenla*  
 For the defendant: Aiyeola
- d Judgment*  
**CHARLES J:** This is a claim for (a) £2,268.19s.0d being the balance of money owing by the defendant by way of loan on overdraft up to the 4th December, 1960 (b) compound interest, calculated at monthly rests, at 10 percent per annum, from the 5th December, 1960 until payment, and (c) execution of a legal mortgage in favour of the plaintiff in respect of certain land by way of specific performance of an equitable mortgage by the defendant to the plaintiff to secure repayment of the said overdraft.
- e*
- f*
- g* The defendant has admitted liability for so much of the sum of £2,268.19s.0d as represents principal but has denied liability for so much of that sum as represents compound interest, calculated at monthly rests at 10 percent per annum, and for subsequent interest at that rate until payment, and has denied having granted an equitable mortgage on her landed property. The novel submission on her behalf was
- h* that the plaintiff should be non-suited so as to allow for negotiations of a settlement on the basis of a reduced rate of interest. It was common ground between the parties that the rate of compound interest charged on the overdraft was 10 percent calculated at monthly rests.
- i* The evidence adduced, because of the defendant's admissions, was brief. An officer of the plaintiff bank deposed that the defendant opened an account with the bank in 1954 and that in March, 1956 she executed a memorandum of deposit
- j* of deeds to secure an overdraft with the bank. The reception

of that document was objected to on the ground that it had <sup>a</sup>  
been executed by an illiterate and without compliance with  
the requirements of the Illiterates Protection Ordinance <sup>b</sup>  
(Cap 88 of the Laws of Nigeria 1948, which has since been  
replaced by Illiterates Protection Law, Cap 47 of the Laws  
of the Western Region 1959). The document, which was  
admitted subject to the objection, provided that interest <sup>c</sup>  
would be charged on the overdraft at the usual rate. The  
plaintiff's officer also tendered copies of statements of ac-  
counts which were furnished to the defendant from time to  
time. No objection was taken to those copies and they were  
admitted. They show the state of the defendant's account <sup>d</sup>  
from time to time with interest for each month in which the  
account was overdrawn having been debited. The rate of  
interest did not appear in the statement but as the amount of  
overdraft increased the amount debited for interest rose ap-  
preciably. The officer also deposed that he knew that the <sup>e</sup>  
defendant could sign her name but he did not know whether  
she was otherwise illiterate.

The defendants evidence was only that she cannot read and <sup>f</sup>  
write, except to sign her name, and that she did not mortgage  
her property to the plaintiff or to any one else.

In my judgment the plaintiff was entitled to charge interest at  
10 percent, calculated by monthly rests, on the overdraft. That <sup>g</sup>  
rate of interest is not unreasonable in West Africa (*Pappoe v.*  
*Bank of British West Africa* (1933) 1 W.A.C.A. 287). As the  
defendant has received accounts from time to time showing the  
appreciable amounts being charged for interest and, even if she <sup>h</sup>  
were illiterate, had the means of being informed of the  
amounts debited against her in that respect, and as there is no  
evidence that she bothered to query those amounts in any way,  
she must be deemed to have accepted those charges and the <sup>i</sup>  
rate at which they were calculated. The plaintiff, therefore, in  
my judgment succeeds on the first item of claim.

As to the second item of claim, the plaintiff has conceded, <sup>j</sup>  
whether rightly or wrongly that it cannot recover interest at a

- a* higher rate than simple interest of 5 percent per annum. As the plaintiff is entitled to interest from the date of the closing of the account until payment on the sum adjudged due at the
- b* date of the issue of the writ, but from the date of judgment to payment at no higher rate than simple interest of 5 percent per annum, I consider it proper to award, under the second item, interest at that rate on the amount awarded on the first item.
- c* As to third item of claim, apart from the memorandum of deposit of deeds, there is no evidence that the defendant did deposit deeds relating to her landed property. The existence of the equitable mortgage, therefore, depends on the validity or enforceability of the memorandum.
- d* Counsel for the defendant, in support of his objection to the admissibility of the memorandum, relied upon my judgment in *Ntiashagwo v. Amodu and another* (1959) W.R.N.L.R. 273
- e* at 276-277, where I expressed the opinion that any document which had been prepared for an illiterate was void and inadmissible in evidence if the preparer had not signed it as required by the Illiterates Protection Ordinance.
- f* Learned Counsel for the plaintiff at first conceded that if the memorandum of deposit of deeds was invalid under the Illiterates Protection Ordinance the court was bound to reject it whether or not the invalidity had been pleaded. He made that
- g* concession with reference to the admissibility of the document as evidence of the defendant's liability to pay compound interest at the rate of 10 percent per annum, a liability which arose independently of the document. On the question
- h* whether the memorandum could be considered as creating an equitable mortgage, learned Counsel submitted that the objection could not be considered as it had not been raised as a defence in the pleadings and he had been taken by surprise. The concession and subsequent submission savour of a blowing
- i* hot and cold, on the face of it, but no doubt learned Counsel had in mind what I think is the true principle, namely, that while objection to the validity of a document which is evidentiary only of a fact in issue need not, and should not, be
- j* pleaded, it must be pleaded if the document is one which has

been pleaded by the party relying upon it as a basis of his cause of action, as is the case of the memorandum of deposit of deeds in respect of the claim for specific performance of an equitable mortgage. The latter obligation to plead invalidity is subject to the exception that when a document appears on its face or from the evidence adduced, clearly to be void for illegality, the court will refuse to give effect to it although illegality has not been pleaded.

I am satisfied from further consideration of my remarks in *Ntiashagwo's* case, that non-compliance with the requirements of the Illiterates Protection Ordinance by the preparer of a document renders the document void, were too widely stated and inaccurate on that account. What is the exact general effect of such non-compliance on the enforceability of a document and its admissibility as evidence need not be considered here. It is sufficient to say that the document is not rendered void in the strict sense, as obviously the illiterate can rely upon it (*Akohwere of Okan v. Emayabor and another* (1959) W.R.N.L.R. 83) but it is unenforceable by the preparer against the illiterate in respect of legal rights created by it in favour of the former (*S.C.O.A. Zaria v. Okon* (1959) 4 F.S.C. 220).

The memorandum of deposit seems clearly to have been prepared by the plaintiff's agent on behalf of the defendant. Consequently, if the defendant were an illiterate the document would be unenforceable against her but not void. But, as the defendant has not pleaded the necessary facts which render the document unenforceable against her, it is not open to the court to consider them: unenforceability of a document, unlike illegality, must always be pleaded (*Paul v. George* (1959) 4 F.S.C. 198). I should perhaps add that even if the effect of non-compliance with the Illiterates Protection Ordinance were to render the memorandum of deposit void for illegality, which it was not I do not think that this would have been a case for the court to hold the document void for illegality when illegality has not been pleaded. The plaintiff may have had evidence as to the defendant being literate



- a* which it was surprised into not calling so that all the relevant evidence as to illegality may not have been adduced.
- b* It follows that the plaintiff is entitled to judgment on the third claim, that for specific performance.  
There will be judgment for the plaintiff on all three items of claim with costs of the action.
- c* *Judgment for plaintiff.*

## British and French Bank Limited v. Opaleye

FEDERAL SUPREME COURT

ADEMOLA CJF, TAYLOR, BAIRAMIAN, FJJ

Date of Judgment: 11 JANUARY 1962

F.S.C.: 43/1961

*Banking – Banker/customer relationship – Customer having two accounts – Bank utilising credit in one account to reduce overdraft in the other without notice or consent of customer – Propriety of*

### Facts

The respondent, a customer of the appellant bank, had two accounts with the bank; one in his own name and another in the name of Fekemo Brothers, a firm of which he was the sole account holder. The firm's account was overdrawn to the extent of £500.00, and when a cheque of £350.00 was paid into the private account, the bank decided without notice to or consent of the respondent, to utilise money from the private account in order to reduce the overdraft in the firm's account, and told the customer that he could not draw on his private account.

The respondent's action against the bank at the Magistrates' Court for damages succeeded. The appeal by the appellant to the High Court was dismissed. The appellant further appealed to the Federal Supreme Court.

### Held –

1. Where a customer has two accounts with a bank, one in the customer's own name and the other in a business name, there is, in the absence of any express agreement to the contrary, an implied agreement that the accounts are to be kept distinct and separate.
2. Where by agreement, express or implied, a customer's several accounts with the banker are to be kept distinct

- a* and separate, the banker has no right to combine them or to transfer assets or liabilities from one account to another, without reasonable notice of the intention so to do, or
- b* without the consent of the customer.

*Appeal dismissed.*

### Cases referred to in the judgment

- c* **Foreign**
- Buckingham and Co v. London and Midland Bank Ltd* (1985) 12 T.L.R. 70
- Garnett v. McKewan* (1872) L.R. 8 Ex. 10
- d* *Greenhalgh (W.P.) and Sons v. Union Bank Manchester* (1924) 2 K.B. 753

### Book referred to in the judgment

- e* Halsbury's *Laws of England*, Volume 2, (3ed) at page 172, paragraph 322

### Counsel

- f* For the appellant: *Impey*

### Judgment

- g* **BAIRAMIAN FJ:** The bank has appealed against the decision of de Lestang CJ, of Lagos, who, on 16th November, 1959, dismissed the banks appeal from the judgment given on the 29th June, 1959, by JA Adefarasin Esq., then Acting Chief Magistrate.

- h* Mr Opaleye, the customer, had two accounts at the bank, one in his own name, another in the name of his Fakemo Brothers, of which he was the sole account holder, and which will be referred to as the firm's account. The firm's account was overdrawn to the extent of £500, and when a
- i* cheque of £350 was paid into the private account, The bank decided to utilise money from the customer that he could not draw on his private account, then the customer told the bank that the £350, less his commission, belonged to the stranger whose property he had sold; but this aspect of it does not
- j* seem to make any difference in the case. The point in the

case is whether the bank was entitled to combine the two accounts without notice or without consent of the customer. The learned Acting Chief Magistrate thought not, and the learned Chief Judge thought not, also. The bank has argued that that was a mistake in law.

Mr *Impey* has drawn attention to the case of *Garnett v. McKewan* (1872) L. R. 8 Ex.10 and to *Greenhalgh (W.P.) and Sons v. Union Bank of Manchester* (1924) 2 K.B. 153. He has said that the former case means that the bank can set off one account against another without notice, provided there is no agreement, express or implied by the course of dealing to the contrary. In regard to the latter case, he has said that it means the converse proposition, namely that the bank cannot set of one account against another unless there is an agreement express or implied to that effect, without notice.

The statement of law given in Halsbury's *Laws of England* (3ed) Volume 2 at page 172, in paragraph 322, is as follows:—

“Combination of different accounts. Unless precluded by agreement, express or implied from the course of business, the banker is entitled to combine different accounts kept by the customer in his own right, even though at different branches of the same bank, and to treat the balance, if any, as the only amount really standing to his credit.”

The note given *Garnett v. McKewan*, and *Greenhalgh (W.P.) and Sons v. Union Bank of Manchester*, (with the words “banker precluded by agreement” in brackets). Namely *Buckingham and Co v. London and Midland Bank Ltd* (1885) 12 T.L.R. 70 (with the words “where the banker was precluded by agreement” in brackets). And another case, namely, *Buckingham and Co v. London and Midland Bank Ltd* (1885) 12 T.L.R. 70, (with the words “where the banker was precluded by the course of business” in brackets).

The point about a customer having different accounts “in his own right” is probably this, namely, that he has both

*a* accounts in his own name, and that neither account is a trust account.

*b* *Garnett v. Mckewan* was a case where the customer had accounts at two different branches, and one of them was in debit, and bank without giving him notice utilised the credit in one account and refused to honour cheques drawn on the other account. The Court of Exchequer were all of opinion  
*c* that the bank was entitled to do that, because there was no special contract and no usage to prevent the bank from doing that, or to require the bank to give him notice before doing it. The accounts were both in the same name.

*d* *Greenhalgh, etc.*, is a more difficult case. It has the following in the head not as the *ratio decidendi*:

*e* “A banker who has agreed with a customer to open two accounts in his name, and who holds bills which the customer has specifically appropriated to one account, is not entitled, without the customers consent, to transfer the proceeds of such bills to the other account.”

*f* Greenhalgh and Sons sold cotton to Winston and Co, who accepted bills drawn on them by the former. Winston and Co. sold cotton to other firms, who gave bills in payment. These Winston and Co paid into their provisional bill account; according to the agreement between them and the  
*g* bank, bills paid into account would be kept there until maturity, when the proceeds of collection would be transferred to the general account, unless here were special instructions. Winston and Co told the bank later that they wanted the  
*h* proceeds when collected to the general account, unless there were special instructions. Winston and Co told the bank later that they wanted the proceeds when collected to be used to pay Greenhalgh and Sons; the bank transferred the proceeds  
*i* when collected to the general account of Winston and Co, where they were swallowed by its debit balance.

*j* We are not concerned here with the question of how it was Greenhalgh and Sons could have sued the bank – it was on the ground of equitable assignments and notice of it to the

bank – because here it is not Mr Bola, the gentleman for *a*  
who the £350 or most of it was said to be intended, but  
Mr Opaleye, the customer of the bank, who sued the bank.  
Here we are concerned with the question of moving money *b*  
from one account to another. Swift J said of the *Greenhalgh*  
case at 164:–

“If the banker agrees with his customer to open two or more ac-  
counts, he has not in my opinion, without the assent of the cus- *c*  
tomer, any right to move either assets or liabilities from the one  
account to the other; the very basis of his agreement with his cus-  
tomer is that the two accounts shall be kept separate, and if the  
customer pays bills drawn upon him not into his general account, *d*  
where they will be discounted and he will receive the benefit of  
being able to draw against them, but in to an account in which they  
will only be used either to pay bills accepted by the bank or bills  
drawn by the customer which are specifically to meet, I do not  
think a banker, any more than any other individual, can change *e*  
them from one account into the other without the customer’s as-  
sent. On this point it seems to me that the only question to be de-  
cided is what is the agreement between the banker and the  
customer? And if that agreement is, as I find it to be in this case,  
that there shall be a general account in to which bills shall be paid *f*  
for some other purpose, bills or their proceeds cannot be moved  
from one account to the other without the consent, express or im-  
plied, of the customer.”

It turns out to be a question of the agreement between the *g*  
customer and the bank. Appellant, as one may infer from the  
opening part of that passage, the agreement to keep the two  
accounts distinct and separate is inherent in the fact that the  
banker has agreed with his customer to open two or more *h*  
accounts.

If the bank may merge them without notice, one can see  
that it may do him great harm. Suppose for example, that the *i*  
customer has a private account and a business account; that  
the business account is in funds, but the other is in debt: the  
customer, not knowing that the bank had done or will do,  
gives out cheques on his business account to pay trade debt, *j*  
say for goods bought; if the bank does not honour them on

*a* presentment, it will do him harm. That is illustrated in *Buckingham and Co v. London and Midland Bank Ltd (supra)*. There the customer had a loan account relating to a secured advance, and a current account; the bank thought that the security was inadequate and transferred the loan account to the current account, with the result that cheques given on the current account were not honoured by the bank. The bank called evidence of Managers of banks for the custom entitling a bank to close an account without any obligation to give notice. The learned trial Judge, Matthew J, left these questions to the jury:—

- d* 1. Was it the course of dealing between the plaintiff and defendants that plaintiff was to be allowed to draw upon his open account without reference to his loan account?
2. If yes, then was the plaintiff entitled to a reasonable notice that that course of business would be discontinued?
- e* 3. Was such a reasonable notice given?

The jury answered (1) and (2) in the affirmative and (3) in the negative, and awarded damages. The dominant point in the case is the importance attached to the course of business between customer and bank.

*g* In effect, the course of business between them implies a contract by which the relation of banker and customer is regulated. In the case in hand, before the £350 was paid into the private account, that account had a credit of under £2, and the firms' account had a debit of £500. Such being the case the bank could not say that they kept an eye on the private account, but the customer could say that he was being allowed to overdraw on the firm's account without reference to the state of his private account, and could in my view rightly, argue that the case fell within the exception in the statement of the law in Halsbury's, which was quoted earlier in this judgment.

*i* I have dealt with this case as if it were quite like the English cases which I have cited from Halsbury's, under the above statement of law. I should, however note that in those cases the account were in the same name, though one

account was called loan account and the other the current *a*  
account, or in the *Greehalgh* case, the provisional bill  
account is in the name of “Opaleye, Rafiu Afolabi Bello,”  
and the other account is in the name of “Fakemo Brothers.” *b*  
And I think it can be said with justice that very strongly  
implied an agreement to keep them separate and distinct,  
without any right on the part of the bank to combine them or  
to transfer assets from one account to the other, at any rate *c*  
not without reasonable notice of the intention so to do.

I would disallow the appeal. No question of cost arises.

Ademola CJF and Taylor FJ concurred in the judgment of  
Bairamian FJ.



*a*

**Barclays Bank DCO v. Baderinwa;  
In re: Lagos Executive Development Board**

*b*

HIGH COURT OF LAGOS STATE

DE LESTANG J

Date of Judgment: 26 FEBRUARY 1962

Suit No. L.D.235/57

*c*

*Banking – Garnishee – Order nisi – Application to be made absolute – Where there is doubt as to ownership of attached debt – Inquiry as to ownership – Proper step to take*

*d*

**Facts**

*e*

The plaintiffs applied for an order to make absolute a garnishee order *nisi* attaching a sum of money due to be paid to the defendant by the garnishee the amount represented the value of land compulsorily acquired by the garnishee, while the defendant has written that he was the owner in fee simple of the land, at the trial he contended that the land was family property and he was merely the head of family.

*f*

**Held –**

*g*

1. The garnishee order absolute cannot be granted where there is doubt as to whether or not the debt attached belongs to the judgments debtor absolutely; nor will it be discharged. An inquiry as to ownership of the debt will be directed.

**Nigerian statutes referred to in the judgment**

*h*

Interpretation Act, Cap 89, section 3

Sheriffs and Civil Process Act, Cap 189, section 84(1)

**Counsel**

For the plaintiffs: *Murray*

*i*

For the defendant: *Bashua*

**Judgment**

*j*

**DE LESTANG J:** The facts of this case are very simple. Barclays Bank having got a judgment for debt against one

Baderinwa obtained a garnishee order *nisi* attaching a sum of money due to Baderinwa by the L.E.D.B. The garnishee admits the debt and the question for decision is whether the garnishee order *nisi* should be made absolute or not.

It is contended for Baderinwa that the order *nisi* is bad because it contravenes section 84(1) of the Sheriffs and Civil Process Act. The relevant portion of that section reads:—

“Where money liable to be attached by garnishee proceedings is in the custody or the control of a public officer in his official capacity . . . the order *nisi* shall not be made . . . until consent to such attachment is first obtained from the appropriate officer . . .”

Then follows the definition of “appropriate officer” in subsection 3, thus:

“appropriate officer means—

- (a) in relation to money which is in the custody of a public officer who holds a public office in the public service of the Federation, the Attorney-General.
- (b) Not applicable.”

It is submitted on behalf of Baderinwa by Mr *Bashua* that the L.E.D.B. is a public officer within the meaning of section 84(1). In support of his submission Mr *Bashua* relies on the definition of public officer in the Interpretation Act which reads as follows:—

“‘Public officer’ or ‘public department’ extends to and includes every officer or department invested with or performing duties of a public nature whether under the immediate control of the Governor-General or of the Governor of a region or not.”

For the bank, Mr Murray concedes that the L.E.D.B. comes within the definition of “public officer” in the Interpretation Act but he contends that “public officer” in section 84(1) has a restricted meaning by virtue of the definition of appropriate officer in subsection 3 thereto which I have already quoted. He argues that as a result section 84(1) applies only “to a public officer who holds a public office in the Public Service of the Federation,” and that the L.E.D.B. is not such a public officer. In my view Mr Murray’s argument is correct.

- a* The expression “public officer” in section 84(1) of the Act has a restricted meaning by reason of the definition of “appropriate officer” and only applies to a public officer who holds a public office in the Public Service of the Federation.
- b* The L.E.D.B. may be a public officer within the meaning of the Interpretation Act but it holds neither a public office nor an office in the Public Service of the Federation. The Constitution of the Federation of Nigeria requires appointments to offices in the Public Service of the Federation to be made by a Public Service Commission for the Federation. Since the L.E.D.B. is a statutory Corporation whose members are appointed by a Minister without reference to the Public Service Commission it follows in my view that it is not a public office in the Public Service of the Federation.

- c* It is further contended on behalf of Baderinwa that the order *nisi* should not be made absolute as the funds in the hands of L.E.D.B. are not the sole property of Baderinwa but belong to him jointly with two or three other members of his family.

- d* The L.E.D.B. holds £250 being the value of a portion of a larger piece of land acquired by it compulsorily. There were many claims to various portions of the land and the matter was referred to the court for decision. In his statement of interest Baderinwa averred that he was the owner in fee simple absolute of a portion of the land but in these proceedings he alleges that the land was purchased with family money and that as head of the family he held it in trust for the family. Whether it is so or not it is impossible for me to decide on the evidence before me. In these circumstances I can neither make the order *nisi* absolute nor discharge it. If the bank wishes to proceed with the garnishee proceedings it seems to me that the proper course for me would be to direct that the L.E.D.B. retain the money and pay it into Court pending the result of an enquiry whether it belongs to Baderinwa solely or to Baderinwa jointly with other members of his family.

*Inquiry as to ownership directed.*

## Oduwobi and others v. Barclays Bank DCO

FEDERAL SUPREME COURT

UNSWORTH, TAYLOR, BAIRAMIAN, FJJ

Date of Judgment: 12 MARCH 1962

F.S.C.: 68/1961

*Banking – Letters of credit – Bank only needs to prove condition under which payment was made to entitle it to recover*

*Banking – Letters of credit – Payment made on same under a mistake on presentation of fraudulent documents – Bank can recover in an action for money had and received – Letters of credit – Instruction to pay recipient on presentation of documents – Documents presented must be genuine; Bills of Exchange – Payment upon bill of exchange which had been accepted – Action lies against beneficiary for money had and received*

*Contract – Action for money had and received – Principles applicable*

### Facts

Barclays Bank, who were respondents held letters of credit in favour of the Colony Overseas Trading Company.

From the letters of credit the bank was instructed to pay a certain amount to the defendants' firm upon the presentation of documents of shipment of certain goods from Lagos. The defendant, Michael F'Oluwaso Oduwobi presented documents purporting to show a shipment of that value and a little more. The bank as a result credited the defendants firm with that amount, most of which was withdrawn. It was subsequently discovered that the shipping documents presented to the bank contained false representation as no goods of that value stated in those documents had been shipped from Lagos.

The trial Judge found as a fact that the defendant, Michael F'Oluwaso Oduwobi was aware of the false representation

*a* in the documents at the time of presentation, and gave judgment in favour of the plaintiffs in the amount claimed. The defendants appealed to the Federal Supreme Court.

*b* **Held –**

*c* 1. That Barclays Bank paid the money under a mistake which was induced by the fraudulent conduct of the first appellant and as such, an action for money had and received lies in the circumstances of this case.

*d* 2. That the instruction to the bank (Barclays Bank) by the Colony Company were to pay money “on presentation of documents for the first shipments” and this must be clearly construed as meaning genuine and not fraudulent and it was found that the first appellant was aware of the fraud, the money paid thereunder is recoverable by the respondent.

*e* 3. That although the payment was made upon a bill of exchange which had been accepted, an action lies against the appellants in the circumstances of this case.

*f* 4. That the payment to the appellants depended upon shipment and not upon delivery of the goods and so the bank needed not call evidence to show that the goods were delivered.

*g* *Appeal dismissed.*

### **Cases referred to in the judgment**

#### ***Foreign***

*h* *Brook’s Wharf and Bull Wharf Ltd v. Goodman Bros* (1937) I.K.B. 534; (1936) 3 A.E.R. 696: 106 L.J.K.B. 437, 156 L.T. 4:53 T.L.R. 126: 80 Sol. Jo. 991

*i* *Holt and others v. Markham* (1923) 1 K.B. 504, 92, L.J.K.B., 406,128, L.T 719, 67 Sol. Jo. 314; [1922] All E.R. Rep. 134

*Kelly v. Solari* (1952) T.R. 26

*j* *London Joint Stock Bank v. Macmillan and Arthur* (1918) A.C. 777, 88 L.J.K.B. 55, 119, L.T. 387, 34 T.L.R. 509, 62

Sol. Jo. 650, [1918] All E.R. Rep. 30. a  
*Moses v. Macferlan* (1760) 2 Burr. 1005, 1 Wm. B.I. 219, 97  
 F.R. 676  
*Sinclair v. Brougham and others* (1914) A.C. 398, 83, L.J. b  
 Ch. 465 III, L.T.I., 30 T.L.R. 315, 58 Sol. Jo. 302, [1914 –  
 1915] All E.R. Rep. 622

### Counsel

For the appellants: *Sanni* c

For the respondents: *Akintoye*

### Judgment

**UNSWORTH FJ:** (*Delivering the judgment of the court*) We d  
 dismissed this appeal on the 5th February, 1962, and said  
 that we would give our reasons later. We now give our rea-  
 sons.

The facts of the case are that in June, 1956, Barclays Bank, e  
 who are the respondents in this case, held letters of credit in  
 favour of the Colony and Overseas Trading Company (here-  
 inafter referred to as the Colony Company). These letters of  
 credit had been opened by a German Bank in favour of a f  
 customer in Germany. The opening bankers' instructions  
 were issued to Barclays Bank in Lagos through a London  
 Bank, and authorised the purchase of shipping documents  
 presented by the Colony Company. By letters dated 29th  
 June, 1956 and 6th September, 1956, the Colony Company g  
 instructed Barclays Bank to pay £3,800 to the order of  
 Messrs F'Olu and Son, who are the present appellants, on  
 presentation of documents for the first shipment. At the end  
 of September the first defendant (who is a partner in the  
 defendant firm) presented shipping documents purporting to h  
 show a shipment of goods to the value of £3,837.10s.0d. The  
 account of the appellant firm was accordingly credited,  
 though the money did not remain in the account as a sub-  
 stantial sum was withdrawn at the beginning of October. i  
 The documents were then remitted to the intermediary Lon-  
 don Bank, who then paid the face value of the documents to  
 the London Office of Barclays Bank. It was subsequently  
 discovered that the shipping documents presented to Bar-  
 clays Bank by the first defendant, in fact contained false j

*a* representations, as no goods of the value stated in those documents had been shipped from Lagos.

*b* The main ground of appeal was that no action for money had and received lay against the appellants at the instance of Barclays Bank. It was said that Barclays Bank might have some claim against their principals in London, or against the Colony Company, but not against the appellants who had  
*c* received the money. In support of this argument Counsel submitted that no contract existed between the parties, and said that in these circumstances the money was not recoverable. He referred to the cases of *Kelly v. Solari* (1952) T.R.  
*d* 26; *Sinclair v. Brougham and others* (1914) A.C. 398; *Holt and others v. Markham* (1923) 1 K.B., 504, 513; *London Joint Stock Bank v. Macmillan and Arthur* (1918) A.C. 777. The case of *Brook's Wharf and Bull Wharf Ltd v. Goodman*  
*e* *Brothers* (1937) 1 K.B. 534, was also referred to in the course of argument.

The facts of the cases referred to above were different from those in the present case, but the cases are of assistance in  
*f* considering the general principles relating to an action for money had and received. The action is based on what is generally described as quasi contract and which was explained by Lord Haldane, in *Sinclair v. Brougham and others* (*supra*) at 415, in this way:—  
*g*

“Consideration of the authorities has led me to the conclusion that the action was in principle one which rested on a promise to pay, either actual or imputed by law. *Moses v. Macferlan* is the leading  
*h* case on this point. It was an action on the case for money had and received under circumstances where any notion of an actual contract was excluded. But Lord Mansfield explained how in such circumstances the law treated the defendant as being in the same position as if he had incurred a debt: ‘If the defendant be under an  
*i* obligation, from the ties of natural justice, to refund; the law implies a debt, and gives this action, founded on the equity of the plaintiff’s case, as it were upon a contract.’”

Lord Mansfield, in the case of *Moses v. Macferlan* referred to  
*j* above, said that the action lies “for money paid by mistake; or

upon a consideration which happens to fail, or for money got through imposition, express or implied; or extortion, or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances.”

In considering the relationship that must exist between the parties in order to sustain an action for money had and received, Lord Wright MR in *Brook's Wharf and Bull Wharf Ltd v. Goodman Bros (supra)* said this:

“The obligation (to repay) is imposed by the court simply under the circumstances of the case and on what the court decides is just and reasonable having regard to the relationship of the parties. It is a debt or obligation constituted by the act of the law, apart from any consent or intention of the parties or privity of contract.”

Now, do these principles apply to the present case? There can be no doubt that Barclays Bank paid the money under a mistake, which was induced by the fraudulent conduct of the first appellant. In my view, a claim for money had and received lies in the circumstances of this case.

The next point argued by Counsel, under grounds 2 and 3 of the grounds of appeal, was that the instructions to the bank were genuine, and money received by persons who did not know of the fraud could not be recovered from them. There was no substance in this ground of appeal. The instructions to the bank by the Colony Company were to pay the money “on presentation of documents for the first shipment,” and this must clearly be construed as meaning genuine and not fraudulent documents. The documents in this case were fraudulent, and the trial Judge held that the first appellant was aware of the fraud at the time of presentation of the documents.

The next point argued was under ground five of appeal. It was said that the payment was made on a bill of exchange which had been accepted. In these circumstances it was submitted that the action should have been against the Colony Company and not against the present appellants. I think



- a* that this point has already been disposed of under the first ground, where I have said that action lay against the appellants in the circumstances of this case. It was further argued
- b* that there was no evidence of fraud, and in respect of this ground of appeal I would merely say that I accept the finding of fact as made by the trial Judge.

Another argument was that evidence should have been

*c* called from Germany to show that the goods had never been delivered. There is no substance in this point, as payment under the letters of credit depended upon shipment and not upon delivery.

*d* We also dismissed the appeal against the counterclaim, as it related to the £401.19s.0d which had already been credited to the appellants.

For the reasons stated in this judgment we dismissed the

*e* appeal. The respondents are entitled to costs which I would assess at 23 guineas.

*Appeal dismissed.*

Taylor, FJ and Bairamian FJ.

**Barclays Bank DCO and others v. Onashile;  
Onashile v. Idowu and others; In re: Bar-  
clays Bank DCO**

HIGH COURT OF LAGOS STATE

ONYEAMA J

Date of Judgment: 26 MARCH 1962

Suit No. L.D.: 45/1960; L.D.: 55/1960

*Banking – Mortgages – Property mortgaged within registra-  
tion district – Failure to register title conveyed by mort-  
gagee – Application for extension of time to register  
mortgage as a first registration – Section 5(1)(c), Registra-  
tion of Titles Act Cap 181*

**Facts**

The respondent obtained a facility from the appellant. As security for the facility, the respondent executed a deed of mortgage over his property at No. 47 Idumagbo Avenue, Lagos. The property mortgaged was within a registration area. However, the mortgage was not registered because the appellant and the Registrar of Titles were under a misconception that mortgages were not registrable.

When the respondent defaulted in payment of the loan, the bank sold the property. The sale was subsequently nullified by the Federal Supreme Court on the ground that the title derived from the mortgage was registrable and since the mortgage was not registered it was void.

During the hearing in the High Court of the case which was appealed to the Federal Supreme Court, it was agreed by Counsel that “if the court finds against the mortgage – *Bentley* may apply for extension of time within which to register the mortgage which application will then be considered.”

The bank now brought the present application under section 5(1)(c), Registration of Titles Act (Cap 181) for extension of time within which to register a mortgage as a first registration.

***a* Held –**

- b* 1. Where a mortgagee defaults in registration of a mortgage on property within a registration district within time because the Registrar of Titles at the time the mortgage was executed would not accept mortgages as first registration, a subsequent application for extension of time to register the mortgage based on a Federal Supreme Court judgment would be granted.
- c*

***Per Curiam***

- d* The reason given for not applying for registration of title appears to me a good one. It is not disputed that the Registrar (prior to the Federal Supreme Court judgment) did not accept mortgages for first registration. In view of this, solicitors would naturally advise their clients that mortgages were not so registrable.
- e*

- f* The respondent obtained large sums of money from the applicant on the security of a mortgage. He now seeks to avoid payment of this legitimate debt and to recover the security which he freely gave for the debt, and asks the court to assist him in this conduct. He has no claim on the merits of the case but bases himself entirely on technicalities.

- g* I am not disposed to assist the respondent in any way as it would, in my view be iniquitous for any Court to permit itself to be used as an instrument of fraud.

- h* *Application granted.*

**Nigerian statute referred to in the judgment**

- i* Registration of Titles Act (Cap 181), section 5(1)(c)

**Counsel**

For the defendant/applicants: *Bentley*

- j* For the respondent: *Rotimi-Williams* (with him *Akinbiyi*)

**Judgment**

**ONYEAMA J:** This application is brought under section 5(1)(c) of the Registration of Titles Ordinance and is for an order extending the time within which the applicant may apply to register title to property situate at No. 47 Idumagbo Avenue, Lagos.

The background of this application is briefly that on the security of a deed of mortgage the respondent obtained a large sum of money from the applicant as loan. The property mortgaged was within a registration area. The applicant did not register the title conveyed by the mortgage because its legal adviser believed that the title was not registrable.

The respondent defaulted in payment of the loan and the applicant sold the property. This sale was subsequently nullified as a result of the decision of the Federal Supreme Court given on the 15th June, 1961, that the title derived from the mortgage was registrable and since the mortgage was not registered it was void.

During the hearing in the High Court of the case which was appealed to the Federal Supreme Court it was agreed by Counsel that “if the court finds against the mortgage . . . *Bentley* may apply for extension of time within which to register the mortgage which application will then be considered.”

This agreement appears to me to reserve an issue for consideration after the judgment of the court on the validity of the mortgage had been made known. I am of the opinion that the “court” in the context is the High Court and any other court whose judgment on the issue could supersede the judgment of the High Court.

I therefore find no merit in the argument that a fresh suit was to be commenced for the purpose of applying for extension of time, or that by reason of the judgment of the Federal Supreme Court an application made in the suit (pursuant to an agreement between Counsel) may not afterwards be considered.

- a* The reason given for not applying for registration of title appears to me a good one. It is not disputed that the Registrar (prior to the Federal Supreme Court judgment) did not accept mortgages for first registration. In view of this, solicitors would naturally advise their clients that mortgages were not so registrable.

- b* The respondent obtained large sums of money from the applicant on the security of a mortgage. He now seeks to avoid payment of this legitimate debt and to recover the security which he freely gave for the debt, and asks the court to assist him in this conduct. He has no claim on the merits of the case but bases himself entirely on technicalities.

*c* I am not disposed to assist the respondent in any way as it would, in my view, be iniquitous for any court to permit itself to be used as an instrument of fraud.

- d* I am satisfied that the proved attitude of the Registrar of Titles was sufficient cause for the applicant not making application for registration within the period prescribed by the Ordinance, and I therefore extend the time within which application for registration may be made up to and including the 30th June, 1962.

*e* Costs to the applicant assessed at £12.12s.0d.

*f* *Application granted.*

## Awolesi v. National Bank of Nigeria Limited

FEDERAL SUPREME COURT

UNSWORTH, TAYLOR, BAIRAMIAN, FJJ

Date of Judgment: 30 MARCH 1962

F.S.C.: 146/1961

*Banking – Guarantee – Continuance of guarantee – Bank opening second account during subsistence of guarantee without consent of guarantor – Bank insulating guaranteed account – Propriety of*

### Facts

The appellant guaranteed the overdraft facility given to one Taiwo by the respondent bank. During the subsistence of the said agreement the bank opened a second account to which payments were subsequently made after insulating the guaranteed account. This was done without the knowledge and consent of the appellant.

The said Taiwo defaulted, whereupon the bank filed an action against the appellant and Taiwo for recovery of the sums involved. The trial Judge appointed a referee to look into the accounts and referee gave a report on the total balance payable after combining the two accounts. The trial Judge gave judgment jointly and severally against Taiwo and the appellant whereupon the appellant filed an appeal.

It was contended on behalf of the appellant that the opening of the second account was prejudicial to the appellant; the amount guaranteed would have been recovered by the bank.

Clauses 1-4 of the Guarantee read:

- “1. In consideration of the bank (which expression shall include their successors and assigns) continuing the existing account with Emmanuel Olaseni Adeyemi Taiwo, of 140 Akarigbo Street, Shagamu, (hereinafter called the Principal), for so long hereafter as the bank may think fit, or otherwise given credit or accommodation or granting time to the Principal I, the undersigned, Moses Sowemimo Awolesi, Afin Akarigbo

- a* Shagamu, hereby guarantee, on demand in writing being made to me the due payment of all advances, overdraft, bills and promissory notes, whether made, incurred or discounted before or after the date hereof, to or for the Principal, either alone or jointly with any other person or persons together with interest, commission and other banking charges, including legal charges and expenses.
- b*
- c* 2. It is mutually agreed that the total amount recoverable hereon shall not exceed ten thousand and five hundred pounds (£10,500.00) in addition to such further sum for interest thereon and banking charges in respect thereof, and for costs and expenses as shall accrue due to the bank within six months before or any time after the date of demand by the bank upon me for payment.
- d*
3. And further, that this guarantee shall be applicable to the ultimate balance that may become due to the bank from the Principal.
- e* 4. I agree that this guarantee shall be counting (continuing?) security to the bank . . .”

**Held –**

- f* 1. An agreement altering a guaranteed contract, made without the knowledge and consent of the surety discharges the surety, unless without inquiry, it is evidence that the alteration is unsubstantial and one which cannot be prejudicial to the surety.
- g*
- In the instant case, without an enquiry by way of ordering the taking of a proper account, it is not self evident that the effect of the alteration is unsubstantial or one that cannot be prejudicial to the surety, nor is it an alteration that is patently unsubstantial and not prejudicial to the surety.
- h*
2. Where an alteration is made on the agreement of guarantee without the knowledge and consent of the guarantor and it is not self evident that the alteration was unsubstantial, the courts will not in an action against the guarantor, inquire into the effect of the alteration but will hold the guarantor discharged.
- i*
- j*

3. Where an account is guaranteed to a limited extent, a banker is not entitled to split that account during the continuance of the guarantee and attribute all payments into the unsecured balance.

***Per Curiam***

“What the bank did here was grave. As it is contrary to practice and good faith, presumably it has not been done, so there is no direct authority on the effect of opening a new account. The remarks which Cotton LJ, made *In Re: Sherry* were provoked by a question put by Counsel in argument, namely this, at page 700 of the report:

“Could the bank have split up the account into two carrying the credit items to the non-guaranteed account?”

Whereupon Lord Selborne LC said this:—

“You are suggesting a fraudulent device to prejudice the surety.”

Counsel repeated the question later, Lord Selborne said:—

“It appears to me that merely splitting the account in that way in the father’s life time would have no effect.”

What the latter remarks means. I do not quite understand: I can only summarise from what Lord Selborne said, towards the bottom of page 703, that as a guarantor is not to be prejudiced by any dealings without his consent between the creditor and the debtor, he ought to suffer from their splitting the account. That it is a device to prejudice him is clear from the present case.

When the account is insulated, the guarantor can be kept in the dark. If he asks the debtor for his passbook or statement of account, he can show the guarantor that which relates to the insulated account. If the bank makes a demand, the bank can give him a copy of the insulated account: and under Clause 6 of the guarantee the copy of the account which the bank gives him is conclusive evidence of what the customer owes in court proceedings. That of course contemplates that the bank has been keeping the account in accordance with practice and good faith – not a case such as the present in



- a* which the account is split, and the bank makes a demand with the insulated account alone, leaving the other one undisclosed, with the result that the amount shown as the indebtedness of the customer is not, as Clause 6 expects it to be, “the amount for the time being due.”
- b*

**UNSWORTH FJ (*Dissenting*):**

- c* “Now, what were the terms of the guarantee in the present case? Clause 1 provides that the consideration is: “continuing the existing account . . . for so long hereafter as the bank may think fit, or otherwise giving credit or accommodation to granting time to the Principal.” Clause 2 says that the guarantee shall be applicable to the ultimate balance, and Clause 3 makes the guarantee a continuing one. This guarantee does not expressly prohibit the opening of a further account, and indeed the terms of the guarantee appear to contemplate that the old account may be closed and a further account or account opened. It is, however, a guarantee for the ultimate balance, and I construe this as meaning the
- d*
- e*
- f* ultimate balance on all accounts.”

**Cases referred to in the judgment**

*g* **Foreign**

- Bradford Old Bank Ltd v. Sutcliffe* (1918) 2 K.B. 833; 88 L.J.K.B. 85; 119 L.T. 727; 34 T.L.R. 619; 62 Sol. Jo. 753.
- h* *Clayton’s Case: Devaynes v. Noble* (1861) 1 Mer. 529; 8 L.J. Ch. 256; 35 E.R. 767, 781
- Deeley v. Lloyd’s Bank Ltd* (1912) A.C. 756; 81 L.J. Ch. 697; 107 L.T. 465; 29 T.L.R. 1; 56 Sol. Jo. 734
- i* *Holme v. Brunskill* (1878) 3 Q.B.D. 495; 47 L.J.Q.B. 610, 38 L.T. 838; 42 J.P. 757
- j* *Mutton v. Peat* (1900) 2 Ch. 79; 69 L.J. Ch. 484; 82 L.T. 440; 44 Sol. Jo. 427; 48 W.R. 486

*Sherry, In re; London and Country Banking Co. v. Terry* <sup>a</sup>  
(1884) 25 Ch.D. 692; 53 L.T. 404; 50 L.T. 227, 32 W.R. 394

*Ward v. National Bank of New Zealand Ltd* (1882 – 1883) 8  
A.C. 755, 52 L.J.P.C. 65; 49 L.T. 315 <sup>b</sup>

### Books referred to in the judgment

*Encyclopaedia of Forms and Precedents (Other than Court Forms)* page 419 in Volume 2

Halsbury's *Laws of England* (3ed) Volume 18, at 506, paragraph 929 <sup>c</sup>

### Counsel

For the appellant: *Moore* (with him *Thompson*) <sup>d</sup>

For the respondent: *Odesanya* (with him *Olakunsin*)

### Judgment

**TAYLOR FJ:** The facts of this case have been sufficiently <sup>e</sup>  
and clearly set out in the judgments which will be delivered  
by my Lords Unsworth, and Bairamian, FJJ The authorities  
to which our attention was drawn at the hearing of the ap-  
peal have also been fully dealt with in those judgments and <sup>f</sup>  
suffice it here for me to direct my attention to what I con-  
sider the major issue in this appeal, which I may state  
shortly as follows:– “Is the opening of account No. 2 by the  
respondent bank in favour of the principal debtor, a substan-  
tial breach of the agreement of guarantee, exhibit “C,” en- <sup>g</sup>  
tered into between the appellant and the respondent bank?”

This agreement was entered into on the 30th December,  
1955 and at that time the indebtedness of the principal  
debtor to the respondent bank was £6,766.16s.9d as deposed <sup>h</sup>  
to by the manager of the respondent bank, Clause 1 of the  
agreement provides *inter alia* as follows:–

“In consideration of the Bank (which expression shall include their  
successors and assigns) continuing the existing account with Em-  
manuel Olasemi Adeyemi Taiwo of 140 Akarigbo Street, Sha- <sup>i</sup>  
gamu (hereinafter called the Principal), for so long hereafter as the  
Bank may think fit . . .”

Now on the 31st December, 1955, again on the evidence of  
the manager of the respondent bank, this Shagamu account <sup>j</sup>

*a* of the principal debtor stood at £10,096; and in the month of January, 1956 a second account was opened by the principal debtor. On the evidence of this witness quite substantial  
*b* sums were paid into this account and there was little effort made to reduce the indebtedness on the old account. This is what the witness says:—

“Approximately £29,000 was paid into this account in year 1956.  
*c* From 1st January, 1957 to 31st March, 1957 approximately £4,000 was paid in . . .

Defendant opened No. 2 account on 12th January, 1956 with deposit of £354. On the 21st August, 1957 No. 2 account was £2.17s.5d in credit. Up to 31st December, 1956 he paid £14,000  
*d* odd into No. 2 account.”

It should be borne in mind that the opening and operation of this account was done without the knowledge of the appellant who was kept completely in the dark as to what was  
*e* going on between the respondent bank and principal debtor. The word “continuing the existing account” in Clause 1 seem to me incapable of any other construction than that the parties had agreed that the account of the principal debtor  
*f* existing on the 30th December, 1955 shall be continued as such, ie in an unbroken state, and that to my mind negatives the opening of a second account in the circumstances disclosed above.

*g* Clause I however, continues:—

“or otherwise giving credit or accommodation or granting time to the Principal, I the undersigned, Moses Sowemimo Awolesi, Afin Akarigbo, Shagamu, hereby guarantee . . .”

*h* The respondent bank cannot in my view find shelter under this provision for the opening of the second account is not a giving of credit or accommodation or granting of time in respect of the existing account. When one goes further and  
*i* looks at the other clauses in the agreement, one finds that the words “ultimate balance” in Clause 3, and “account” in Clause 6 can only be read in light of Clause 1 as relating to “the existing account.” If the parties intended that the principal debtor should be placed in a position where he could  
*j*

open more than one account, and the guarantee should cover such accounts, then in my judgment they should say so in clear and unambiguous words, for it has been said that the law favours a surety and protects him with considerable vigilance and jealousy. In the case of *Ward v. National Bank of New Zealand Ltd* (1882 – 1883) 8 A.C. 755 at 764, Lord Justice Cotton's observations in *Holme v. Brunskill* 3 Q.B.D. 495 are contained in the judgment of their Lordships delivered by Sir Robert P Collier, which reads thus:—

“The true rule, in my opinion, is that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that, if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, and one which cannot be prejudicial to the surety, the surety may not be discharged; yet that, if it is not self evident that the alteration is unsubstantial, or one that cannot be prejudicial to the surety, the court will not in an action against the surety, go into the effect of the alteration.”

A little earlier their Lordship said at 763 that:—

“A long series of cases has decided that a surety is discharged by the creditors dealing with the principal or with a co-surety in a manner at variance with the contract, the performance of which the surety had guaranteed.”

Is the variation that has taken place a substantial one? This must always depend on the peculiar circumstances of each case. In the case before us the position is this, that by the terms of the contract the surety would be entitled to the benefit of all sums paid in by the principal debtor into his account and which would undoubtedly go towards the partial liquidation of the principal sum and reduction of the interest payable on same. On the evidence before the trial Judge it was made clear that this second account was in credit at times to the tune of £2,500. In my view without an enquiry by way of ordering the taking of a proper account it is not self evident that the effect of the alteration is unsubstantial or one that cannot be prejudicial to the surety, nor is to an alteration that I can say is patently unsubstantial and

*a* not prejudicial to the surety. For these reasons I do not consider it necessary to embark upon an enquiry by way of accounts or otherwise into the effect of this alteration.

*b* I would discharge the surety from liability and would allow this appeal and dismiss the claim with costs assessed at 50 guineas in favour of the appellant in this Court. The costs of the court below to be taxed by the court.

*c* **BAIRAMIAN FJ:** This is an appeal from the judgment of Irwin J given on the 21st August, 1959, in Suit No. A.B./111/57 of the High Court of the Western Region,

*d* in which the bank sued two defendants the first, E.O. Adeyemi Taiwo, their customer, and the 2nd, his guarantor, who is the appellant on the claim for £10,023.14s.3d, to which these particulars were appended – “24th July, 1957 to

*e* balance of banking account £10,023.14s.3d.” The appeal raises the question of the opening of a second account after a guarantee is obtained.

*f* Taiwo, who had an account at the Shagamu Branch of the bank, issued a number of cheques which could not be met; on the 30th December, 1955, the appellant signed a guarantee and they were honoured; on the 31st the account, according to the bank’s statement, was overdrawn to a little less

*g* than £10,100. The limit of the guarantee was £10,500 (plus charges). The bank then insulated that account as the guaranteed account. Taiwo drew no more on it; but there are credits to it from time to time; and it is debited with interest

*h* from month to month. The overdraft in July, 1957 stood, according to the bank’s statement, at the figure sued for, £10,023.14s.3d. Taiwo submitted to judgment in the suit; his guarantor resisted the claim.

*i* The bank attached to the statement of claim, a copy of that account, and did not disclose the fact that in January, 1956, a second account was opened for Taiwo at the Shagamu Branch. It appeared in Ledger Book brought by the manager

*j* when testifying for the claim; it showed that between January,

1956, and July, 1957, Taiwo had paid in £33,000 or more, and drew out of it not quite so much. Part of the argument for the guarantor was that, the second account notwithstanding, the bank was obliged, under the rule in *Clayton's* case, to credit payments-in to the overdraft, and that prior debts should be satisfied in order of date; for the bank it was argued that the rule did not apply in the case. The learned Judge held that:—

“It was not open to the Bank to make a new account during the currency of the guaranteed one so as to prevent the application of the principle of *Clayton's* Case, *Devaynes v. Noble*, (1816) 1 Mer. 572.”

*In re: Sherry, London and Country Banking Co v. Terry*, (1884) 25 Ch.D. 692, Cotton LJ said:

“The balance which the surety guarantees is the general balance of the customer's account, and to ascertain that, all accounts existing between the customer and the bank at the time when the guarantee comes to an end, must be taken into consideration. So that it would be impossible for the bank to say, to the prejudice of the surety, ‘We carry these sums which have been paid by the customer not to an account of which we ascertain the balance, but to a new account, and we refuse to bring those sums to the credit of his banking account to the relief of the surety.’ That is quite a different thing, and would be an improper dealing, improper in this sense, that it would prevent the balance of the account from being ascertained in accordance with the terms of the guarantee.”

And in *Mutton v. Peat* (1900) 2 Ch.D. 97, it was held that two accounts of the customer must be treated as one in order not to prejudice the rights of the surety.

Lower down the learned Judge says that:—

“The ultimate balance owing under Clause 3 of the guarantee is, I think, in the circumstances, to be ascertained by combining the two accounts at Shagamu with the account at Lagos and by taking the balance due on the 24th July, 1957, after treating all three as one unbroken account.”

He appointed a referee, who later gave this evidence:—

“From exhibit F the ledger marked 66, I have extracted the total of the debit and treated amounts applied to a No. 1 account in name

- a* of E.O.A. Taiwo from the start of business on 30-12-55 of close of business on 24-7-57. From the same ledger I have extracted the totals of the debits and debt and credits applied to a No. 2 account in name of E.O.A. Taiwo from 21-1-56 to 24-7-57. From the
- b* ledger exhibit marked 235 I have entered in my reckoning the credit balance of 5s.2d as at 24-7-57.
- Had these three accounts been operated as one account from December 30, 1955, to July 24, 1957, the total indebtedness to the
- c* bank concerned would have been debit £9,610.14s.4d. I have prepared a statement of credit and debit transactions of E.O.A. Taiwo over the relevant period which I have signed and now produce. Exhibit K.”
- d* Judgment was given against the guarantor for £9,610.14s.4d jointly and severally with Taiwo; as against Taiwo only, judgment had been given for £10,023.14s.3d before the trial began. Taiwo did not appeal; his guarantor did.
- e* Of the grounds of appeal in the notice prepared by his solicitors, Nos. 3, 4, 5, 8 and 9 were not argued. Nos. 1, 2, 6, and 7 objected that the trial Judge had not applied the rule in *Clayton’s* case correctly, and that under it he should have
- f* dismissed the action; also that he erred in the way he decided that the ultimate balance was to be ascertained, and failed to consider the effect of absence of evidence of appropriation in the bank’s case. Chief O Moore QC, advised
- g* the addition of this ground:—
- “The respondent having materially altered the condition of the guarantee by opening a second account for the first defendant and the learned Judge having so found erred in law in failing to dismiss the plaintiffs/respondents’ claim against the appellant.”
- h*
- He argued the appeal under two submission:—
- (1) that the opening of the No. 2 account materially altered
- i* the condition of the guarantee, and the surety was thereby discharged; alternatively,
- (2) that as the principal debtor, after the guarantee was
- j* given, paid in more than the amount guaranteed, the guaranteed debt was satisfied.

The second submission is based on the rule *Clayton's case*,<sup>a</sup> the first on the ground that a contract of guarantee is *strictissimi juris*. Learned Counsel for the bank argued that the said rule did not apply in this case, and that the bank was at liberty,<sup>b</sup> under the terms of the guarantee, to open a second account, and the opening of it did not discharge the guarantor.

The guarantee is an exhibit, Clause 1 states the consideration and gives the guarantee; Clause 2 limits it to £10,500 plus charges; Clause 3 states this:—<sup>c</sup>

“3. And further, that it is a continuing guarantee shall be applicable to the ultimate balance that may become due to the bank from the Principal.”<sup>d</sup>

Clause 4 states that it is a continuing guarantee, and endures until the expiry of six months after notice to determine it; Clause 5 deals with the manner in which the bank may make and prove a demand in writing; Clause 6 deals with proof of the amount due: it provides that:—<sup>e</sup>

“6. I agree that a copy of the account of the principal contained in the bank's books of account, or of the account for the preceding six months if the account shall have extended beyond that period, signed by manager or any officer for the time being of the bank, shall be conclusive evidence against me of the amount for the time being due to the bank from the principal in any action or other proceedings brought against me or my legal representatives upon this guarantee.”<sup>f</sup><sup>g</sup>

Clause 7 makes any admission in writing by the principal of the amount due, or any judgment against him, binding and conclusive; and Clause 8 waives any rights so far as may be necessary to give effect to the guarantee.<sup>h</sup>

Clause 1 is vital in this dispute; it states that:—<sup>i</sup>

“In consideration of the bank (which expression shall include their successors and assigns) continuing the existing account with Emmanuel Olasemi Adeyemi Taiwo of 140 Akarigbo Street, Shagamu (hereinafter called the Principal, for so long hereafter as the bank may think fit, or otherwise giving credit or accommodation<sup>j</sup>



- a* or granting time to the Principal, I the undersigned, Moses Sowemimo Awolesi, Afin Akarigbo, Shagamu, hereby guarantee, on demand in writing being made to me, the due payment of all
- b* advances, liabilities, bills, and promissory notes, whether made, incurred or discounted before or after the date hereof, to or for the Principal, either alone or jointly with any other person or persons together with interest, commission and other banking charges, including legal charges and expenses.”
- c* When the guarantee was given, the exiting account was a current account, but it was not continued as such: it was insulated as the guaranteed account at the end of the following day. A new account was opened as the customer’s current
- d* account, but it cannot be said to come within the words in Clause 1: “Or otherwise giving credit or accommodation or granting time” to Taiwo: for the credit or accommodation or time was given and through the insulated account. The
- e* new current account was an unauthorised departure from the terms of the guarantee.

In Halsbury’s *Laws* (3ed), Volume 18 at 506, paragraph 929, on “Guarantee and Indemnity,” it is said that:–

- f* “Any departure by the creditor from his contract with the surety without the surety’s consent, whether it be from the express terms of the guarantee itself or from the embodied terms of the principal contract, which is not obviously and without inquiry quite unsub-
- g*stantial, will discharge the surety from liability, whether injures him or not, for it constitutes an alteration in the surety’s obligations.”

- h* *Holme v. Brunskill* (1878) 3 Q.B.D. 495 C.A. at 505-506, per Cotton LJ, and other cases are cited in support.

- i* In Halsbury’s *Laws*, Volume 2, in the chapter on banking, at page 172, in paragraph 321, on “Appropriation when account guaranteed,” it is said that “the banker is bound however, to deal with the accounts in the ordinary ways of business” and a little lower it is said that:–

- j* “On the termination of the guarantee the account may be closed, and a new one opened, to which all payments in may be carried. But the banker is not entitled, where an account is guaranteed to a

limited extent, to split that account during the continuance of the guarantee and attribute all payments in to the unsecured balance.” *a*

The authorities are *In re: Sherry (supra)* and *Deeley v. Lloyds Bank Ltd* (1912) A.C. 756, H.L. Again, at page 236, *b* in paragraph 446, it is said that:–

“It would be contrary to ordinary business and good faith to open a new account during the currency of the guaranteed one, and carry all payments in to the new account.” *c*

The authority is *In re: Sherry*, for what Cotton LJ said; and one is asked to compare *Mutton v. Peat* and *Bradford Old Bank Ltd v. Sutcliffe* (1918) 2 K.B. 833 C.A.

What the bank did here was grave. As it is contract to practice and good faith, presumably it has not been done, so there is no direct authority on the effect of opening a new account. *d*

The remarks which Cotton LJ made in *In re: Sherry* were provoked by a question put by Counsel in argument, namely this, at page 700 of the report: “Could the bank have split up the account into two carrying the credit items to the non-guaranteed account?” Whereupon Lord Selborne LC said *e* *f* this:– “You are suggesting a fraudulent device to prejudice the surety.” Counsel repeated the question later, Lord Selborne said:– “It appears to me that merely splitting the account in that way in the father’s life time would have not effect.” *g*

What the latter remarks means. I do not quite understand: I can only summarise from what Lord Selborne said, towards the bottom of page 703, that as a guarantor is not to be prejudiced by any dealings without his consent between the creditor and the debtor, he ought to suffer from their splitting the account. That it is a device to prejudice him is clear from the present case. *h* *i*

When the account is insulated, the guarantor can be kept in the dark. If he asks the debtor for his passbook or statement of account, he can show the guarantor that which relates to the insulated account. If the bank makes a demand, the bank *j*

*a* can give him a copy of the insulated account: and under Clause 6 of the guarantee the copy of the account which the bank gives him is conclusive evidence of what the customer owes in court proceedings. That of course contemplates that the bank has been keeping the account in accordance with practice and good faith, not a case such as the present in which the account is split, and the bank makes a demand with the insulated account alone, leaving the other one undisclosed, with the result that the amount shown as the indebtedness of the customer is not, as Clause 6 expects it to be, “the amount for the time being due.”

*d* There is another aspect; it relates to the effect that splitting the account can have on the amount of interest.

The referee said that if the accounts had been operated as one, the final debt would have been the amount he gave. The first portion of his evidence, and the accounts he put in, show that he treated them as separate accounts. His first sheet takes the No. 2 account alone, and gives the debits and credits of it left and right, and arrives at their respective totals; his second sheet takes the No. 1 account alone, and does likewise; and his third sheet merely combines the two (and also adds on the credit side 5s.2d as the balance of the Lagos account, which may be ignored). That is how the ultimate debt is arrived at; it is treating the Shagamu accounts as two legitimately separate accounts.

Chief *Moore* has pointed out that insulating the first account meant accumulating interest on it. He has referred to the portion of the judgment which states that at times the second account was in credit for sums exceeding £2,500. It seems to me that if the first account had been run on as an unbroken account into which all amounts paid in or drawn out of the unsecured second account were entered, the debit balances on which interest would be reckoned were bound to be different from those appearing in the insulated account.

For the bank it has been argued that it was convenient to have a new account; that the guarantor was interested in the

ultimate balance only, which could be struck on two (or  
three) accounts. a

There are cases in which the mere adjusting of one account  
with another will be enough. It was done in *Mutton v. Peat*. b  
There, a firm of stockbrokers had two accounts – a current  
account and a loan account and the question was whether  
some bonds they had deposited to secure their general in-  
debtedness, or merely what they owed on the loan account. c  
When the firm defaulted on the Stock Exchange, the bank  
closed the current account and carried its credit balance of  
£1,362.10s.0d to a bankruptcy account, instead of setting it  
against the £7,500 due on the loan account. The Court of d  
Appeal held that the deposit had been made to secure their  
general indebtedness which meant that the bonds were secu-  
rity for £7,500 less £1,362.10s.0d; and that was what the  
owners of the bonds wanted to be done. There was no ques- e  
tion of there being anything wrong with the firm's having  
two accounts, so far as that was concerned.

It has been pointed out for the bank here that the referee  
was not examined on behalf of the guarantor. That was un- f  
fortunate. His Counsel did not appear; when the court of-  
fered copies of the referee's accounts, the gentleman who  
appeared for him said he had no instructions and asked leave  
to withdraw. It would have been better if the accounts had g  
been sent to both sides earlier, so that Counsel on either side  
could have examined them and been ready. As it is, one  
cannot go into details of the accounts, but must confine  
oneself to saying that the referee did not blend the two Sha- h  
gamu accounts into one unbroken account, but merely stood  
them together.

I am sorry that I cannot accept the suggestion that the  
opening of the second account was done merely for conven- i  
ience's sake and was immaterial. Where the convenience  
lies of having two accounts instead of one, is hard to see. In  
any case, it is contrary to practice and frowned upon, and  
one can see why. j

*a* I do not think that the remedy is to order a fresh reference: for there is the added ground of appeal, that the bank materially altered the condition of the guarantee by opening the  
*b* second account, and that discharged the guarantor; which in my view succeeds on the ground that the opening of the second account was an authorised departure from the terms of the guarantee, which (in the words quoted from Halsbury's Volume 18) "is not obviously and without inquiry  
*c* quite material." On the contrary, the present case shows how that may work to the prejudice of the guarantor.

It becomes unnecessary on that view to consider the other  
*d* submission on the rule in *Clayton's* case.

After arriving at that view, I found a precedent for a Guarantee for Advances to a Customer, at page 419 in Volume 2 of the *Encyclopaedia of Forms and Precedents (Other than*  
*e Court Forms)* (3ed): it is not identical, but it looks not unlike the one in the present case. It has, at page 421, a special paragraph, which begins thus:—

*f* "In the event of this guarantee ceasing from any cause whatsoever to be binding as a continuing security on me or my legal representatives the bank shall be at liberty without thereby affecting their rights hereunder to open a fresh account or accounts. . . "

. . .with provisions on appropriation; which strikes me as  
*g* being derived from *In re: Sherry*. The point to note is that the liberty to open a new account does not come into being until after the guarantee ceases to be binding as a continuing security on the guarantor or his estate.

*h* I would allow the appeal and dismiss the claim against the appellant, with costs of appeal assessed at fifty guineas in all, and with costs below to be taxed there.

*i* **UNSWORTH FJ:** (*Dissenting*) This is an appeal from a decision of Irwin J, in which he held the appellant liable on a guarantee in the sum of £9,610.14s.0d.

*j* The facts are that the end of December, 1955 the current account at the respondent bank of one Taiwo was overdrawn

and cheques of the value of over £8,724 had been dishonoured. On the 30th December the appellant, who is Taiwo's uncle, signed a guarantee and the first four paragraphs of that guarantee reads as follows:—

- “1. In consideration of the bank (which expression shall include their successors and assigns) continuing the existing account with Emmanuel Olaseni Adeyemi Taiwo of 140 Akarigbo Street, Shagamu, (hereinafter called the Principal), for so long hereafter as the bank may think fit, or otherwise given credit or accommodation or granting time to the Principal, I, the undersigned. Moses Sowemimo Awolesi, Afin Akarigbo Shagamu, hereby guarantee, on demand in writing being made to me the due payment of all advances, overdraft, bills and promissory notes, whether made, incurred or discounted before after the date hereof, to or for the Principal, either alone or jointly with any other person in persons together with interest, commission and other banking charges, including legal charges and expenses.
2. It is mutually agreed that the total amount recoverable hereon shall not exceed ten thousand and five hundred pounds (£10,500.00) in addition to such further sum for interest thereon and banking charges in respect thereof, and for costs and expenses as shall accrue due to the bank within six months before or any time after the demand by the bank upon me for payment.
3. And further, that this guarantee shall be applicable to the ultimate balance that may become due to the bank from the Principal.
4. I agree that this guarantee shall be counting (continuing?) Security to the bank. . .”

Both on the day that the guarantee was signed and on the subsequent day, cheques which had previously been dishonoured were accepted. The amount of the overdraft was then accepted. The amount of the overdraft was then £10,096.16s.9d.

On the 12th January, 1956, a new account was opened by the bank in the name of Taiwo. No cheques were drawn on the old account after the 31st December, 1955, and the

- a* amounts paid in did not represent a serious attempt to reduce the overdraft and interest thereon. The No. 2 account was at one time in credit for sums of about £2,500 but in May, 1957 the credit balance in that account was £2,019.0s.4d. On the 21st May, 1956, the bank demanded collateral security, and, when this was not forthcoming, proceeded to enforce the guarantee and later sued the principal debtor and the guarantor in these proceedings for the sum of £10,023.14s.3d due under the old account.

The trial Judge held that the liability of the guarantor under Clause 3 of the guarantee was for the ultimate balance and said that this should be ascertained by treating all the appellant's accounts with the bank as one unbroken account. He accordingly gave judgment in the following terms:—

- e* “The ultimate balance owing under Clause 3 of the guarantee is, I think, in the circumstances, to be ascertained by combining the two accounts at Shagamu with the account at Lagos and by taking the balance due on the 24th July, 1957, after treating all three as one unbroken account.
- f* Judgment will be entered for the plaintiff bank against the second defendant for the ultimate balance thus ascertained.

For this purpose it will be necessary to refer the matter to a suitable referee to be appointed by the court in default of agreement by the parties.”

- g* The parties agreed that the referee should be the Manager of the Bank of West Africa at Abeokuta. The referee calculated the liability as £9,610.14s.4d. The method of calculation adopted by the referee was not disputed in the court below, and judgment was accordingly given for this amount.

- h* It has been submitted in this appeal that the Judge should have held that the very fact of opening a second account discharged the guarantor from all liability.

- i* I have considered the cases referred to by Counsel, and, in particular, the judgment of Lord Selborne and Cotton LJ, *In re: Sherry, London and County Banking Company v. Terry* (1884) 25 Ch.D. 692. I do not construe these judgments as

meaning that a surety is necessarily discharged by the opening of a new account, but only that the opening of such an account would not affect the surety whose liability must be calculated in terms of the guarantee. The matter is put in this way in Paget's *Law of Banking*, (5ed) at 441:—

“Where there is a mere unbroken current account, part of which is covered by a guarantee, the other not, as where the guarantee has been determined, there is, in the absence of appropriation, no presumption that moneys paid in are to be allocated to the unsecured rather than the secured portion, or otherwise than in the usual sequence of payments in and out in order of date.

Where the guarantee is a continuing one to secure an ultimate balance, the question of appropriation does not arise, except in the sense suggested by Cotton LJ, *In re Sherry, London and Country Banking Co. v. Terry*, namely, that credits could not be carried to a new account during the currency of the guarantee so as to deprive the surety of the benefit of them in estimating the ultimate balance for which he was liable.”

Now, what were the terms of the guarantee in the present case? Clause 1 provides that the consideration is: “continuing the existing account . . . for so long hereafter as the bank may think fit, or otherwise giving credit or accommodation to granting time to the principal.” Clause 2 says that the guarantee shall be applicable to the ultimate balance, and Clause 3 makes the guarantee a continuing one. This guarantee does not expressly prohibit the opening of a further account, and indeed the terms of the guarantee appear to contemplate that the old account may be closed and a further account or account opened. It is, however, a guarantee for the ultimate balance, and I construe this as meaning the ultimate balance on all accounts.

In these circumstances, I would hold that the guarantor was not discharged from liability but that the bank was obliged to give the guarantor the benefit of credits in other accounts. As was said in *Mutton v. Peat* (1900) 2 Ch. 79, the method of book keeping adopted by the bank must not prejudice the real rights of the surety under the guarantee,



- a* and the Judge in the present case rightly held that the amount due by the guarantor was the ultimate balance as ascertained after treating all accounts as one unbroken account.
- b*

- Counsel for the appellant further submitted that amounts exceeding the balance due on the old account at the time of the guarantee had been paid into the No. 2 account and that
- c* on this ground there was no liability. I do not think that there is substance in this point. The guarantee was a continuing guarantee for the ultimate balance.

- For the reasons given in this judgment I would dismiss the
- d* appeal.

*Appeal allowed. Judgment against the guarantor set aside.*

## National Bank of Nigeria Limited v. Thompson

HIGH COURT OF LAGOS STATE

UDOMA J

Date of Judgment: 12 MAY 1962

Suit No.: L.D.: 580/61

*Banking – Loan secured by deposit of title deeds – Status of – Whether simple or specialty debt – Limitation of time to commence action to recover – Section 3 of Limitation Act, 1623*

*Limitation of action – Banking – Loan secured by deposit of title deeds – Action to recover same – When to commence – Section 8 of Real Property Limitation Act, 1874; Section 3 of Limitation Act, 1623*

### Facts

On 24th April, 1954, the defendant was granted overdraft facilities up to the sum of £500 by the plaintiff upon his request. The facility was secured by the deposit of title deeds of plaintiff's property.

The defendant stopped operating the account on 1st December, 1954, but plaintiff continued to charge interest wherefore the amount standing to the debit of the defendant in his account had risen to £1,097.19.10d as at 30th September, 1961, which is now the subject matter of the action.

It was contended on behalf of the defendant that the debt is a simple contract debt due to be repaid according to the plaintiff on 27th October, 1954, and that since it was not repaid, it must be considered statute barred since the action was commenced after a period of six years, ie after 27th October, 1960 in violation of the Statute of Limitation, 1623.

*a* **Held –**

1. Action to recover money secured by deposit of title deeds is a simple contract debt and not a specialty debt.  
*b* Such action must therefore be commenced within a period of six years in accordance with section 3, Limitation Act, 1623 and not within a period of 12 years stated in section 8, Real Property Limitation Act, 1874.
2. In the instant case, since the action herein was not commenced within a period of six years the action is statute barred.  
*c*

*Action dismissed.*

*d* **Cases referred to in the judgment**

**Foreign**

- Barnes and another v. Glanton and others* (1899) 1 Q.B. 885  
*e* *Brooks v. Marston* (1913) 2 Ch. 75  
*Firth v. Slingsby* 58 L.T. 481  
*Kirkland v. Peakfield* (1903) 1 K.B. 756

*f* **Nigerian statutes referred to in the judgment**

Limitation Act 1623, section 3  
Real Property Limitation Act 1874, section 8

**Counsel**

- g* For the plaintiffs: *Oduntan*  
For the defendant: *Coker*

**Judgment**

- h* **UDOMA J:** In this case, the plaintiffs' claim is as follows:

- "£1,097.19.10d due to them as bankers as at the 30th September, 1961, in respect of an overdraft of the defendant's banking account for moneys advanced to or paid for him at his own request and interest thereon at 10 percent per annum."  
*i*

Pleadings were ordered and filed. In paragraph 3 of their statement of claim, the plaintiffs averred as hereunder appearing:

- j* "The defendant on 24th April, 1954, created a legal charge on his property at No. 1, Odaliki Street, Ebute Metta in favour of the

plaintiffs to secure an overdraft of a sum of £500 from the plaintiffs.” *a*

At the hearing, Counsel for the plaintiffs applied for, and was granted leave to amend paragraph 3 of the plaintiffs’ statement of claim. As amended, paragraph 3 of the statement of claim reads as follows: *b*

“The defendant on 24th April, 1954, deposited the title deed dated 22nd April, 1954, and registered as No. 56 in Volume 990 of the Land Registry at Lagos in respect of his property at No. 1, Odaliki Street, Ebute Metta, in favour of the plaintiffs to secure an overdraft of his current account with the plaintiffs to the sum of £500.” *c*

The facts of this case do not appear to be in dispute. The only evidence called was on behalf of the plaintiffs and was given by the senior accountant of the plaintiff bank, Robert Emmanuel Babatunde Osborne. The facts which have been established by the evidence are these: *d*

On 23rd April, 1954, the defendant opened a current account with the plaintiff bank with the sum of £50. At the close of business on that day, the defendant had standing to his credit in that account with the plaintiff bank the sum of £49.15.10d. On 24th April, 1954, the defendant asked for, and was granted by the plaintiff bank overdraft facilities up to the sum of £500. As security for that loan, the defendant, at the request of the plaintiff bank, deposited the title deed, exhibit “B,” of his property at No. 1, Odaliki Street, Ebute Metta. *e*

Thereafter the defendant availed himself of the facilities thereby granted to him, and operated his account with the plaintiff bank from time to time. On 4th May, 1954, the defendant’s account with the plaintiff bank showed a debit balance of £15.15.8d. On 1st October, 1954, the defendant’s debit balance had risen to £503.10.4d. That amount included interest chargeable by the plaintiff bank as from 4th May, 1954. The defendant stopped operating the account with the plaintiff bank on 1st December, 1954. Meanwhile, interest continued to be charged by the plaintiff bank on the amount *f*  
*g*  
*h*  
*i*  
*j*

- a* withdrawn by the defendant as standing to his debit in his account with the plaintiff bank. The result of this was that on 30th September, 1961, the amount standing to the debit of
- b* the defendant in his account had risen to £1,097.19.10d, which is now the subject matter of this action.

- The plaintiffs say that as from the 27th October, 1954, the loan of £500 granted to the defendant was due to be repaid
- c* by the defendant, and that the defendant then had failed to repay it. And to recover it with interest thereon they have brought this action.

- d* At the close of the plaintiffs' case, Mr *Coker*, Counsel for the defendant, who had called no evidence, submitted that the debt of £500 was statute barred under the Statute of Limitations, 1623. He drew the court's attention to paragraph 10 of his statement of defence in which he had specifically pleaded the Statute. Mr *Coker* has contended that
- e* the debt is a simple contract debt; that it was due to be repaid, according to the plaintiffs' evidence, on 27th October, 1954, and that since it was not repaid and there has been no
- f* evidence of any acknowledgment on the part of the defendant, it must be considered statute barred as the debt has been due and unpaid for more than six years. The debt was six years old on 27th October, 1960.

- g* In reply to this submission, Mr *Oduntan*, Counsel for the plaintiffs, has maintained that the debt is not a simple contract debt but a debt secured by equitable mortgage by deposit of title deed. He submits that by the deposit of his title deed with
- h* the bank, the defendant created an equitable charge over his property, and that the debt is, therefore, a charge on his land. In which case, the Statute of Limitation, 1623, 21 Jac 1C 16, section 3 does not apply. He has submitted that the statute
- i* which applies is the Real Property Limitation Act, 1874, which provides for 12 years as the period of limitation. The reason for this proposition is that since the loan was charge on land as an equitable mortgage, it cannot be fettered by the Act
- j* of 1623 which deals only with simple contract debts. The

authorities for this proposition were said to be the judgments <sup>a</sup>  
in *Kirkland v. Peakfield* (1903) 1 K.B. 756 and *Brooks v. Marston* (1913) 2 Ch. 75.

On the contention of both Counsels, the question for deter- <sup>b</sup>  
mination by the court would seem to be: whether the loan  
which was granted to the defendant is a simple contract debt  
and, therefore, affected by the Statute of Limitations of 1623  
or a specialty debt, governed by the Real Property Limitation <sup>c</sup>  
Act of 1874.

I do not, however, propose to review the two cases of *Kirk-*  
*land v. Peakfield* and *Brooks v. Marston* which have been  
cited and relied by the Counsel for the plaintiffs as I am <sup>d</sup>  
satisfied that they are completely irrelevant to the issues in  
controversy between the parties in, and the facts and circum-  
stances of this case. I am also satisfied that this is a clear case  
of an action to recover money lent. It is a simple contract <sup>e</sup>  
debt. It is nevertheless a debt secured by an equitable mort-  
gage by deposit of a title deed. It cannot, therefore, be prop-  
erly described as a specialty debt, for it is not. There is no  
agreement or contract under seal. No legal mortgage has <sup>f</sup>  
been executed, nor is there even an agreement or memoran-  
dum in writing specifying the terms of the loan. There is  
evidence that the loan was granted on 24th May, 1954, and  
was due to be repaid back on 27th October, 1954, and that it <sup>g</sup>  
was not in fact repaid.

There is also no evidence of any acknowledgement of the  
debt by the defendant. The defendant stopped operating the  
account in the plaintiff bank on 1st December, 1954, and the <sup>h</sup>  
account has only been kept alive in the plaintiffs' books by  
interest charges which continued to grow, probably un-  
known to the defendant.

The argument for the plaintiffs, as I understand it, is that be- <sup>i</sup>  
cause the debt is charged on land, the only statute of limitations  
available to the debt and pleadable by the defendant is the  
Real Property Limitations Act, 1874, and not the Statute of  
Limitation of 1623. The appropriate section of the Real <sup>j</sup>

- a* Property Limitation Act, 1874, to which the court has been referred is section 8, which imposes a limitation of 12 years on action to recover money charged on land. The Real Property Limitation Act 1833, upon which the Real Property Limitation Act, 1874 was based, enacted that no action or suit should be brought to recover any sum of money charged upon land “but within 20 years” reckoned from the time when the right of action first accrued. The Real Property Limitation Act, 1874 cut that period down to 12 years.

- d* Mr *Oduntan* has argued that since the debt is not yet 12 years, it cannot be barred. Therefore, the plea of the Statute of Limitation, 1623 by the defendant must fail. I do not think that submission is a sound one in law, and I propose to examine it carefully.

- e* I have already pointed out, I think, that the authorities cited and relied upon by both Counsels have not been of much assistance to the court. It has, therefore, been necessary to look elsewhere for appropriate assistance. As there appears to be no local authority on this point, I have had to resort to English reported cases. In my search, I have only been able to lay hands on two cases, namely, *Firth v. Slingsby* 58 L.T. 481 and *Barnes and another v. Glanton and others* (1899) 1 Q.B. 885, which appear to have dealt with situations and circumstances not altogether dissimilar from those present in the case under consideration. There may be other cases, but I have found these two cases of considerable assistance on the issues raised in this case.

- h* The relevant facts in *Firth v. Slingsby* were that by a memorandum, dated 28th April, 1874, it was witnessed that the defendant deposited with the plaintiff certain title deeds by way of equitable mortgage for a loan of £6,000 and interest. The defendant also agreed to pay to the plaintiff on demand £6,000, with interest and to execute a proper mortgage with all the usual powers and authorities usually given to a mortgagee. The memorandum was not under seal. No interest was paid under the agreement and nothing was done until

about 11 years afterwards when the action was brought for the specific performance of the agreement. <sup>a</sup>

At the trial the issues in controversy then were whether on the facts therein established the Statute of Limitation 1623, which was pleaded and relied upon, was available to the defendant/debtor, and whether the Real Property Limitation Act, 1874 superseded the Limitation Act of 1623. It was held that the Limitation Act of 1623 was available to the defendant. On those issues Stirling J in his judgment said: <sup>b</sup>

“Now there was a part of the contention which was raised on behalf of the plaintiff which does not seem to me to be well founded. It was said, in the first place, that the Statute (of Limitation 1623, ie, 21 Jac 1C 16s. 3) did not apply to a case of this sort, where there was an agreement, though not under seal, to execute a mortgage; and it was said that the agreement being to execute a mortgage, that implied necessarily that it should be a proper and ordinary mortgage according to what the court would hold to be such, and that such a mortgage would contain a covenant for payment, and that that covenant for payment, if it had been good, would not be barred under the recent statute, (ie 1874) till the expiration of 12 years from the date of the memorandum, supposing it be given at once, and that, therefore, in this case the court would decree specific performance, the action having been brought within 12 years. Well, I confess I cannot follow that argument. The agreement is not under seal; therefore, the debt thereby referred to is not granted on any contract, according to the words in the Statute of James. Therefore, if at the end of 6 years an action had been brought either to recover the £6,000 and interest therein mentioned, or for a breach of covenant to execute a mortgage at law, the Statute of James would have been a complete bar.” <sup>c</sup>

Then in *Barnes and another v. Glenton and others (supra)*, it was held that where an action is brought to recover a simple contract debt, and the money sought to be recovered is charged on land, the period of limitation is that imposed by the Limitation Act of 1623, and has not been enlarged to 12 years by the Real Property Limitation Act, 1874. <sup>d</sup>

In his judgment on this point, Smith LJ said:

“The action was brought upon a simple contract debt. The loan was secured by a charge on land, and the action was not brought <sup>e</sup>



- a* within years after the right of motion first accrued. The question is whether the Real Property Limitation Act, 1833 and 1874 have repealed the provisions of the Statute of Limitation 1623, ie 21 Jac 1 C16, section 3 which allows a debtor, in cases where the creditor
- b* has slept on his rights for six years, to set up the Statute as an answer to the claim made against him.

- It is clear that the Statute of James was passed in favour of debtors because by it they were allowed to plead the lapse of six years as a bar to an action. Where is it to be found, in the Statute of William
- c* IV and of the Queen, that this right is taken away? I cannot find anything to that effect; and in my opinion, the case of a simple contract debt is not affected by the later Statutes.”

- d* It is to be noted that in both these cases there were memoranda in writing witnessing the loan whereas in the case under consideration there was nothing at all in writing as to the terms of the loan. From the passages which I have quoted in the two judgments above, it seems quite clear that
- e* the Real Property Limitation Act, 1874 has not in any way impaired the right secured to a debtor by the Limitation Act of 1623. The Act of 1874 does not operate to remove the fetters imposed on simple contract debts after 6 years by the
- f* Act of 1623. What it has done is to impose a fetter over an extended area. In my view, the statutory prohibition against taking proceedings after the period of 12 years imposed by the Real Property Limitation Act, 1874, is not a statutory
- g* permission which is given to a creditor to institute proceedings against a debtor within that period.

- I am of opinion that the Real Property Limitation Act, 1874 applies only to land whereas the Statute of Limitation,
- h* 1623 applies to the personal remedy on a simple contract debt. I hold, therefore, that the Statute of Limitation, 1623, which has been properly pleaded, applies in this case, and that the claim is, therefore, statute barred. I will dismiss the
- i* claim with costs.

*Claim dismissed.*

**Jia Enterprises (Electrical) Limited v. British  
Commonwealth Insurance Co Limited; In re:  
British and French Bank Limited**

FEDERAL SUPREME COURT

BRETT, TAYLOR, BAIRAMIAN FJJ

Date of Judgment: 15 JUNE 1962

F.S.C.: 328/1960

*Banking – Floating charge – Nature of – Whether “creates interest in land” within the meaning of section 15 of Land Registration Act, Cap 99*

*Banking – Overdraft secured by floating charge over assets of debtor – Assets insured in the names of bank and debtor for “their respective rights and interest” – Whether Bank can claim against insurance company in case of loss*

**Facts**

The first respondent, Jia Enterprises Limited brought an action against the second respondent, the British Commonwealth Insurance claiming the sum of £22,450 as money due on an insurance policy in respect of goods and a building destroyed or damaged by fire. The appellants, the British and French Bank Limited brought a motion seeking to be joined as plaintiffs, under Order IV, rule 5 of the Supreme Court (Civil Procedure) Rules, which provides for the joinder of person as plaintiffs or defendants where it appears to the court “that all persons who may be entitled to or who claim some share or interest in the subject matter of the suit or who may be likely to be affected by the result, have not been made parties.”

The appellants claimed that under the policy the bank are joint insurers with Jia Enterprises Limited and accordingly have an interest in any monies paid under the policy. The policy named the persons insured as Jia Enterprises Limited and British and French Bank Limited for “their respective rights and interest” Jia Enterprises Limited however opposed

- a* the application on grounds that the bank was a simple creditor of Jia and had no interest whatsoever in the property insured. The motion was dismissed on ground that the bank,  
*b* being simply a creditor of Jia could not prove an insurable interest in the property insured. The bank appeals against this ruling.

**Held –**

- c* 1. The bank has no claim whatsoever because it has suffered no loss in respect of the property damaged or destroyed. That property was *pro tanto* replaced by the  
*d* claim under the policy which itself came under the floating charge. The bank therefore suffered no loss and has no *locus standi* at all to make a claim.  
*e* 2. To hold that a floating charge creates an interest in land within the meaning of the Land Registration Act is to ignore the essential characteristic of floating charge as a charge comprising property which may vary between reality and personality according to the commercial needs  
*f* of the owner of the property at any given time. In this case, section 15 of the Land Registration Act did not prevent the debenture from being given in evidence and that it was an error in law to exclude it. It is thus necessary to consider the effect of the debenture in deciding  
*g* whether the bank has established a right to be joined as plaintiff.

*h* *Appeal dismissed.*

**Case referred to in the judgment**

***Nigerian***

- i* *General Accident Fire and Life Insurance Corporation Ltd v. Midland Bank Ltd* (1940) 2 K.B. 388  
*Illingworth v. Houldsworth* (1904) A.C. 355  
*j* *Macaura v. Northern Assurance Co Ltd* (1925) A.C. 619

**Nigerian statute referred to in the judgment**

Land Registration Act Cap 99, section 15

*a*

**Nigerian rules of court referred to in the judgment**

Supreme Court (Civil Procedure) Rules, Order IV, rule 5

*b*

**Counsel**

For the applicants: *Ferguson*

For the respondents: *Elele*

*c*

**Judgment**

**BRETT FJ:** (*Delivering the judgment of the court*) The circumstances giving rise to these appeals are as follows. The first respondents, Jia Enterprises (Electrical) Limited (hereinafter referred to as Jia), brought an action in the High Court of Lagos against the second respondents, the British Commonwealth Insurance Company Limited (hereinafter referred to as the Insurance Company), claiming the sum of £22,450, as money due on an insurance policy in respect of goods and a building destroyed or damaged by fire. The appellants, the British and French Bank Limited (hereinafter referred to as the bank), brought a motion asking to be joined as plaintiffs, under Order IV, rule 5 of the Supreme Court (Civil Procedure) Rules, which provides for the joinder of additional persons as plaintiffs or defendants where it appears to the court “that all the persons who may be entitled to or who claim some share or interest in the subject matter of the suit, or who may be likely to be affected by the result, have not been made parties.” In the supporting affidavit sworn to by MJC Young it is stated that the deponent believes that the claim is brought under a Fire Policy No. 163189, taken out by Jia with the Insurance Company, and that under that policy the bank are joint insurers with Jia and accordingly have an interest in any monies paid under the policy, including monies awarded in the action. The reference to joint insurers means persons who are jointly insured. A copy of the policy was not annexed to the affidavit, but the original appears to have been tendered in the suit already and its terms were referred to by Counsel for Jia in the course of proceedings in this Court, so that we are at

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- a* liberty to look at it. It names the persons insured as Jia Enterprises (Electrical) Limited and the British and French Bank Limited “for their respective rights and interests.”
- b* The insurance company neither assented to nor resisted the bank’s application and has remained equally aloof both from the subsequent applications to which I shall refer later and from these appeals. Jia, however, opposed the application,
- c* and a director of Jia named Jamil Tayar swore in an affidavit that the bank was a simple creditor of Jia and had no interest whatsoever in the property insured. No further affidavit was filed by the bank, and the motion was heard by Bellamy J,
- d* who gave his decision on the 17th May, 1960, dismissing the motion on the ground that the bank, being simply a creditor of Jia’s, could not prove an insurable interest in the property insured.
- e* On the 27th May, 1960, the bank filed notice of a fresh motion in identical terms, supported by a new affidavit by MJC Young, to which was annexed a debenture issued by Jia in favour of the bank to secure an overdraft not exceeding £3,000, in which Jia, as beneficial owner, charges with
- f* the payment of the overdraft its undertaking, all its property and assets of every description (including uncalled capital, book debts and goodwill) by way of floating security. The
- g* debenture contains the usual provision that the principal money secured shall become immediately repayable on demand or on the occurrence of any of various events, and the bank is empowered to appoint a receiver and manager at
- h* any time after the principal has become payable, but it was not alleged in Young’s affidavit that the principal had become payable. This application was dismissed by Bellamy J on the 22nd June, 1960, not on the merits but on the ground
- i* that the question whether the bank had an insurable interest was *res judicata* by virtue of his decision on the former application.
- j* On the 23rd June, 1960, the bank filed notice of yet another motion supported by an affidavit and the Debenture,

and to avoid being barred by the plea of *res judicata* this application was brought under Order IV, rule 2, which refers to the case where a person has jointly with other persons a ground for instituting a suit. This application was no more successful than the others, and was dismissed by Bellamy J on the 4th July, on the ground that the Debenture was an instrument within the meaning of the Land Registration Act and that section 15 of that Act made it inadmissible in evidence as affecting land for want of registration under the Ordinance.

The present appeals are brought against all three decisions, though the bank will, no doubt, be satisfied if they succeed on any one of them. The substance of the grounds is, as regards the first application, that the Judge had only to decide, at that stage, whether they had shown a *prima facie* interest, and that they had done this; as regards the second application that the question whether they had shown a *prima facie* interest was not *res judicata*; and as regards both the second and the third, that the debenture should have been received as evidence of an insurable interest, and that it was not registrable under the Land Registration Act.

As regards the first application I am not prepared to hold that on the material before him the Judge was wrong in refusing to join the bank as plaintiff, though I agree that he went further than was necessary for the determination of the application in coming to a positive finding that the bank had no insurable interest, and that it would have been enough if he had held that in the face of Jamil Tayar's uncontradicted affidavit the bank had failed to make it appear to the court that it might be entitled to a share or interest in the subject matter of the suit; an authority for holding that a simple creditor has no insurable interest is *Macaura v. Northern Assurance Co Ltd* (1925) A.C. 619. It is true that the bank claimed such a share or interest, but having held that on the material before him it did not appear that the claim could have any substance in law the Judge was not required by

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*a* Order IV, rule 5, to grant the application. I would dismiss the appeal as regards the first application on these grounds.

*b* Turning to the second application, the facts of which section 53 of the Evidence Act makes a judgment conclusive proof must among other things be facts directly in issue in the case, and if, as I have already held, it was unnecessary on the first application for the court to decide whether the bank actually had an insurable interest, the question whether it had such an interest was not a fact directly in issue. I would hold, therefore, that the Judge was wrong in treating his previous decision as concluding the matter, and that he should have considered the second application on its merits.

*d* However, if he was right in holding, on the third application, that the debenture could not be given in evidence the second application, in which the existence of the debenture was the only fresh fact, must necessarily have failed like the first.

*e* The third application likewise could not succeed unless the debenture was admitted in evidence, and it will be convenient from this stage to deal with the second and third applications together in considering whether the debenture was admissible in evidence and whether, if so, it shows either

*f* that the bank may be entitled to a share or interest in the subject matter of the suit or that the bank has a ground jointly with Jia for instituting the suit.

*g* As Mr Ferguson, who appears for the bank, has pointed out, the question whether a debenture containing a floating charge is admissible in evidence – and it will not be enforceable in law unless it is admissible – is one of great importance to the business community, from the point of view of both of those who wish to raise loans on this convenient form of security and of those whose business it is to grant loans on adequate security. The nature of a floating charge was described in the following terms by Sir Wilfrid Greene, MR, in

*i* *General Accident Fire and Life Assurance Corporation Ltd v. Midland Bank Ltd* (1940) 2 K.B. 388, 400, which Mr Ferguson referred us:–

*j* “It floats over and comprises all the property, whatsoever it may be at any given moment, of the person giving the charge. If one

piece of property is replaced by another piece of property, the first piece of property drops out, and the new piece of property comes in.” *a*

It was pointed out by Lord Halsbury in *Illingworth v. Houldsworth* (1904) A.C. 355, that a floating charge enables the grantor to carry on its business in the ordinary way. If the property includes any interest in land, as it admittedly does in the present case, the question is whether the floating charge is a document affecting land whereby the person giving it confers, transfers, limits, charges or extinguishes in favour of the holder any right or title to, or interest in land. If it is, then it would appear to come within the definition of an instrument in section 2 of the Land Registration Act and to be inadmissible in evidence as affecting land if it is not registered. It is perhaps material to point out that the first proviso to section 15 of the Ordinance makes it clear that an equitable mortgage requires registration under the Ordinance. *b c d e*

The difficulty which arises is that section 9 of the Land Registration Act, provides that no instrument other than a power of attorney shall be registered unless it contains a proper and sufficient description and, subject to the regulations, a plan of the land affected by such instrument, and that since the nature of a floating charge is such that the property over which it extends may vary from day to day it is impossible for the instrument creating the charge itself to contain such a description or plan. Sections 101(1)(f) and 114 of the Companies Act clearly assume that a company registered in Nigeria has power to create a floating charge on the undertaking or property of the company, and it is significant that in classifying the various kinds of mortgage or charge to which section 101(1) applies, a distinction appears to be drawn between a mortgage or charge on various specific kinds of property, as set out in paragraphs (b) to (e), and a floating charge. Paragraph (d) expressly refers to a mortgage or charge on land, and paragraph (c) to a mortgage or charge *f g h i j*



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*a* created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale.

*b* In my opinion to hold that a floating charge creates an interest in land within the meaning of the Land Registration Act is to ignore the essential characteristic of a floating charge as a charge comprising property which may vary between realty and personality according to the commercial needs of the owner of the property at any given time. Shortly before the passage in his judgment which I have already quoted, Sir Wilfrid Greene MR distinguishes between a floating and a fixed charge and refers to a floating security as one which had not yet crystallised. Later in his judgment, *d* at page 411, he held that in circumstances very similar to those in the present case:—

*e* “The bank had no claim whatsoever, because they had suffered no loss in respect of the buildings. The damaged building was *pro tanto* replaced by the claim under the policy which itself came under the floating charge.”

*f* I would therefore hold that in this case section 15 of the Land Registration Act did not prevent the debenture from being given in evidence and that it was an error in law to exclude it. It is thus necessary to consider the effect of the debenture in deciding whether the bank has established a right to be joined as plaintiff.

*g* On this issue the decision in *General Accident Fire and Life Assurance Corporation Ltd v. Midland Bank Ltd* (*supra*), on which Mr Ferguson has relied for the effect of a floating charge, is conclusive against the bank’s claim, *h* whether under rule 2 or rule 5 of Order IV. In that case an insurance policy had been issued in the names of a limited company, the company’s landlords and the bank for their respective rights and interests, and the Master of the Rolls, *i* at pages 404-405, used the following words in rejecting the submission that the parties had a joint interest:—

*j* “That there can be a joint insurance by persons having a joint interest is, of course, manifest. If A and B are joint owners of property – and I use that phrase in the strict sense – an undertaking to

indemnify them jointly is a true contract of indemnity in respect of a joint loss which they have jointly suffered. Again, there can be no objection to combining in one insurance, a number of persons having different interests in the subject matter of the insurance, but I find myself unable to see how an insurance of that character can be called a joint insurance. In such a case the interest of each of the insured is different. The amount of his loss, if the subject matter of the insurance is destroyed or damaged, depends on the nature of its interest, and the covenant of indemnity which the policy gives must, in such a case, necessarily operate as a covenant to indemnify in respect of each individual different loss which the various persons named may suffer. In such a case there is no joint element at all.”

I would respectfully adopt that passage as expressing my grounds for holding that the appeal in relation to the application under Order IV, rule 2 must fail.

As to whether the bank has an interest in the subject matter of the suit passage from the judgment of the Master of the Rolls at Page 411 which I have cited earlier in this judgment provides the answer. The bank has no claim whatsoever because it has suffered no loss in respect of the property damaged or destroyed. That property was *pro tanto* replaced by the claim under the policy which itself came under the floating charge. The bank therefore has suffered no loss and has no *locus standi* at all to make a claim: The appeal in relation to the second application under Order IV, rule 5, must also fail.

During the course of argument it was suggested to Counsel for Jia that if Jia did not dispute their indebtedness to the bank there was no purpose in their opposing the application, and Counsel undertook to take further instructions from his clients. After doing so he has informed us that Jia would be prepared to withdraw their opposition, but there has been no formal application for judgment by consent and having regard to the view which I have formed as to the law applicable I can see no advantage to the bank in allowing the appeals. The bank has sufficient power under the floating

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- a* charge to safeguard its interests and I would dismiss the appeals with costs assessed at 25 guineas.

*Appeal dismissed.*

- b* Taylor FJ and Bairamian FJ concurred in the judgment of Brett FJ.

## Barclays Bank DCO v. Adedapo

HIGH COURT (WEST)

BECKLEY AG J

Date of Judgment: 5 JULY 1962

Motion No.: A.B./32/60

*Banking – Judgment on bank loan – Execution and attachment – Execution exceeding judgment debt*

*Execution – Sheriff and Civil Process Law – Execution outside jurisdiction – Failure to comply with the Procedure*

*Practice and procedure – Instalmental payments, failure to pay instalments as at when due – When execution may issue*

### Facts

The judgment debtor brought this application to set aside the writ of attachment issued to the judgment creditor against his property for irregularity and to release the property attached in pursuance of the writ.

The judgment debt was for a total sum of £792.9.10d which the court granted an order for instalmental payments at the rate of £20.00 per month, and the judgment debtor had paid £220.00 to date though paid irregularly. The judgment creditor then obtained a writ of attachment for the total judgment debt without regard to the amount already paid. The writ itself was issued at Abeokuta Judicial Division and was executed at Ijebu Judicial Division. The applicant argued that this was irregular.

### Held –

1. Execution will be set aside where it was levied for more than it was due on the judgment.
2. Before execution can issue two conditions must be fulfilled, firstly, there must be an instalment or more in arrears, and secondly, there must be an order of the court

*a* specifying the balance of the judgment debt and costs due.

***Obiter***

*b* “If this were a substantive action in which the judgment debtor claims damages on the complaint of excessive execution for the balance, he must prove malice and the absence of reasonable and probable cause on the part of the judgment creditor” per Beckley

*c* AGJ.

Writ of Execution set aside and property of judgment debtor under execution to be released.”

*d* **Cases referred to in the judgment**

***Foreign***

*De Medina v. Grove* (1947) 10 Q.B. 172

*Kwabera Oduro of Nsawam and Others v. Daniel Francis*

*e* *Davis of Adversee* 14 W.A.C.A. 46

**Nigerian statute referred to in the judgment**

Judgments (Enforcement) Rules Cap 116 Volume 6 Laws of

*f* Western Nigeria

**Book referred to in the judgment**

Halsbury’s *Laws of England*, (3ed) Volume 16, page 38, paragraph 56

*g* **Counsel**

For the applicants: *Akintola*

*h* **Judgment**

*i* **BECKLEY AG J:** This is an application by the judgment debtor asking for an order to set aside the writ of attachment in the above suit on grounds of irregularity and/or to release the property attached in pursuant thereto. It is supported by an affidavit of 10 paragraphs. There is also a counter affidavit sworn to by one Allen Michael Scott, Manager, Barclays Bank DCO, Ijebu Ode. Although it is not stated on the motion paper, the section of the law under which the application is brought, it appears to have been properly brought

*j*

under Order 1, rule 10 of the Judgments (Enforcement) Rules Cap 116, Volume 6, Laws of Western Nigeria. a

I shall deal with the counter affidavit first. The counter affidavit seeks to show that the judgment debtor paid various instalments due not in accordance with the order of the court made on the 1st September, 1961. The counter affidavit also succeeds in showing that the irregular payments by the judgment debtor were condoned by the judgment creditor over a period of months. If I had to exercise my discretion in the matter to grant a relief I would not have hesitated in exercising it in favour of the judgment debtor. That, however, appears unnecessary in view of the other points raised on the hearing of this application and which appear here-under. b  
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In arguing this motion, Mr Akintola who appeared for the judgment debtor argued that although the order of the court is for payment of the Judgment debt and costs by monthly instalments of £20, the judgment debtor has in fact paid over £220 which amount is over and above the amount due on the stated instalments of £20 per month. This argument does not, in my view, alter the facts that the instalments have been paid irregularly and that if the creditors had acted promptly, all other things being regular, there could have been no answer to any application brought by the creditor for the realisation of the fruits of the judgment. However, this point of payments of amount totalling over and above the total instalments due in accordance with the order of the court could have weighed in the mind of the court to exercise its discretion in favour of the judgment debtor. e  
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The second point made by Counsel for the judgment debtor is that when an order is made for payment by instalments and whenever there is default the creditor must apply to the court for the real amount due to be ascertained before he can levy execution. In this respect he referred me to the case of *Kwabena Oduro of Nsawam and others v. Daniel* i  
j

- a Francis Davis of Adversee* 14 W.A.C.A. page 46. In that case, the West African Court of Appeal held:
- b* “The order for payment by instalments replaced the original decree in the judgment in the previous case: there was no longer a previous debt of the amount of the judgment debt but the debt accruing due by so much a month; and execution in default of payment could not issue except under an order of the court specifying the amount of the instalment or instalments then owing in respect of
- c* which execution should issue; therefore the execution for the entire balance of the judgment debt was wrongful and the sale unlawful.”
- d* In arriving at that decision the West African Court of Appeal considered Order 43, rule 6 of the then Gold Coast (Civil Procedure) Rules which reads as follows:
- e* “Where a decree orders payment of money by instalments, execution shall not issue until after default in payment of some instalment according to the order, and execution, or successive executions may then issue for the whole money then remaining unpaid, or for such portion thereof as the court orders, either when
- f* making the original order or at any subsequent time.”
- That order does not appear in our own laws exactly as they appeared in the Gold Coast (Civil Procedure) Rules quoted above. Similar provisions, however, are contained in sections
- g* 4(1) and 4(2) of the Sheriffs and Civil Process Law Cap 116, Volume VI of the Laws of Western Nigeria. Both the Western Nigeria Rules and the old Gold Coast Rules derive from section 61 of the United Kingdom Execution Act, 1844,
- h* which provides:
- i* “If the judge of any such court shall have made any order for payment of any sum of money by instalments, execution upon such order shall not issue against the party until after default in payment of some instalment according to such order, and execution or successive executions may then issue for the whole of the said sum of money and costs then remaining unpaid, or for each successive instalment and cost remaining from time to time unpaid as the judge shall order either at the time of making the original order or
- j* at any subsequent time under the seal of the court.”

Referring to this section, in Volume 13 of Halsbury's *Laws of England*, (2ed) the following appears: a

“The provisions of this section constitute one of the several exceptions to the rule that no leave is necessary to levy execution . . .” b

As these Rules appear to have been by and large similarly couched, they should as such be construed in *pari materia*. The Gold Coast Rules were considered in the case quoted above and I am of the view that the Western Nigeria Sheriffs and Civil Process Law should be construed similarly. I hold therefore that before execution can issue in the present case two conditions must be fulfilled. Firstly, there must be an instalment or more in arrears; and secondly, there must be an order of the court specifying the balance of the judgment debt and costs due. If the last condition is not fulfilled, the likelihood of execution being made for the higher amount than that due cannot be excluded, leading to the irregularity of the issue of a writ for more than is due. In the case before the court, leave of the court was not obtained before the judgment creditor proceeded to execution. c  
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The third point raised by Counsel for the judgment debtor was that the writ was issued for more than was due. By a *prapice* for writ of execution filed by the solicitor for the judgment creditor on 24th February, 1962, an application was made for a writ of *Fifa* to levy execution for a total sum of £792.9.10d. This was for the total sum of judgment debt and costs obtained on 14th July, 1961. It took no account whatsoever of the instalments already paid. Both from the Affidavit of the judgment debtor and the counter Affidavit sworn to by the Manager of the judgment creditor the amount in respect of which execution was asked for is clearly wrong. Judgment Form 41 was made for the total sum of £797.14.10d on 22nd February, 1962. There can be no doubt whatsoever that this is also clearly wrong. The question is whether if a writ of execution is made out for more than is due from the judgment creditor whether this an g  
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- a* irregularity which makes the writ void. At page 38 Volume 16 Halsbury's *Laws of England* (3ed), paragraph 56, the following, appears –
- b* “An execution is irregular when it is levied by an unauthorised officer or when the Writ does not follow the judgment precisely in name of the parties or the terms of the judgment or when several executions are issued on a joint judgment, or where there is an error the amount ordered to be recovered or paid. In all these cases
- c* executions will be set aside unless the irregularity is waived by execution debtor or set right by amendment . . .”

It seems therefore from the above that where execution is levied for much more than is due on the judgment it is irregular and the writ will be set aside. I must, however, observe that if this were a substantive action in which the judgment debtor claims damages on the complaint of excessive execution for the balance, he must prove malice and the absence of reasonable and probable cause on the part of the judgment creditor. See the case of *De Medina v. Grove* (1847) 10 Q.B. 172 where an action against the execution by creditor and his solicitor for levying for the whole amount after part payment with the knowledge of both failed for want of proof of malice and the want of reasonable and probable cause.

- d*
- e*
- f*

The fourth point made is that the execution is irregular in that the Abeokuta Judicial Division cannot order an execution to be levied in Ijebu Judicial Division. In other words, execution cannot be ordered to be levied in a foreign court's jurisdiction. This submission is not exactly correct. The Abeokuta Judicial Division can order execution to be levied in any Judicial Division in Western Nigeria but the provisions of section 20 of the Sheriffs and Civil Process Law must be complied with in the process. Section 20 provides as follows:

- g*
- h*
- i* “Where a Writ of Execution has been issued from a court, hereafter in this section referred to as a ‘home court’ against the property of any person and the property or any of it is out of the local division or district of that court, the Registrar of that court may send the Writ of Execution to the Registrar of any other court within the jurisdiction of which the property is or is believed to be with a warrant thereon endorsed or thereto annexed requiring execution
- j* of the original writ.

20(2) On receipt of the warrant, the Registrar of the other court shall act in all respects as if the original writ of execution had been issued by the court of which he is Registrar and shall within the prescribed time:

(a) report to the Registrar of the home court what he has done in the execution of the writ; and

(b) pay over all moneys received in pursuance of the writ.

20(3) . . .”

In the matter now before this Court the Registrar of the Abeokuta Judicial Division did not send the writ of execution to the Registrar of the Ijebu Judicial Division with the warrant endorsed thereon as in Form 10 of the First Schedule to the Sheriffs and Civil Process Law in compliance with subsection (1) of section 20 of the Law quoted above. The other provisions of subsections 2 and 3 of the Sheriffs Law were not complied with. What appeared to have happened was that the writ was sent direct to the Deputy Sheriff, Ijebu, for execution, this was on the 22nd February, 1962. This would have been regular before the creation of Ijebu Ode Judicial Division which took effect from the 1st January, 1962. In the present case, however, the sending by the Registrar of Abeokuta Judicial Division of the writ direct to the Deputy Sheriff and the execution thereof without compliance with subsection (1) of section 20 of the Sheriffs and Civil Process Law is, in my view, irregular.

Counsel for the respondent had no effective answers to the points raised by Counsel for the applicant. Towards the end of his submission, however, Counsel for the respondent agreed that for non-compliance with section 20 of the Sheriffs and Civil Process Law, the writ was irregular but that this error was of an administrative nature and that the court should order the suspension of the writ pending the rectification of the irregularity. I propose to do nothing of the sort. There are abundant reasons appearing in this ruling which make it imperative that the writ in this matter should be set aside.

- a* I accordingly order that the writ of execution in this matter be set aside and the property of the judgment debtor under execution be released immediately.

## Barclays Bank DCO v. Kosoko

HIGH COURT OF LAGOS STATE

DE LESTANG CJ

Date of Judgment: 30 JULY 1962

Suit No.: L.D.46A/1962

*Banking – Mortgages – Equitable mortgage on registered land – Interest duly registered encumbrances on property – Whether mortgagee entitled to register a caution against disposition affecting that property – Section 44(1), Registration of Title Act Cap 181 – Memorandum of deposit giving right to mortgagee to call for legal mortgage – Whether unregistered claim entitling mortgagee to enter a caution – Memorandum of deposit giving right to mortgagee to call for legal mortgage – Whether unregistered claim entitling mortgagee to enter a caution*

### Facts

One Mustafa Sulu Laneni was the registered proprietor of a property registered as Title No. L.D. 1840. By a Memorandum of deposit of title deeds made on the 7th September, 1955, Laneni created an equitable mortgage over the property in favour of the Bank to recover advances made by them to a business to which he was interested. This equitable mortgage was duly registered as an encumbrance on the property. When Laneni died, his administrators purported to sell the property to Mr Ganiyu Kosoko, the appellant. When the purported sale came to the knowledge of the bank, they sought to register a caution against the registration of any disposition or charge or ownership affecting that property. The application to register the caution came before the Registrar of Title. Mr Kosoko objected to the registration of the caution but his objection was dismissed by the Registrar of Title. Mr Kosoko appealed to the High Court.

The appellant contended that the caution be the bank was not registrable because section 44(1), Registration of Title Act. Cap 181, confers a right to register a caution only on a

- a* person claiming an unregistered estate or an unregistered interest or an unregistered claim and that since the bank claims an interest which was registered they were not entitled to register a caution. The bank on the other hand, argued
- b* that the word, “Unregistered” in section 44(1), Registration of Titles Act. Cap 181 applies to “Estate” only. It was further argued that under the memorandum of deposit, the registered proprietor, Laneni (deceased) undertook to execute on demand a legal mortgage in favour of the bank or their nominees. This, it was contended is a personal right, against the deceased which is registered and therefore entitling them to a caution.
- c*
- d* Although this point was not taken before the Registrar of Titles, the Appellate High Court allowed it to be taken because it goes to the root of the matter.
- Section 44(1) Registration of Titles Act. Cap 181, provides:–
- e*
- “Any person claiming an unregistered estate, interest or claim in any registered land or charge, whether such estate, interest or claim is created before or after first registration may require the
- f* Registrar to register a caution against the registration of any disposition or change of ownership affecting that land or charge without notice to the cautioner.”

#### **Held –**

- g* 1. On the plain grammatical reading of section 44(1), Registration of Titles Act. Cap 181, the adjective “unregistered” qualified all three nouns, “estate,” “interest” and “claim” and not merely “estate.” Therefore it is only a
- h* person claiming an unregistered estate, interest or claim who may require the registration of a caution and since the Bank/respondent’s claim is registered they are not entitled to a caution.
- i* 2. Since the undertaking by the registered proprietor to execute a legal mortgage is contained in the memorandum of deposit creating the equitable mortgage which has been registered, it forms part of the registered instrument and cannot be treated separately as constituting
- j*

an unregistered personal right entitling the bank to register a caution. a

*Appeal allowed: Decision of the Registrar set aside: Registration of Caution disallowed.* b

### **Nigerian statute referred to in the judgment**

Registration of Titles Act. Cap 181, section 44(1) c

### **Counsel**

For the appellant: *Kotun*

For the respondent: *Barsely* d

### **Judgment**

**DE LESTANG CJ:** The facts giving rise to this appeal are as follows: e

One Mustafa Salu Laneni was the registered proprietor of a property registered as Title No. L.D. 1840. By a memorandum of deposit of title deeds made on the 7th September 1955 he created an equitable mortgage over it in favour of the respondents, who are bankers, to recover advances made by them to a business in which he was interested. The equitable mortgage was duly registered as an encumbrance on the property. Laneni is now dead and his administrators purported to sell the property to the appellant. When this came to the knowledge of the respondents they sought to register a caution against the registration of any disposition or change of ownership affecting that property. The appellant objected to the registration of the caution but his objection was dismissed by the Registrar of Titles. It is against this dismissal that he appeals. f  
g  
h

Two questions arise for decision on this appeal. i

The first is whether in the circumstances the caution was registrable under section 44(1) of the Registration of Titles Act. That section reads as follows:

“Any person claiming an unregistered estate, interest or claim in any registered land or charge, whether such estate, interest or claim is j

*a* created before or after first registration, may require the Registrar to register a caution against the registration of any disposition or change of ownership affecting that land or charge without notice to the cautioner.”

*b* The appellant’s contention is that section 44(1) confers a right to register a caution only on a person claiming an unregistered estate or an unregistered interest or an unregistered claim and that since the respondents claim an interest which is registered they are not entitled to register a caution. For the respondents it was contended that the word “unregistered” in section 44(1) applies to “estate” only. This interpretation was not, however, pressed when it was not supported by Counsel for the Registrar of Titles. In my view, section 44(1) is clear and unambiguous.

*e* On the plain grammatical reading of the section the adjective “unregistered” qualifies all three nouns, “estate,” “interest” and “claim” and not merely “estate” as suggested. That being so, it is only a person claiming an unregistered estate, interest or claim who may require the registration for a caution and since the respondents’ claim is registered they are not entitled to a caution. The reason for limiting cautions to claimants of an unregistered estate, interest or claim is very clear to me. A registered claimant is sufficiently protected by the fact of registration because no dealings with the registered land should take place without his being notified and given an opportunity of objecting. Although there is no express provision in the Registration of Titles Act requiring the Registrar of Titles to notify all persons, who have a registered interest, of dealings in the land effected, it is, in my view, implied from the scheme of the Act and I am very glad to hear from the learned Counsel for the Registrar of Titles that it is the practice in the Land Registry in Lagos to give such notices. I am sure that this is the right practice. Before leaving this question it is only fair to add that this point was not raised before the Registrar and was only allowed to be argued in this Court because it goes to the root of the matter.

The other question is whether the respondents' right under the memorandum of deposit to call for a legal mortgage is an unregistered claim entitling them to a caution. *a*

By Clause 2 of the memorandum of deposit, the deceased undertook to execute on demand a legal mortgage in favour of the respondents or their nominees and it is contended that this is a personal right against the deceased which is unregistered. I am unable to agree. In my view since this right is contained in the instrument creating the equitable mortgage which has been registered, it forms part of it and cannot be treated separately. *b* *c*

In the result the appeal succeeds. The decision of the Registrar of Titles is set aside and it is ordered that the registration of the caution be disallowed. As the appeal succeeds on a point which was not taken before the Registrar of Titles there will be no order as to costs. *d* *e*



*a*

**African Continental Bank Limited v.  
Nnaji and another**

*b*

HIGH COURT (EAST)

REYNOLDS J

Date of Judgment: 6 SEPTEMBER 1962

Suit No.: E/46/62

*c*

*Banking – Guarantee – Promise by a letter from guarantor to guarantee loan or overdraft – Guarantor bound once bank gives the overdraft on the strength of the letter*

*d*

*Contract – Offer and acceptance – Unilateral contract – Offer to guarantee overdraft – Formal notice of acceptance not essential*

*e*

*Mortgage – Equitable mortgage – Deposit of title deeds to secure loan/overdraft – Intended legal mortgage not executed – Deposit amounts to equitable mortgage*

**Facts**

*f*

The first defendant applied by a letter for overdraft facilities from the plaintiff bank, stating that the second defendant had agreed to stand as guarantor for him. Before any overdraft was granted to first defendant, the second defendant by a letter to the plaintiff bank offered to stand as guarantor for the first defendant's overdraft. The second defendant for this purpose surrendered his building lease to the bank to enable it prepare a mortgage deed. The mortgage deed was never prepared, but the bank granted the overdraft to the first defendant on the strength of the letter of the second defendant.

*g*

*h*

*i*

*j*

The plaintiff bank brought an action to recover the unpaid balance of the loan. It was argued on behalf of the second defendant that the promise of guarantee was conditional upon the bank preparing a mortgage deed and the bank having failed to accept the offer in the manner prescribed, there was no binding contract. It was further argued that the actual deposit of lease, though essential, was not in itself sufficient to make it an equitable mortgage. The depositor must go

further to prove either by oral or written evidence that the deposit was intended to be by way of security. *a*

**Held –**

1. That the letter constitutes a simple promise of guarantee or suretyship in respect of the contemplated loan by the bank to first defendant and, when acting on that offer, the bank granted the first defendant overdraft facilities, second defendant became bound by his promise. *b* *c*
2. That the second defendant as surety for the repayment of the loan by first defendant is liable for the amount of the balance of the loan due from the first defendant jointly and severally with the first defendant. *d*
3. That the letter from the second defendant was a unilateral contract, that is, it was the offer of a promise for an act and the only acceptance required to make second defendant's promise binding was the doing of the act namely the granting of the loan. *e*
4. That as it is in this case, where a person deposits title deeds, not simply for safe custody but for the purpose of preparing a legal mortgage intended as security for a loan, and such mortgage is not repayment of the loan and would constitute an equitable mortgage. *f*

*Appearances not stated.*

*g*

**Judgment**

**REYNOLDS J:** This is an action by the plaintiff against the first and second defendants jointly and severally to recover the sum of £840.19.11d. 1st defendant has admitted liability and judgment has been entered against him. *h*

Evidence led for the plaintiff, the African Continental Bank was that first defendant applied by a letter (exhibit A) dated 23rd July, 1959 for overdraft facilities from the bank in the sum of £3,500, stating that the second defendant had agreed to stand as guarantor for him. On the 26th August 1959 before any overdraft was granted to first defendant the second *i* *j*

*a* defendant by letter (exhibit B) offered to stand as a guarantor for the first defendant's overdraft. The last paragraph of the letter reads "I am surrendering to you the Building Lease in respect of the above plot (Plot 8, Block 9, Ogui Road) to enable you to prepare mortgage deed to this effect." This lease (exhibit C) was enclosed with exhibit B. On the strength of these letters the bank granted first defendant a loan overdraft of £1000 repayable within 6 months. Part of the loan was repaid by first defendant. The matter was discussed with second defendant on a number of occasions who said first defendant would soon pay the balance outstanding. Second defendant was warned that if it was not repaid, court action would be taken. Second defendant never disputed sending the bank the letter (exhibit B) and the lease (exhibit C). At no time when the matter was discussed did second defendant allege that he was not a party to the transaction.

*e* At the end of the plaintiff's case Mr *Aniagolu* for second defendant rested his case and elected to call no evidence. I accept as being substantially true the evidence by the witness for the plaintiff.

*f* As I understand it Mr *Aniagolu* based his defence on the proposition that in a contract where an offeror specifies the mode of acceptance of his offer a binding contract is entered into only when the offer is accepted in the manner specified. He has submitted that the second defendant's promise of guarantee or suretyship was conditional upon it being accepted by the bank in the manner indicated by the last paragraph of the letter (exhibit B) which has been quoted above and the bank having failed to prepare a mortgage deed had not accepted the offer in the manner prescribed.

*g* I do not consider that the paragraph above-mentioned was intended by second defendant to be a prescribed method of acceptance of an offer. Second defendant is a moneylender and I have no doubt that he knows that before granting overdraft facilities banks frequently require mortgage deeds to be executed by applicants and sureties to secure the loan. I have

no doubt that by the paragraph mentioned he only intended to indicate his willingness to execute a mortgage deed in respect of his property should the bank consider it necessary. a

To me the letter appears to constitute a simple promise of guarantee or suretyship in respect of the contemplated loan by the bank to first defendant and, when acting on that offer, the bank granted the first defendant overdraft facilities second defendant became bound by his promise. It was what is sometimes called unilateral contract that is: It was the offer of a promise for an act and the only acceptance required to make second defendant's promise binding was the doing of the act namely the granting, of the overdraft. b  
c  
d

Accordingly I hold that second defendant as surety for the repayment of the loan by first defendant is liable for the amount of the balance of the loan due by first defendant at the date of filing of this action jointly and severally with the first defendant. e

It was argued by Mr *Okoye* for the plaintiff that the surrender by the second defendant of the lease exhibit C was a deposit by way of equitable mortgage. Mr *Aniagolu* has pointed out that as stated at page 583 of Cheshire's *Modern Real Property* (6ed) "An actual deposit though essential is not in itself sufficient. The depositor must go further and prove by parole or written evidence that the deposit was intended to be by way of security." f  
g

But as stated at the earlier part of this same paragraph; "In this particular case (ie, an equitable mortgage) there need be no memorandum because the deposit ranks as an act of part performance and the deposit alone is treated as constituting an agreement to execute a legal mortgage." h

In my opinion, therefore, where, as in this case a person deposits title deed not simply for safe custody but for the purpose of preparing a legal mortgage intended as security for a loan and such mortgage is not executed, the deposit must be considered to be as security for the repayment of the loan and would constitute an equitable mortgage. It is not i  
j

- a* without significance on this aspect of the case that the lease exhibit C was at the trial produced from the custody of the bank without, apparently any demand being made for its return by the second defendant.

- b* I have dealt with this matter because it was argued by both Counsels at some length but having regard to my finding on the construction of second defendant's letter (exhibit B) and the nature of the claim itself it is not necessary to determine it in order to arrive at a decision on the liability of the second defendant.

- d* I will therefore enter judgment for the plaintiff against the second defendant for the sum of £840.19.11d.

*Okoye*: Disbursements £32.3.6d. Ask for 20 guineas costs against second defendant only.

- e* Costs to plaintiff measured at £32.3.6d granted against first and second defendants. Costs to plaintiff against second defendant only measured at 15 guineas.

**National Investment and Properties Co  
Limited and another v. Bank of West Africa  
Limited**

FEDERAL SUPREME COURT

ADEMOLA CJF, BRETT, TAYLOR, BAIRAMIAN FJJ

Date of Judgment: 7 NOVEMBER 1962

F.S.C.: 478/1961

*Banking law – Securities for banker's advances – Competing priority of equitable mortgagee and void registration of title by unincorporated company*

*Land law – Registration of instruments affecting land – Registration in the name of an unincorporated entity – Effect*

**Facts**

At the High Court of Lagos State, the plaintiff/respondents bank claimed against the defendant/appellants a declaration that the defendants/appellants did not obtain any rights of priority over the banks equitable mortgages of certain leaseholds and an order of specific performance against the second defendant/appellant compelling him to execute a legal mortgage in favour of the plaintiff/respondent bank.

The bank's case was that Mansour had deposited three certificates of leasehold property in Lagos registered in his name under the Registration of Titles Act, to secure monies advanced or to be advanced to him and to Ali Mansour and Sons Limited, or to either of them; that in or about March, 1956, he undertook in a memorandum (referred to as exhibit P.6) to execute a legal mortgage, but did not do so when called upon in or about July, 1957; that in February, 1958, the bank lodged the certificates with the Registrar of Titles for a purpose; that on the 1st March, 1958 Mansour purported to assign the leases to the National Investment and Properties Company who obtained the certificates and on the 25th, were registered as owners, but as the National Investment and Properties Company were then unincorporated, the registration was void, and yet they would not hand over the

- a* certificates; and that both Mansour and Ali Mansour and Sons Limited were heavily indebted to the bank. Accordingly the bank asked for a declaration that the National Investment and Properties Company did not obtain by registration any rights of priority over those of the bank as equitable mortgagee, and certain forms of relief.

*c* The bank called evidence, while the defendants did not whereupon the learned Chief Judge found the bank's case proved, and granted the declaration. He also made orders on Mansour to execute a legal mortgage with the usual covenants, and on the National Investment and Properties Company to deliver the certificates to the bank, together with an order for the Register to be rectified by deleting the National Investment and Properties Company and restoring Mansour as the owner of the leases.

- e* Dissatisfied with the decision, the appellants appealed to the Supreme Court.

**Held –**

- f* 1. Registration of ownership of lands or leaseholds under the Registration of Titles Act in the name of a company which is not incorporated at the date of registration is void and of no effect.
- g* 2. The first appellant which purportedly took assignment of three leases when it was un-incorporated and were registered as owners of the three certificates of leasehold in the Land Registry did not acquire any right of priority over the respondent bank as an equitable mortgagee of the same leasehold property.
- h*
- i* 3. The second appellant having undertaken in a Memorandum to execute a legal mortgage but breached that undertaking should execute the legal mortgage in favour of the respondent bank forthwith.
- j* 4. The first appellant should deliver the three certificates of leasehold to the respondent bank while the Register of Lands should be rectified by deleting the first appellant

and restoring the second appellant as the owner of the leases.

*a*

*Appeal dismissed.*

*b*

### **Case referred to in the judgment**

#### ***Foreign***

*Hasham v. Zenab* (1960) A.C. 316; (1960) 2 W.L.R. 374

*c*

### **Nigerian statutes referred to in the judgment**

Land Registration Act, Cap 99, section 15

Registration of Titles Act, Cap 181, section 86

*d*

Ademola, CJF, Brett and Taylor, FJJ concurred in the judgment of Bairamian FJ.

### **Counsel**

For the first defendant/appellant: *Williams* (with him *Nzegwu*)

*e*

For the second defendant/appellant: *Okorodudu* (with him *Alele*)

*f*

For the plaintiff/respondent: *Goulding* (with him *Bentley*)

### **Judgment**

**BAIRAMIAN FJ:** This appeal is against the judgment of De Lestang CJ, High Court of Lagos in favour of the plaintiff bank.

*g*

The bank's case was that Mansour had deposited three certificates of leasehold property in Lagos registered in his name under the Registration of Titles Act, to secure monies advanced to or to be advanced to him and to Ali Mansour and Sons Limited, or to either of them; that in or about March, 1956, he undertook in a Memorandum (referred to as exhibit P.6) to execute a legal mortgage but did not do so when called upon in or about July 1957; that in February 1958, the bank lodged the certificates with the Registrar of Titles for a purpose; that on the 1st March, Mansour purported to assign the leases to N.I.P.C. who obtained the certificates

*h*

*i*

*j*



*a* and on the 25th were registered as owners, but as the N.I.P.C. was then un-incorporated the registration was void, and yet they would not hand over the certificates; and that  
*b* both Mansour and Ali Mansour and Sons Limited were heavily indebted to the bank. Accordingly the bank asked for a declaration that the N.I.P.C. did not obtain by registration any rights of priority over those of the bank as equitable mortgagee, and certain forms of relief.  
*c*

The bank called evidence, the defendants did not; the learned Chief Justice found that the bank's case was proved, and granted the declaration; he also made orders on Mansour  
*d* to execute a legal mortgage with the usual covenants, and on the N.I.P.C. to deliver the certificates to the bank, together with an order for the Register to be rectified by deleting the N.I.P.C. and restoring Mansour as the owner of the leases.

*e* The defendants have appealed against the judgment. The hearing began with Mansour's appeal, which was argued by Chief *Okorodudu*; Chief *Williams* argued for the N.I.P.C.; Mr *Goulding* argued for the bank.

*f* The dominant question arises under Mansour's first ground of appeal which complains that:—

“The learned trial Judge erred in law in admitting as evidence the document exhibit P.6. The said document being inadmissible by  
*g* virtue of the provisions of the Land Registration Act.”

For convenience that Act will be referred to as the 1924 Act. It provides for the registration of instruments and the filing of judgments affecting land in Nigeria. It sets up office for registration and directs the Registrars to register instruments which satisfy the requisite conditions; section 3 and section  
*h* 5. Every instrument (as defined in section 2) must be registered; if it is not, then, subject to the exemption which will  
*i* be discussed later, an instrument cannot be pleaded or given in evidence in court as affecting land: section 15; but registration does not cure defects: section 25.

*j* It was doubtless to give a measure of security to dealings in land and reduce litigation, that in 1935 the legislature

enacted the Registration of Titles Act, to provide registration of titles to land, which is being applied to more and more of Lagos, according as it becomes possible to create one and then another registration district: see Orders made under the Act in Volume X of the current Laws. The Acts established registries and requires a separate register to be kept in a certain form: section 4; section 69. If after the creation of a registration district a fee simple is conveyed, or a lease with 40 years to run is granted or assigned, for a consideration which consists wholly or in part of money: the grant becomes, after two months (unless extended) after execution of the conveyance grant or assignment, void if the guarantee does not apply for registration within that period: section 5. After first registration there are simple methods of dealing with registered land and having the dealing registered. On the other hand a registered land can be dealt with as if it were not registered, but any such dealing is capable of being overridden by registered disposition for valuable consideration: section 42(1). Mortgage by deposit of certificate is dealt with in section 58. The point to note is that the Titles Act (referred to for short) is based on a different conception and has another aim; that can easily be seen by looking at section 48 and on to section 54, which protects the registered purchaser for value from unregistered interest affecting the estate of any previous registered owner.

Much turns on section 86(1), which provides that:—

- “1. No document affecting land which originates an application for first registration and which is executed after the creation of the registration district in which land is situate and no document affecting registered land executed after first registration shall require to be registered under the Land Registration Act. No registered owner, being purchaser for value subsequent to first registration shall be affected by notice of any document registered under such Act.”

For such a purchaser the register kept under the Titles Act serves as a screen behind which he need not look. The first mentioned class of document is dealt with in section 5: failure

*a* to apply for registration in time carries the penalty of making the document (conveyance of fee simple; grant or assignment of lease) void. The second class comprises all  
*b* documents executed after the first registration, whether the interest or right created by the document is registered or not; failure to register such interest or right carries the risk of being overridden by registered dispositions for valuable  
*c* consideration: section 42(1). Moreover the convenience and security buying, or advancing money on land registered under the Titles Act, made it desirable to save him from having to look at anything other than the Register kept under the Act. There was no point in having registration under two  
*d* Acts; hence the exemption of those two classes of documents from registration under the 1924 Act. When the Titles Act was passed in 1935, section 85(1) (now printed as 86(1), began with the second class of documents after “and” in line  
*e* 4 of the text; early in 1956 the subsection was amplified to read as quoted above, by Act No. 8 of 1956, with effect from March, 1956.

*f* To now pass section 15 of the 1924 Act: its original form reads as follows:

*g* “No instrument shall be pleaded or given in evidence in any court as affecting any land unless the same shall have been registered in the proper office as specified in section 3: provided that, etc.”

*h* The first proviso is irrelevant; the words “as specified in section 3” were added in 1954, but nothing hangs on that. In 1956, at the same time as section 85(1) (now 86(1)) of the Titles Act was amended and amplified, a further proviso was added to section 15 of the 1924 Act, by Act No. 9 of 1956,  
*i* also with effect from 1st March 1956, which reads:—

*j* “Provided further that this section shall not apply in the case of any document which is exempted from registration under this Act by virtue of section 85(1) (now printed as section 86(1)) of the Registration of Titles Act and which is registered under this Act.”

Chief *Okorodudu*, the learned Counsel for Mansour, relies on that proviso as making the memorandum P.6 inadmissible in evidence that it is an instrument but was not registered under the Titles Act; the pith of his argument is that unless both arms of the proviso co-exist, the proviso is not effective.

Chief *Williams* the learned Counsel for the N.I.P.C. argues that an instrument cannot be given in evidence unless it is registered; that the memorandum in respect of the equitable mortgage should have been registered by notice given within two months under section 58 of the Titles Act; and that after that time it could and should have been registered under the 1924 Act for the sake only of making it admissible in evidence.

Both the learned Counsels criticise the learned Chief Justice's view that "registered" could, after first registration of title under the Titles Act, mean submitted for registration; they argued that it means entered in the register.

The learned Chief Justice in an attempt to achieve some harmony between section 86(1) of the Titles Act and the proviso to section 15 of the 1924 Act, gave it as part of his view that when the bank submitted a caution for registration under the Titles Act,, that amounted to having the memorandum registered thereunder. That was in the ruling of 10 November, 1960, where the learned Chief Justice gives a further reason thus:—

"In any case having regard to the scheme of Act(s) and their objects, and in particular having regard to the recognition given to unregistered documents in the Registration of Titles Act 1 consider that without doubt it would cause injustice and favour fraud if a document which had been refused registration were rejected by the court, in particular when the registration of that document is the very matter in issue in the action."

Mr *Goulding*, the learned Counsel for the bank, points out that under section 85 of the Titles Act, a document which initiates registration thereunder is exempted from registration under the 1924 Act; which means that the Registrar appointed under the 1924 Act is not required to register it.

- a* The guarantee applies for first registration under the Titles Act; if it is refused; on the interpretation argued for by the defendants, he cannot give his conveyance in evidence in court because it is not registered under the Titles Act. Thus *b* section 85(1) turns out to be a trap. He points out that, if in addition there must be registration, the exemption in section 86 becomes nugatory; that the Titles Act provides its own *c* penalty, and there is no reason to add another penalty, inadmissibility in evidence, in the 1924 Act. The position in 1935 when the Titles Act was enacted was that by virtue of section 86 certain documents were exempted from registration under the 1924 Act, section 15 of which made no mention of them; and learned Counsel could not find any reason *d* why that exemption should be cut down in the second proviso added to section 15 in 1956.

- e* The reply for Mansour is that admissibility is governed by that section and the memorandum is caught in the second proviso.

- Replying for the N.I.P.C., Chief *Williams* agrees that *f* “REGISTER” in section 5 of the 1924 Act means register under that Act and that between 1935 and 1956 there was total exemption, by virtue of section 86 of the Titles Act; he argues that in 1956 that was qualified when the proviso was added to section 15 of the 1924 Act, the effect being that one *g* could not put in a document unless it was registered under the one or other Act.

- The effect of that argument is that section 15 with the proviso should be understood as if the section reads as follows:— *h*

- “No instrument shall be pleaded or given evidence in any court as affecting any lands unless the same shall have been registered in the lands office as specified in section 3 or in the case of any *i* document which is exempted from registration under this Act by virtue of section 86 of the Registration of Titles Act, unless such document is registered under that Act.

- That is also implicit in Chief *Okorodudu*’s argument. Both *j* arguments use the proviso as a means of enlarging the field

of prohibition in the enactment, contrary to the intention of the proviso, which is plain from the words:— *a*

“Provided further that this section shall not apply” etc. and which is to reduce the field of prohibition. That odd result is achieved by overlooking the function of a provision added to exclude certain cases from the operation of the enactment to which it is appended.” *b*

The proviso is added on the assumption that, but for the proviso, the enacting clause would operate on those cases. That assumption may be correct, possibly correct, or mistaken. Sometimes the enacting clause is ambiguous; the proviso is useful; it excludes those cases and settles the ambiguity. But where the field within which the enacting clause operates is clear from its language, the adding of a proviso to exclude cases which do not fall within the field is both superfluous and apt to lead one astray. Nevertheless, when someone fears that those cases fall within that field, a proviso is added to allay his fears; which saves argument but may create trouble. The fact may be overlooked that it is a proviso dependant on the enacting clause before it, and cannot be treated as if it were an independent enacting clause: when that fact is overlooked, the result is to read into the enactment, words which are not to be found there and which would alter its operative effect. The mistake made in the arguments for the defendants has been illustrated by re-writing the enactment in section 15 with the proviso as an additional enacting clause. *c*  
*d*  
*e*  
*f*  
*g*

The proper construction of section 15 with the proviso is to read the enacting clause first. This embraces instruments which require registration under the 1924 Act, it does not embrace any that do not; consequently it does not operate on documents which are exempted from such registration by virtue of section 86 of the Titles Act, whether registered or not registered under that Act. Quite unnecessarily, the second proviso was added to section 15 of the 1924 Act, to exempt such documents when registered under the Titles Act; being proviso, it does not have effect on extending the *h*  
*i*  
*j*

- a* operation of the enacting clause to such document when not registered under the Titles Act. The intention of the legislature in 1956 when adding the proviso was to reduce the field of prohibition; it is a fallacy to impute to the legislature an intention to enlarge that field.

In my view the memorandum was inadmissible in evidence, and the first ground in Mansour's appeal must fail.

- c* There is no need to discuss the various other points argued under that ground. Further, as Mansour's second ground hangs from the first, it need not be set out or discussed.

- d* Grounds 3 to 7 were argued *en bloc* – they relate to a passage in a letter of the 5th October, 1957, from the bank to Ali Mansour and Sons Limited, in an answer to an inquiry from them which states:–

- e* “At the moment we are holding the securities mentioned in your letter against the following account but we must point out in the case of 128/130 Broad Street, this is also regarded as supporting the guarantee given by Mr H.A. Mansour, to the company. Company's accounts, 208/212 Broad Street, 9 Wiwo Onatere Street.

- f* Life Policies: Mr H.A. Mansour:– 128/130 Broad Street.”

The judgment deals with it as follows:–

- g* “This letter was never put to the witness and it does not deal with all the certificates of title. It is quite possible that it merely reflects the internal arrangements of the bank in regard to the certificates and no more. Moreover this is a special defence which ought to have been specifically pleaded and was not. It is open to the second defendant.”

- h* (The topic was raised in argument, that there had been an appropriation of the securities by the bank between Mansour and Ali Mansour and Sons Limited.)

- i* The grounds of appeal complain that the learned Chief Justice erred in not treating the bank's letter as an admission; in failing to apportion the indebtedness and securities; in depriving Mansour of a defence open to him in law; in ordering specific performance without a finding of fact on the
- j*

amount of the debt; and in not directing his mind to the issue *a*  
whether Mansour was liable on the evidence as a guarantor  
“of any indebtedness of Ali Mansour and Sons Limited sued  
upon and if so for what amount.” *b*

The argument is that on the bank’s evidence it is only  
128/130 Broad Street, which affects Mansour.

For the bank, the argument is that 208/212 Broad Street, *c*  
was owned by Mansour, who by exhibit P.10 guaranteed the  
company’s account, and there is finding (3) in judgment that  
both he and the company are still heavily indebted to the  
bank. There should have been a specific defence, in view of *d*  
Order 32, rule 13 of the Supreme Court Rules; but in any  
event, the letter says “at the moment,” and was not a waiver:  
it was not under seal and Mansour had not given any consid-  
eration for waiver; it was not addressed to him but to the  
Company for information: with exhibit P.6 (the memoran- *e*  
dum) in evidence the matter was set out at length there.

The reply for Mansour is that the memorandum was aban-  
doned by the bank and superseded by the letter, which con- *f*  
fined his liability; his title deeds are security but limited to  
the letter as a contract.

A contract imports an offer and acceptance of it, but the  
bank’s answer cannot be said to be an acceptance of an offer *g*  
in the letter of the company, nor can the answer to the in-  
quiry from the company have the effect of superseding the  
memorandum or of operating as an admission of waiver of  
the bank’s rights. The arguments for the bank are in my *h*  
view conclusive, and grounds 3 to 7 must fail.

Ground 8 was not argued.

Ground 9 complains that the order on Mansour to execute *i*  
a legal mortgage with the usual covenants is vague and bad  
law, the argument is that it presumes that the memorandum  
is admissible. For the bank it is stated that the learned Chief  
Justice on 19 March, 1962, settled the form; and later also  
the figure. There is no reply. Ground 9 has no substance. *j*



*a* Ground 10 complains that there was no evidence that Mansour refused to carry out his obligations, and that made the order for specific performance bad law Chief *Okorodudu*  
*b* refers to paragraph 2 of the memorandum (P.6) which stated that:—

*c* “The undersigned will on demand at his or their own cost make and execute to you or as you may direct a valid Legal Mortgage of or on the said property on any part thereof in such form and with such provisions and powers of sale leasing and appointing a receiver and otherwise as you may require.”

*d* He argues that there were reasons for delay. For the bank, is pointed out that paragraph 9 of the statement of claim does not allege refusal but failure and neglect to execute a legal mortgage. The witness, Hawkins and Smith asked Mansour several times to execute the deed. He did not dispute the obligation to do so, but he told the one that he was negotiating a sale and the other that the company’s seal was with the auditors, and he went of with the engrossment and did no more about it. It is argued for the bank that the time had come to execute the deed and *Hasham v. Zenab* (1960) A.C. 316, settled the point. That meets the complaint; and I would add that Mansour’s was a polite form of refusal. Ground 10 must fail.

*e* The 11th and final ground was not argued.

*f* In my judgment Mansour’s appeal must fail.

*g* The N.I.P.C. notice of appeal contains 11 grounds. Of these the first complains that the memorandum P.6 was wrongly admitted; the argument for the N.I.P.C. has been discussed together with that for Mansour; the first ground fails.

*h* The second and 11th complaints that the learned Chief Justice erred in holding that the memorandum was registered and that the bank had registered a caution with the memorandum as its foundation. The caution had been submitted for registration and in his ruling of 10th November, 1960,  
*i* when interpreting the proviso to section 15 of the 1924 Act,  
*j*

the learned Chief Justice thought the word “registered” should include something submitted for registration. In the judgment itself there is no finding that the memorandum was registered: so grounds 2 and 11 are beside the point.

Ground 13 is that the learned Chief Justice erred in holding that P.6 is the document referred to in paragraph 5 of the statement of claim (in its final form) which alleges that the memorandum was executed in or about March, 1956. It had been contended at the trial that P.6 was not that document; the judgment says:—

“I hold that it was executed as stated by Hawkins in the second half of 1956. In the absence of any evidence that there was another memorandum of equitable mortgage executed by the second defendant. I see no reason to doubt, however, that exhibit P.6 is the document referred to in the statement of claim. The discrepancy between the date pleaded and proved is probably attributed to the fact that it was not dated on the date it was executed.”

The witness Hawkins testifying in November, 1960, said:—

“To the best of my knowledge, exhibit P.6 was signed some time in 1956. I think it was in later half of 1956 that exhibit P.6 was executed, because it was after I relieved Mr Sells that I signed it. I relieved Sells I think in April 1956 for approximately two and a half months. In 1956 I was in Lagos for the whole of the year. After relieving Sells I was appointed Manager of Lagos Branch and held that post for the rest of 1956.”

That the evidence might mean any time between April and the end of 1956. If it was April, the words “in or about March” would be near enough. Mansour, who might remember when it was, did not give evidence and has not complained. He executed only one memorandum, and it was page 6. The most that ground 3 can mean is this, that the bank should pay the cost of amending its pleading. The mistake did not embarrass the defence. It could not be a ground for defeating a ground proved in substance.

The only other grounds argued are 4, 5, and 6. No. 6 raises the point in ground 4. Grounds 4 and 5 state that:—

4. The learned Chief Justice erred in law in holding that a mortgagee who has failed to give notice of the mortgage to

*a* the Registrar within the time prescribed by section 58(2) of the Registration of Titles Act could protect such interest by lodging a caution or by registration thereof as an encumbrance.

*b* 5. The learned Chief Justice erred in law in failing to observe that the interest of a mortgagee created off the Register is not an interest which is capable of being protected by caution or by registration thereof as an encumbrance.

*c* Mr *Goulding*, for the bank, has objected that the N.I.P.C. has no interest in those matters. Chief *Williams* has argued that as holding the land certificates, the N.I.P.C. has *locus standi*.

*d* On the other hand, he concedes that as the assignment of the lease was void, the order to delete the registration in the name of N.I.P.C. and restore Mansour's name is lawful. The N.I.P.C. did not show any reason which justified retention of the certificates: the bank has proved its claim for having

*e* them back. It follows that it was lawful to order the N.I.P.C. to deliver them up; and thus it is clear that the N.I.P.C. has no interest in those matters. They are interesting questions,

*f* but the decision of them does not arise in the appeal of the N.I.P.C., in which they are raised. Consequently anything said on them would be in the nature of *obiter dicta*. To avoid those "proverbial chickens of destiny" coming back to roost, I shall not deal with those grounds of appeal, but confine

*g* myself to saying that they would not help in bringing success.

*h* There is complaint by the bank that the title of the land certificate was not handed in by the N.I.P.C., but a wrong one put in instead. That should be taken up in the court below.

In my judgment both the defendants fail, and it is proposed to order as follows:

*i* The appeal of the defendants In the High Court of Lagos, Suit No. 137/59 from the judgment of 12th December, 1960 is hereby dismissed with 200 guineas costs.

*j* *Appeal dismissed.*

## Nwandu v. Barclays Bank DCO Nigeria Limited

HIGH COURT (EAST)

REYNOLDS AG CJ

Date of Judgment: 28 NOVEMBER 1962

Suit No.: E/59/62

*Banking – Bank paying cheque for work done by payee after countermand by customer – Whether banker can debit customer's account with the amount – Applicable principles*

*Banking – Countermand – Payment of cheque for work done or to be done by payee after countermand – Effective countermand – What constitutes – Failure of Bank to honour countermand – Effect*

### Facts

The plaintiff's claim against the defendant was for a declaration that the defendant cannot debit the plaintiff's account with the defendant with the sum of £669 in favour of the plaintiff's account, and for special and general damages. The plaintiff had at all material times a current account with the defendant. The plaintiff issued a post-dated cheque for £660 in favour of a company. But before presentment he made a valid countermand of the cheque. The defendants having failed to do this the plaintiff brought these proceedings. The plaintiff said in evidence that the cheque had been given for work done and to be done by the payee which it had failed to perform and so he countermanded the cheque. The defendant's defence was based on the equitable doctrine under which a person who had paid the debts of another without authority may be allowed to take advantage of his payment.

### Held –

1. There is a distinction between a case where money is paid in settlement of a debt without authority of the debtor and where money is paid in disregard of the

- a* debtor's express direction not to pay. Thus where a cheque has been paid in settlement of a debt, the equitable defence expounded will not avail a banker where
- b* there has been a valid countermand of the cheque before presentment.

In the instant case, since there was a valid countermand of the cheque before presentment, the defendant is liable

- c* to the plaintiff.
2. To constitute an effective countermand, it must come to the conscious knowledge of the banker. If by negligence or default of the Banks such countermand fails to be effective,
- d* the bank will be liable to the customer for any loss incurred thereby.

- In the instant case, since there was a valid countermand of the cheque in question, but the said countermand was not honoured due to the negligence of the defendant's officer, the defendant is liable to the plaintiff.
- e*

*Plaintiff's claim granted.*

*f* **Case referred to in the judgment**

***Foreign***

*Ligett (Liverpool) Ltd v. Barclay Bank* (1928) 1 K.B. 48

*g Reade v. Royal Bank of Ireland C.A.* (1922) 2 I.R. 22

**Counsel**

For the plaintiff: *Obi-Okoye*

*h* For the defendant: *Okwuosa*

**Judgment**

- REYNOLDS AG:** The plaintiff's claim against the defendant
- i* bank is (a) for a declaration that the defendant cannot debit the plaintiff's account with the defendant with the sum of £660 in honour of plaintiff's stopped cheque No. 184/62571 and (b) a sum of £1,000 being (1) £660 special damages for the amount wrongly paid out and debited to plaintiff's account (2) general damages of £340.
- j*

The plaintiff, a businessman had at all material times a current account at the defendant's Garden Avenue Branch Office, Enugu. *a*

Sometime in early August, 1961, plaintiff issued a post-dated cheque No.184/62571 for £660 in favour of the Nigerian Properties Management Company at Lagos to be paid on 31st October, 1961 out of the plaintiff's current account at the above mentioned branch of the defendant. By a letter (exhibit "A") dated 19th October, 1961 delivered to the defendant at Enugu, plaintiff advised the defendant to stop payment of the cheque. Through a mistake of a servant of the defendant the cheque was honoured when presented for payment by the payee on 31st October, 1961 and the plaintiff's account debited with the sum of £660. By his letter (exhibit A1) dated 22nd November, 1961, the plaintiff protested to the defendant and asked for the sum of £660 to be re-credited to his account. By its letter dated 28th November, exhibit A2, the defendant notified the plaintiff that his account had been re-credited with the £660, wrongly paid out. By its letter (exhibit A3) dated 1st March 1962 the defendant suggested that the cheque had been given to the payees for value received and that consequently if this were so, the plaintiff should be in position to authorise the payment. The plaintiff replied by a letter (exhibit A4) dated 6th March, 1962 in which he said that the cheque had been given for work done and to be done by the payee which it had failed to perform and refused to authorise the cheque. *b c d e f g*

By a debit note, however, dated 29th August, 1962, the defendant notified the plaintiff that it had re-debited his account with £660. The plaintiff then through his solicitor by letter dated 31st August, 1962 required the defendant to re-credit his account with the £660 within 24 hours. The defendant having failed to do this the plaintiff instituted the present action. *h i*

The only dispute on the facts is as to whether the cheque for £660 was issued for work already completed by the payees when it was handed over to them in August, 1961. *j*

- a* The plaintiff said in evidence that when the cheque was handed over by him the payees, who were building two houses for him, one at Arakan Street, Apapa and the other at
- b* Degema Close Road, Apapa, had still to have water and electricity connected to the Degema Close Road property and that the cheque was post dated to enable this to be done and a certificate of occupancy obtained by them and handed
- c* over to the plaintiff. The cheque for £660 had been stopped by the plaintiff because water and electricity had not been connected by the payee's contractors as they were bound to do.
- d* The present Manager of the Garden Road Branch of the defendant who had been on leave at all material times until 12th December, 1961 said that when he returned he found that the plaintiff's cheque for £660 had been paid to the
- e* payee through a mistake of one of the defendant's clerks who overlooked the plaintiff's stop order. On representations from the plaintiff the £660 had been refunded to him to the debit of a special suspense account. He attempted to get
- f* the plaintiff's assistance to enable the defendant to recover from the payees. Plaintiff's attitude was that as defendant had made a mistake he must suffer for it and he was not prepared to assist. The bank considered it has the right to recover from one or other of the parties and after inquiries
- g* and considerations it was decided to re-debit the plaintiff's account with the £660.
- Defendants called one James Oladipo Talabi a member of
- h* the firm of building contractors, the payee of cheque for £660. The firm had constructed the two buildings at Apapa for the plaintiff already mentioned. A dispute arose over the payment by plaintiff for variations from the contract of the building at Degema Close. Plaintiff refused to pay the
- i* amount claimed and the firm refused to deliver occupation of the building to the plaintiff. When plaintiff attempted to obtain possession by force there was a disturbance and the police intervened. There in the presence of Superintendent
- j* Oshodi the claim was finally settled the firm agreeing to

take £1,160 offered by the plaintiff. Plaintiff gave two <sup>a</sup>  
cheques one for £500 dated 30th September, 1961, the other  
for £660 dated 31st October, 1961. Plaintiff said the payees  
must give him a certificate of occupancy before cashing the <sup>b</sup>  
second cheque.

He made out the receipt for the amounts (exhibit C). The  
certificate of occupancy was duly handed over on 14th Oc-  
tober and the cheque for £660 presented and cashed on 31st <sup>c</sup>  
October. No notice that the cheque was stopped was given to  
the firm.

Mr Oshodi said the plaintiff and payee came before him  
and finally settled their dispute. The payee wanted their <sup>d</sup>  
money, the plaintiff wanted a certificate of occupancy. Some  
things remained to be done to the building and plaintiff  
agreed to be responsible for the doing of that work from the  
time of the settlement. Two cheques were given by plaintiff <sup>e</sup>  
one for immediate payment the other posted dated 31st Oc-  
tober, 1961 when the certificate of occupancy would have  
been handed over. The receipt (exhibit C) was made out and  
signed by the payees. <sup>f</sup>

The defendant's defence is based on the equitable doctrine  
applied in the case of *Liggett (Liverpool) Ltd v. Barclay's*  
*Bank* (1928) 1 K.B. 48, under which a person who has paid  
the debts of another without authority was allowed to take <sup>g</sup>  
the advantage of his payments. The case is closely analo-  
gous to the present one in that the defendant bank there  
made payments on unauthorised cheques which it ought to  
have known were drawn without authority and therefore <sup>h</sup>  
negligently. In the course of his judgment in *Liggett's* case  
Wright J said:

“Under the circumstances I think that the equity I have referred to  
ought to be expended even in the case where the cheque which <sup>i</sup>  
was paid was paid out of the credit balance, and was not paid by  
way of overdraft so that the bank will be entitled to the benefit of  
that payment if he (*sic*) can show that the payment went to dis-  
charge a legal liability of the customer. The customer in such  
case is really no worse off because the legal liability which has to <sup>j</sup>



*a* be discharged is discharged though under circumstances which at common law would not entitle the bank to debit the customer.”

*b* In Halsbury’s *Laws of England*, Volume 2, (3ed) at page 193 paragraph 361 the position is stated as follows “Subject to questions of statutory protection, estoppel or adoption a banker who has paid a cheque drawn without authority or has paid one in contravention of the customer’s order or  
*c* probably negligently cannot debit the customer’s account with the amount. But if such cheque is paid in discharge of the customer’s debts the banker is entitled to take credit for it.” *Liggett’s* case is quoted as the authority for this last  
*d* proposition. Mr *Okoye* for the plaintiff has submitted that the proposition as stated is too wide and that in so far as it purports to relate to monies paid on a cheque which had been countermanded *Liggett’s* case is not an authority for the application of the equitable doctrine in such circum-  
*e* stances. He relied on a statement of the law set out in Paget’s *Law of Banking* (6ed) at page 258:

*f* “To constitute an effective countermand, it must come to the conscious knowledge of the banker . . . if it be by the negligence or default of the bank that such countermand fails to be effective the bank will be liable to the customer for any loss incurred thereby.”

In *Reade v. Royal Bank of Ireland C.A.* (1922) 2 I.R. 22, the head note reads:

*g* “The plaintiff had a current account in the defendant’s bank which was in funds. The plaintiff drew a cheque on this account in pay-  
*h* ment of a gambling debt but prior to its presentation countermanded by telegram payment of the cheque. Notwithstanding the countermand the defendants subsequently honoured the cheque on presentment. The plaintiff did not sue the payee of the cheque for the recovery of the money nor did he prove that he could not re-  
*i* cover from the payees:— Held that the defendants were guilty of a breach of duty as bankers and that the plaintiff was entitled to re-  
cover from them the amount of the cheque.”

Unfortunately the full report of this case is not available to the court so that it is not possible to say whether the bank sought to avail itself of equitable defence and if so, whether  
*j* it was held to be not available because the money was paid

in respect of a gambling debt and not a trade debt, as *a*  
Mr *Okwuosa* for the defendant submitted.

To me there appears to be a distinction between a case *b*  
where money is paid in settlement of a debt without author-  
ity of the debtor and where money is paid in disregard of the  
debtor's express direction not to pay. To hold that the latter  
payment is a valid discharge of the bank's duty to its cus-  
tomer would I consider, strike at the very root of the rela- *c*  
tionship of trust and confidence between the two. I am  
therefore of the opinion that where a cheque has been paid in  
settlement of a debt the equitable defence relied upon by the  
defendant in this case is not available where there has been a *d*  
valid countermand of the cheque before presentment.

There is another ground upon which the defence raised  
must fail. I think the word "debt" used in this connection *e*  
must mean an acknowledged or undisputed debt. The plain-  
tiff having a good claim against the defendant at common  
law the onus is on the defendant to prove the facts which  
would make the equitable defence available to him.

*f*  
This in the present case, I consider the defendant has failed  
to do. The plaintiff's case is that it was because he was dis-  
puting the defendant's debt that he stopped the cheque. The  
plaintiff said that it was not possible for him to have the *g*  
light and water connected without the co-operation of the  
payees' contractors and that the plaintiff was unable to get  
that co-operation. I accept this evidence and I hold that the  
payees had failed to perform something contemplated by the *h*  
parties to the agreement at the date of the settlement and that  
plaintiff was entitled to withhold payment because of this  
breach. On the evidence before me I do not consider that I  
would be justified in holding the plaintiff owed the building  
contractors £660 at the material time. The principle upon *i*  
which the doctrine is made available is that because the pay-  
ment is made on discharge of a legal liability the customer is  
no worse off. But, as in the present case, when that liability is  
disputed then the customer is put in a worse position. *j*

- a* Instead of merely having to defend an action which might never be brought he is put in the position of having to institute proceedings to recover money which should never have been paid.
- b*

For these reasons I hold that the plaintiff is entitled to the declaration sought and to recovery of £660 wrongly paid by the defendant and I will order accordingly.

- c* The plaintiff has in addition claimed the sum of £340 general damages. Many of the items of damage the plaintiff mentioned were in the nature of special damage which must be strictly proved. Others such as embarrassment and hurt to his feelings I consider too vague and too remote to be recoverable. I think the defendant was put in a very embarrassing position because of the plaintiff's refusal to co operate with it to enable it to ascertain whether value had or had not been received for the cheque.
- d*
- e*

I consider that any general damage suffered by the plaintiff is purely nominal and I assess it at £5 and award to the plaintiff.

- f* Costs to plaintiff against defendant are measured at 65 guineas.

*Declaration granted.*

**Barclays Bank DCO v. Bright Gravel  
and Granite Service and another**

HIGH COURT OF LAGOS STATE

CRANE AGJ

Date of Judgment: 8 FEBRUARY 1963

Suit No.: L.D. 464/60

*Banking – Garnishee – Whether applicable to money in  
courts custody*

**Facts**

The applicants filed this application to attach the monies payable to the defendant by the garnishee.

In a previous action the defendant having got judgment against the garnishee, the garnishee appealed and as condition of appeal paid the judgment debt into court. The plaintiff herein in another matter got judgment against the defendant and seeks to attach the money paid into court by the garnishee.

**Held –**

1. Money paid into court pursuant to an order of court as a condition for the grant of stay of execution is not a money liable to be attached by garnishee proceedings.

Order *nisi* refused.

**Cases referred to in the judgment**

***Foreign***

*Brereton v. Edwards* (1888) 21 Q.B.D. 488 C.A.

*Dolphin v. Layton* (1879) 4 C.P.D. 130

*Holthy v. Hodgson* (1889) 24 Q.B.D. 103

**Counsel**

For the applicants: *Impey* (with him *Coker*)

For the respondents: *Agbebi*

**Judgment**

**CRANE AGJ:** This is an application by Messrs Barclays Bank DCO under section 84(1) of the Sheriffs and Civil

Crane AGJ

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- a* Process Act Cap 189, that they may be granted leave as judgment/creditors:
- b* “to attach the sum of £1,020.0s.0d due and payable from the above named garnishee to the judgment/debtor under the judgment in Suit No. L.D./157/57, *Bright Oridami v. G. Kraus* which said sum is now in *custodia legis* being held by the Registrar of the High Court pending the determination of an Appeal No. F.S.C./322/1961.
- c* (High Court Suit No. L.D./157/57).”

- The application was originally *ex parte*, but after hearing Mr *Coker* for the applicant, the court, acting under Order 34, rule 10, allowed the motion to be made on notice to both the Registrar and High Court, and the judgment debtor, on whose behalf Mr *Agbebi* appeared and objected to these proceedings as being misconceived.
- d*

- e* The facts of the matter as set out in the affidavit in support of the motion and the counter affidavit, and further counter affidavit shortly put, are as follows:—

- f* In Suit No. L.D.157/57, Bright Oridami, who apparently trades *sub nom* Bright Gravel and Granite Services, recovered judgment in the sum of £1,020.0s.0d, against one Gerhard Kraus. Kraus was dissatisfied with the decision; he gave notice of appeal, but was allowed to appeal only on condition that he paid the amount of the judgment and costs into court to abide the event of his appeal to the Federal Supreme Court; which he did.
- g*

- h* On December 16, 1961, in Suit No. L.D.464/60, Messrs Barclays Bank DCO recovered judgment against Messrs Bright Gravel and Granite Service in the sum of £1,389.13s.11d with £52.0s.0d by costs. This amount remains wholly unsatisfied and the present proceedings are preferred under subsection (1) of section 84 of the Sheriff Process Act Cap 189, with a view to attaching the £1,020 paid in *custodia legis* by Kraus to abide the result of the appeal.
- i*
- j*

It will be necessary to examine section 84 aforesaid so that it is appropriate to set out both subsections (1) and (2) thereof at this stage:—

“84(1) Where money liable to be attached by garnishee proceeding is in the custody or under the control of a public officer in his official capacity or in *custodia legis*, the order *nisi* shall not be made under the provisions of the last proceeding section unless consent to such attachment is first obtained from the appropriate officer in the case of money in the custody or control of a public officer or of the court in the case of money in *custodia legis*, as the case may be.

(2) In such cases the order of notice must be served on such public officer or on the Registrar of the court, as the case may be.”

Having considered the arguments for and against the making of the order *nisi*, it appears to me that the material question for determination is, should Gerhard Kraus, referred to in the affidavit in support as the “proposed garnishee,” be made garnishee in these proceedings?

In my opinion, the answer to this question is in the negative for Kraus cannot be considered in any sense a garnishee; he being no longer in control of a debt which he has paid into court.

The effect of an order *nisi* is to bind the debt in the hands of the garnishee (section 85), so that if he has already a court order, there can be nothing to bind. Should the court make such an order, it would surely be doing so in vain. No court will stultify itself by making an order to which there is no reasonable prospect of securing obedience, and undoubtedly, this is a major consideration in determining whether the order sought should be made or not.

The whole purport of garnishee proceedings contemplates a debt in “the hands of the garnishee” which is capable of being bound by attachment, and if there is not, my opinion is there is no basis for such proceedings.

Moreover, the court has discretion in the matter of the issue of a garnishee order *nisi* – section 84 requires the consent of the court. The discretion must, of course, be exercised

Crane AGJ

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*a* judicially; that this is so may be seen from Order 8, rule 11 of the Judgment (Enforcement) Rules, Cap 189 which reads as follows:—

*b* “i. A judge or magistrate may, in his discretion, refuse to make or issue a garnishee order, where from the smallness of the amount to be recovered, or of the debt sought to be attached, or otherwise, the remedy sought would be worthless or vexatious.”

*c* Having given the matter due consideration, I take the view that the remedy sought by the judgment creditors against Kraus would be vexatious, if not worthless, in the circumstances. Moreover, it was held in *Dolphin v. Layton* (1879) 4 C.P.D. 130, 132, that the proceeds of a judgment paid into Court are not attachable by means of a garnishee summons at the suit of a third person as a “debt” due from the Registrar of the court to the judgment debtor. Admittedly, this was a decision in a county court appeal in which Denman J, *obiter*, after agreeing with Coleridge CJ, that money in the hands of, the Registrar as an officer of the county court is not subject to the process of attachment, stated as follows:—

*f* “I am of the same opinion, I see no distinction in this respect between the Registrar of a county court and the master of one of the superior courts.”

*g* The position then would seem to be that money paid into court pursuant to an order of court as a condition for the grant of a stay of execution is not, “money liable to be attached by garnishee proceedings.”

*h* I am strengthened in this opinion by the statement which appears in the *Annual Practice* Volume 1, 1963, page 1096, paragraph 20, under caption, “Judgment Debt” which reads:—

*i* “The question whether a judgment upon which there is a stay of execution can be attached has never been decided. It is submitted, however, that until the stay is removed, there can be no attachment. As Lopes LJ, said in *Holthy v. Hodgson* (1889) 24 Q.B.D. 103, ‘What is the test whether a debt is attachable. That it is owing by the garnishee, and that it is a debt of which the judgment can enforce payment if he desires to do so.’”

*j*

It is submitted with confidence that despite the dismissal of Kraus' appeal by the Federal Supreme Court, the amount of £1,020 is not attachable in Kraus' hands, simply because, having paid it into court, he no longer can be said to owe it; nor can it be attached in those of the High Court Registrar because the proper method of getting at money standing to the credit of a judgment debtor is by a charging order. See *Brereton v. Edwards* (1888) 21 Q.B.D. 488 C.A.

Admittedly, procedure by way of charging order is the practice and procedure of the High Court of England and not within our rules of court, but it is nevertheless manifestly permissible by section 12 of the High Court of Lagos Act, Cap 80 which states that:—

“The jurisdiction vested in the High Court shall be exercised in the absence of any such provisions in substantial conformity with the practice and procedure for the time being of Her Majesty's High Court of Justice in England.”

This being my view, this application is misconceived and must be dismissed with costs assessed at £5 to the respondents.

Order *nisi* refused.



*a*

## R v. Okon

HIGH COURT OF ABA

*b*

IDIGBE J

Date of Judgment: 3 APRIL 1963

Suit No.: A/5C/63

*c*

*Banking – Account – Money paid into customer's account –  
Becomes money of bank*

*Banking – Banker/customer relationship – Nature of*

*Banking – Draft – Includes a Bill of Exchange as well as a  
cheque.*

*d*

*Banking – Banker's draft – Whether to be regarded as a  
cheque*

*Banking – Cheques – Whether banker's draft to be regarded  
as*

*e*

### Facts

*f*

The accused was charged for contravening section 5(b) of the Exchange Control Act Cap 63 in that he purchased bank drafts from a bank for onward transfer by the bank to someone outside the scheduled area.

*g*

His Counsel made a no case submission on four grounds but one which is germane to this exercise was that payment was not made by the accused but by the bank, and it was the bank who should have obtained the permission of the Minister of Finance because money paid into bank ceases to be the payer's money and in making payments the bank paid out its own money.

*h*

### Held –

*i*

1. Where money is paid into a customer's account in a bank, the money so paid into the bank immediately become that of the bank and when the latter subsequently pays out the equivalent of that amount to the customer, or to another at the request of such customer, it in fact pays out its own money.

*j*

2. The relationship between the banker and its customer is that of a debtor and not that of agent and principal or trustee and beneficiary. When money is paid by a customer into the bank, there is a contract between the banker and customer in which the banker receives the money as a loan from the customer against the promise by the banker to honour the customer's cheque or other orders of the customer; in this connection there is hardly any difference between a cheque and a "draft."
3. "The word 'draft' no doubt includes a bill of exchange as well as a cheque."
4. A banker's draft however is not to be regarded as a cheque since it is not really "addressed by one person to another," as is required by the Bill of Exchange Act Cap 21 (section 3). It is drawn on behalf of a bank upon itself, whether payable at the Head office or at some other branch of the bank and at law, the Head office and its branches constitute one legal person or entity.

*Accused discharged and acquitted on all counts.*

### **Cases referred to in the judgment**

#### ***Foreign***

*Bavery v. Contract and Trading Company (Southern) Ltd* 1959 2 W.L.R. 568

*Capital and Counties Bank Ltd v. Gordon* 1903 A.C. 240

*Ex p. Debtor v. Ligouri* [1950] 2 All E.R. 733

*Foley v. Hill* 2 H.L.C. 28

*Hunter v. Bowyer* (1850) 15 L.T.O.S. 281

*Peter Obiyomi v. Joloko* 14 W.A.C.A. 621 at 622

*R v. Davenport* (1954) 38 C.A.R. 37 at 41

#### **Counsel**

For Board of Customs for the Crown: *Ogundere*

For the accused: *Williams*

*a* **Judgment**

*b* **IDIGBE J:** The accused is charged on five counts with five separate offences of making payment in various sums of money in the scheduled area “on behalf of a purported customer outside the Scheduled Area,” contrary to section 5(6) of the Exchange Control Act Cap 63. Altogether seven witnesses gave evidence for the Crown. The first, the Manager of the African Continental Bank Limited at Aba gave evidence to the following effect. Accused was until last year a customer of the bank. In 1961 he was still a customer of the bank and he (witness) produced two certified copies of statement of account of the accused in the bank. Exhibits 1 and 3 were statements of the current account of the accused; and exhibit 2 was a statement of account of “Drafts on London purchased” by the accused and it shows that drafts to value of various amounts were purchased by the accused for transfer to the London Branch of the African Continental Bank (ie A.C.B. Limited) between April, 1961 and July, 1962. On the various dates shown on the several counts in the indictment, the accused gave instructions that various sums of moneys be transferred by bank drafts to the London Branch of the bank on account of or to the credit of Messrs Carrerar Limited and Edanmal. The various sums of money were according to the witness, transferred as requested to the London Branch of the bank and to the credit of Carrerar Limited and Edanmal and the account of the accused in the bank at Aba was in each case duly debited with the various amounts together with the bank charges thereon. No documents were produced from the London bank to show that the various sums of money so transferred were (1) in fact received by the London Branch and (2) in fact paid out to Carrerar Limited and Edanmal, both of whom were as set out in the several counts of the indictment, the persons who were to be paid by the accused on the order of a purported customer in Fernando Po “and which customer was a person resident outside the scheduled territories.”

The second witness, Edet Ebierne Bassey who told me that the accused was his uncle, on several occasions wrote several letters for and at the request of the accused to various people, and the letters were exhibits 4, 5, 6, 7, 8, 9. By the cumulative effect of these letters the prosecution undoubtedly tried to show that accused was dealing with some customer of his, from whom he purchased cigarettes (mainly of the Consulate and Craven “A” brand). These letters also (on their face) appeared to show, that the customer lived in some place, for which it was necessary that a passport should be issued to any one who intended to get there. The witness who put these letters in evidence appeared to me to be hostile to the prosecution and leave was given to the prosecution to treat him as hostile and his written statement exhibit 10 was also received in evidence. Exhibit 10 showed clearly that the witness lied when he told me that he could not remember the persons to whom exhibits 4-9 were addressed and the nature of transaction to which the exhibits relate. In exhibit 10 the witness had said the letters were addressed to a customer of the accused in the Fernando Po Island and that the transactions related to purchase of cigarettes. Whatever the value of exhibit 10 (and at best it only shows that the witness Bassey was untruthful in the sense that he told a different story before me), it certainly was not evidence before me and the law precludes this Court from treating the contents of exhibit 10 as evidence – see *R v. White* (1922) 17 C.A.R. 60; also *R v. Harris* (1927) 20 C.A.R. 144. In my view, the evidence of Bassey was of no assistance to me in determining the guilt of the accused.

The third witness for the prosecution was Edet Bassey Emenyi who was an employee of the accused. He put in evidence exhibits 11, 12, 13, – letters which he said he wrote at the request of the accused. He did not tell me that he also made a copy of the original letters which he wrote for the accused. He however told me that exhibit 13 was a letter he wrote at the request of the accused (who is presumably illiterate – for there was even no clear evidence on this point) to one Amilivia who according to witness resides in Santa

- a* Isabel in the Island of Fernando Po. There was no evidence that exhibit 13 was a copy of an original and no evidence was led to show how the letter which was addressed to Amilivia in Fernando Po was produced before me; and no
- b* evidence was led to show that exhibit 13 was ever posted to Amilivia. Witness told me that in May, 1962 after he had been re-engaged by the accused who once terminated his employment (with the accused) – he was given some documents
- c* (amongst which was exhibit 14) for safe keeping. But under cross-examination witness said that the letters given to him for safe keeping by the accused were tied together in a bundle and that he kept the bundle (which he never untied) in a box in his room and which box had no lock. When he was asked by
- d* defence Counsel how he (witness) was sure that exhibit 14 was one of the documents contained in the bundle, he replied that when police searched his house, the police collected the bundle of documents he kept in the box in his room and that exhibit 14
- e* was from the bundle. There was no suggestion to the witness that the bundle was collected by police in his absence before exhibit 14 was shown to him. If I believe the witness, it seems to me that exhibit 14 could be one of the documents given to the witness by the accused, for although the bundle of documents was never untied by the accused, it was always found
- f* tied together in the box during occasional checks which accused said he made of the documents in the box. It is to be observed in this connection that the accused did not give evidence and did not deny that he gave exhibit 14 or any documents to the witness in May, 1962. In exhibit 14 which
- g* purports to come from Amilivia in Santa Isabel, it was stated:–

- h* “We are pleased to inform you that we want that instead of cash money on the Account of Amilivia on the African Continental Bank Limited; you send the money by air mail through the Bank to Carreras Limited, London, and we beg you to send us the receipts of the lots of money you, with your name, sent to Carreras Limited at London.

- i* Thanking you per advance.

We remain.

Yours faithfully,

- j* Amilivia.”

The next witness Alfredo Jones, Niger, the Commissioner of the Spanish Employment Agency in Nigeria told me that there is a company in Fernando Po known as Amilivia Limited and that the signature on exhibit 14 was that of Rosales who is an employee of that company. He also told me that he does not know any one known as Edanmal. a  
b

The fifth witness, Innocent Nwokolo, who is an employee of one Edoh and both of whom are apparently engaged in the smuggling of goods to and from Fernando Po into Nigeria told me that accused frequently asked him to deliver “bank-slips” to Amilivia Limited in Fernando Po. He did not tell me the nature of these bank-slips nor did he refer to any particular transaction or sum of money connected with any particular count of the indictment. He also told me that quite often the Managers of Amilivia Limited in Fernando Po gave him letters in return which he in turn then he gave to the accused. c  
d  
e

The sixth witness, Mustafa Ayinla Karimue, an Assistant Secretary in the Ministry of Finance (Federal in Lagos) told me that to the best of his knowledge no permit was ever issued to the accused for transfer of money or payment of money to any one outside the schedule territories. He then tendered a certificate from the Federal Minister of Finance exhibit 18. The certificate purported to comply with provisions of paragraphs 3 and 4 of Part II of the Fifth Schedule of the Exchange Control Act Cap 63 and so to preclude any inference that this prosecution was statute barred. f  
g

The evidence of the next witness Michael Onyekuba a Sub-Inspector of Police was in my view, of no assistance to the case for the prosecution. At the end of the evidence of this witness it appeared to the Counsel for prosecution, that he acquired more evidence in support of his case and he applied for an adjournment to call a witness whom he told was laid up with a broken leg in a hospital in Lagos. He was not sure (1) how long it would take to get this witness, and he admitted that it could be anything up to six months; h  
i  
j

- a* (2) he was not even sure what exactly this witness, if and when produced, was going to say and for that matter how it was going to assist his case; (3) and although the prosecution on three separate occasions enlarged the number of the witness shown on their proof of evidence and the nature of the testimony the witness were to give, they did not at any time include the name of this particular witness. It was also
- c* said that this particular witness (ASP Kaduru) took part in the search of the house of the accused wherein several documents were discovered and that he was as a result required to improve the evidence in respect of letters exhibits 11, 12,
- d* 13 and 14. It should be observed that when Edet Emenyi gave evidence he told me that exhibits 11, 12, 13 and 14 were found in a box in his house and not in the house of the accused. I considered the application and gave ruling setting
- e* out my reasons for the refusal of the application. I should only add that with a little more care on the part of the prosecution in the conduct and perhaps investigation of this case there would have been no need for the application and I will
- f* have occasion to refer to the conduct of the case later. When I refused the application, I asked Counsel for the Crown what his next step was and he opted to close his case. Counsel for the defence said he was not calling evidence and
- g* rested his case on the evidence led by the prosecution.

- I should say at once that no case was made on the counts relating to payments made to Edanmal (and the counts concerned are third and fifth counts) for at best the very meagre evidence led through PW 1, suggests that money was transferred to London for the credit of Edanmal, I was not told who or what this Edamal was. Was it a company or firm or
- i* was he a person; and if so was he resident outside the scheduled territories? Such evidence as there was, raised the inference that he was resident in London within the scheduled territories. With regard to the counts relating to Carrerar Limited (spelt Carreras Limited in the indictment) the following
- j*

submissions were made by Counsel for defence, Chief *Rotimi Williams*. a

1. There was no evidence of payment by the accused to Carrerar Limited. b
2. There was no evidence that the company was resident outside the scheduled territories.
3. Assuming that it was shown that the company Carrerar Limited had any connection with Amilivia in Fernando Po, the charge should have been brought under section 6 of the Exchange Control Act and not under section 5 since the latter section deals with payments made, to a person or on account of a person outside the scheduled territory, in Nigeria and the former deals with payment made outside Nigeria to such a person; the evidence in this case he further submitted, at the highest suggests that payment was made outside Nigeria (in this case in London). c
4. Assuming that he was wrong in the submission in the immediately preceding paragraph, payment was not made by the accused but by the bank and (1) that it was the bank who should have obtained the permission of the Ministry of Finance and (2) that money paid into the bank ceased to be the payer's money and that when payment was in fact made it was the bank's money that was paid out (and for this he referred me to the statement of Goddard LJ in *R v. Davenport* 38 C.A.R. 37 at 41. d
5. That the prosecution was barred and did not lie. He further submitted that the certificate given by the Minister (exhibit 18, by virtue of section 14(e) of the Interpretation Act Cap 89 does not save the situation. e

Before dealing with the submissions of the defence Counsel I would like to make a material observation. At the close of the evidence of the prosecution the defence rested its case on f



- a* that of the prosecution and Mr *Ogundere* for the prosecution addressed the court and even referred to exhibit 18 as a proper certificate given by the Minister under paragraph 2(4) of Part II of the Fifth Schedule Cap 63. In his reply, Chief *Williams* referred to the fact that exhibit 18 was in fact given under paragraph 6 Part II of the Fourth Schedule of the Exchange Control Act, 1962 No. 16 of 1962; and that by virtue of section 14(e) of the Interpretation Ordinance the certificate required for this prosecution should be given under paragraph 2(4) of Part II of the Fifth Schedule Cap 63. This he said was the effect of section 40(1) and (2) of Exchange Control Act, 1962 (No. 16 of 1962). As soon as the defence Counsel completed his address, Counsel for the Crown told me that he had made a mistake in putting exhibit 18 in evidence. There was, in fact, he said, a proper certificate given by the Minister under paragraphs (2) and (4) of Part II of the Fifth Schedule Cap 63 and that as there were several cases pending against the accused under Cap 63 and under Act of 1962 (No. 16 of 1962), he had made a mistake in selecting the proper certificate out of the number in his possession. He therefore asked that the certificate (not tendered in evidence) be at that stage substituted for exhibit 18 and he submitted that I could do so and he referred me to section 200 of the Criminal Procedure Act. If Counsel for prosecution made a mistake, that was regrettable. There is no doubt that under section 200, I had the power to recall the witness Karimu and ask him to put in the certificate referred to by Counsel for prosecution, but the powers under that section which are discretionary must be exercised judiciously and never to the prejudice of the accused – see *R v. John Owen* 36 C.A.R. 16; *Ohanyere* W.A.C.A. 3033 Oct., 1949; *Dickson Ejukelem* W.A.C.A. 3833 Aug., 1952. It was urged with so much vigour by Counsel for the prosecution that it was as a result of a mistake that he put exhibit 18 in evidence and that the situation here was different and called for the exercise of discretion. If the defence had given evidence and had from their evidence attached little or no importance to exhibit 18, it might have been possible for me to gauge the degree (if any) to which they may be prejudiced by re-introduction of substitution of another certificate, for exhibit 18. Here, the defence rested its case on

that of the prosecution and in doing so it must be taken that they took into consideration exhibit 18 and its defects or limitation (if any), and if any authority is required for my view that even in such a case, the law does not expect the court (even allowing for a mistake on the part of the prosecution) to exercise its discretion under section 200, the case of *R v. Egwuatu* 6 W.A.C.A 79 at 81-82 decided by the West African Court of Appeal on almost similar facts is clearly in point. I therefore refused the application. I need only observe that the prosecution has a duty to show sufficient care in the conduct of its cases.

In considering the five points raised by defence Counsel, I prefer to begin with the last the submission that this prosecution was statute barred because the offences arose more than 12 months before prosecution was initiated and as submitted by the defence that no certificate as required by paragraph 2(4) of Part II of the Fifth Schedule to Cap 63 had been produced.

Now sub-paragraph (3) of paragraph (1) of Part II of the Fifth Schedule Cap 63 provides for trial both summarily and on indictment of a person charged with an offence under section 5 of the Exchange Control Act, paragraph 2(3) of Part II of the Fifth Schedule to the Act provides as follows:—

“Any proceeding under a law establishing summary jurisdiction which may be taken against any person in respect of any offence punishable under this part of the Schedule may notwithstanding anything to the contrary in that law be taken at any time within 12 months from the date of the commission of the offence or within three months from the date on which evidence sufficient in the opinion of the Minister to justify the proceedings comes to the knowledge of the Minister, whichever period last expires . . .”

A similar provision is also inserted in paragraph 2(3) of the Fifth Schedule of the Exchange Control Act 1947, England (10 and 11 Geob C. 14) (see Halsbury's *Statutes of England*, (2ed), Volume 16, page 612). But in the English Act, the

- a* expression “under a law establishing summary jurisdiction” does not appear and instead a clearer expression “under the summary jurisdiction Acts” was incorporated in the provision. I was not addressed by either Counsel, on the expression
- b* “under a law establishing summary jurisdiction.” What then does that expression mean exactly? What is meant by the expression “under a law establishing summary jurisdiction?”
- c* Obviously, it includes all proceedings under summary trial. Does it however include a trial under the provision of section 340(2)(b) of the Criminal Procedure Act? Are proceedings under that section of that Act “under a law establishing summary jurisdiction?”
- d* Proceedings in a summary court to my mind would come under that expression, but not all proceedings in the High Court. Trials under Part 38 (section 364) of the C.P.A. although in the High Court could, it appears to me, be included under that expression, and in that case no information would be filed. Under section 340(2)(b) of the Criminal Procedure Act, an information would have to be filed. Would a trial in those circumstances be considered to be one “under a law establishing summary jurisdiction?”
- f* The answer to the question is not free from difficulty and I would readily have given an answer in the negative but for the definition given in section 2(1) of the Criminal Procedure Act of the terms “summary trial” and summary court.”
- g* This makes it necessary for me to study the question a little more carefully. The Criminal Procedure Act is a law providing in parts for the exercise of summary jurisdiction by courts and under section 2(1) of that Act, “summary court”
- h* is defined thus:—

“means unless the same is expressly or by necessary implication qualified. (a) a Judge of the High Court when sitting in court and presiding over a summary trial, and (b) any Magistrate when sitting . . .”

*i*

That same section defines “summary trial” thus:—

“means any trial by a magistrate and a trial by a judge in which the accused has not been committed for trial after preliminary inquiry.”

*j*

In my humble view, that definition of summary trial does not appear to be exhaustive, for it hardly embraces a trial by a Judge under section 364 of Part 38 of the Criminal Procedure Act and trial under that section is certainly summary as provided for by the section itself; and in such a case the accused would have been committed to the High Court after a preliminary inquiry but such trial would not be on any information filed. While it is true that the essence of the summary nature of such a trial is to be found in a further subsection of subsection (1) of section 364, the essential element which makes it a summary trial is that no information has been filed. A trial under section 340(2)(b) is under Part 37 of Cap 6 of the Criminal Procedure Act and it is a trial on information. Such a trial, in my view, could hardly be described as a proceeding “under a law establishing summary jurisdiction”; and in any event it seems to me that the only occasions where summary trial exists in the High Court are under Part 38 of the Criminal Procedure Act (see also section 275(a)(iv) of the Criminal Procedure Act) and under sections 277(a) and (b) of the Criminal Procedure Act. Trials under section 340(2)(b) of that Act are clearly valid legal trials in the High Court – see *R v. Zik Press Ltd* 12 W.A.C.A 202 at 207 (and in which case the description at the heading of Part 37 of Cap 6 of the Act (ie Criminal Procedure Act) was described as “hardly appropriate” – see page 207 of 12 W.A.C.A). The High Court is certainly not a court of summary jurisdiction; and to my mind, trials on information are hardly such as could be described as trials under summary jurisdiction – see also section 27(a) and (b) of the Criminal Procedure Act. Therefore, it is my humble view that since the definition of summary trial in section (2) of the Criminal Procedure Act is not exhaustive (and this is also borne out by sections 277(a) and (b) and 340(2) of the C.P.A.) and since the High Court is not a court of summary trial, a trial under section 340(2)(b) of the C.P.A. does not come within the expression “proceeding under a law establishing summary jurisdiction.” That being so, it is my humble view that the provisions of

- a* paragraph 2(3) of Part II of the Fifth Schedule to Cap 63 should be confined to those circumstances in which as provided in sub-paragraph 3(a) of paragraph (1) of Part II of the
- b* Fifth Schedule (aforesaid), a summary trial for summary conviction was carried out. (C/P by analogy also *Peter Obiyomi v. Joloko* 14 W.A.C.A. 621 at 622). I am therefore unable to accede to the contention of defence Counsel that
- c* the trial in the instant case was statute barred. In my view a certificate of the Minister given under paragraph 2(4) of Part II of the Fifth Schedule is necessary when the accused is charged before a Magistrate or when an accused is being
- d* tried by a court exercising summary jurisdiction (which as I have said is not the case here).

- On the third submission by defence Counsel, it is my view that section 5 of Cap 63 was designed to meet a case where
- e* the fact show that payment of money was made by a person resident in Nigeria to the credit of a person resident outside the scheduled territories. If it was proved by the prosecution that accused made payment of money in Nigeria (eg, into
- f* particular account in Nigeria or into a bank in Nigeria) for a person or on account of a person resident outside the scheduled territories, a case for an offence against section 5 of Cap 63 would have been made out. If (as was contended by
- g* prosecution in this case), payment was made, by accused resident in Nigeria, to some one in London (or through an agent resident in London) for the benefit of a third person resident outside the scheduled territories, then payment in
- h* such a case would have been made outside Nigeria and it seems to me that a case for an offence under section 6 of the Act would have been made out. Therefore, I do share the view of defence Counsel that the accused should have been
- i* charged on the facts which the prosecution attempted to prove under section 6 of the Act *not* under section 5.

- On the fourth submission by defence Counsel, I agree that where money is paid into a customer's account in a bank,
- j* the money so paid into the bank immediately becomes that

of the bank and when the latter subsequently pays out the equivalent of that amount to the customer, or to another at the request of such customer, it in fact pays out its own money. That view was settled by the House of Lords in 1848 in the case of *Foley v. Hill* 2 H.L.C. 28 and was in recent years expressed by Goddard LJ in *R v. Davenport* (1954) 38 C.A.R. 37 at 41. The relationship between the banker and its customer is that of a debtor and not that of agent and principal or trustee and beneficiary. When money is paid by a customer into the bank, there is a contract between the banker and customer in which the banker receives the money as a loan from the customer against the promise by the banker to honour the customer's cheque or other orders of the customer; in this connection there is hardly any difference between a cheque and a "draft." As was said by Pollock CB "the word 'draft' no doubt includes a bill of exchange as well as a cheque."

"It is a *nomen generale* which embraces every request by the drawer upon the drawee to pay money" – see *Hunter v. Bowyer* (1850) 15 L.T.O.S. 281 at 282. A banker's draft however is not to be regarded as a cheque since it is not really addressed by one person to another" – as is required by the Bill of Exchange Act. Cap 21 (section 3). It is drawn on behalf of a bank upon itself, whether payable at the Head Office or at some other branch of the bank and at law, the Head Office and its branches constitute one legal person or entity – (see *Capital and Counties Bank Ltd v. Gordon* 1903 A.C. 204). All the same, where as in the instant case a customer request his banker to provide him with a banker's draft the amount in respect of which is to be debited to his account, he ought, ordinarily to enclose with his request, a cheque covering the amount. The amount so paid in by the customer becomes under the principle above described the bank's money and when paid out, still that of the bank, but paid out pursuant to the contract above described (ie that of a debtor and customer). The banker's draft issued at request of the accused were never produced in evidence; but

*a* the principle remains the same when as on the evidence of P.W.1 the customer first drew a cheque on his own account with the A.C.B. Limited at Aba. Therefore it seems to me  
*b* that there is considerable substance in the submission of learned Counsel for the defence; for the effect of section 33 of Cap 63 on any contract affected by Cap 63, (and this includes a contract for payment of money by bank draft  
*c* between the bank and customer), is that a term is implied by operation of law into it, that the performance of the contract shall be subjected to the permission of the appropriate Minister being obtained (where under the Act such permission is necessary) – see Sir Raymond Evershed MR in *Re A debtor: Ex p. Debtor v. Ligouri* [1950] 2 All E.R. 733 at 734; also Lord Evershed M.R. in *Bavery v. Contract and Trading Company (Southern) Ltd* 1959 2 W.L.R, 568 at 570-571. It will be useful to set out here the material portion of section  
*e* 33 aforesaid:

“1. It shall be an implied condition in any contract that, where by virtue of this Ordinance, the permission or consent of the minister is at the time of the contract required for the performance of any term thereof, that term shall not be performed except in so far as the permission or consent is given or is not required:

*g* Provided that this subsection shall not apply . . .”

If therefore, the bank proceeds to pay out the money on the order of the accused to a person in London (ie outside Nigeria) on account of or for the credit of any person resident  
*h* outside the scheduled territories, the bank would, it seems to me, unless it obtained permission of the appropriate Minister clearly be committing an offence not against section 5, but against section 6 of the Act. When however as alleged in the  
*i* instant case, the accused by a bank draft asked that money be paid to Carrerar Limited in London, there was no evidence to show, or from which it could be inferred that the bank knew that Messrs Carrerar Limited in London were  
*j* being paid, or were required to be paid, money on account of

a  
a person resident outside the schedule territories (as it was  
the prosecution's case that Carrerar Limited were agents for  
a person –Amilivia Limited– resident in Fernando Po Island,  
outside the schedule territories). If therefore payment was  
b  
made by the bank to Carrerar Limited (with which issue, I  
will deal later), the bank only made payment to a person in  
London within the scheduled territories and in respect of  
which transaction no offence was committed under Cap 63  
c  
certainly neither against five nor against six.

I will now deal with the first and second submission of de-  
fence Counsel; and they were (1) that there was no evidence  
of payment to Carrerar Limited and (2) that there was no  
d  
evidence that that company resided outside the scheduled  
territories. On the second part of the submission, it is to be  
remembered that it was not the case for the prosecution that  
Messrs Carrerar Limited were resident outside the scheduled  
territories. If it was, then I say that they led no evidence to  
e  
warrant any such inference; on the contrary, it appears to me  
that exhibit 14 was introduced to show that Carrerar Limited  
were a kind of agent of Amilivia Limited resident in Fer-  
nando Po Island outside the scheduled territories. It was  
f  
however not proved that (1) Carrerar Limited in fact exists  
or existed at all periods material to this inquiry; (2) nor was  
it ever proved that Messrs Carrerar Limited were a legal  
entity (ie legal *persona*); (3) nor was there any proof of  
actual payment of money to Messrs Carrerar Limited. The  
g  
best evidence on this issue would have been the production  
of a cheque by which payment was made to Carrerar Lim-  
ited by the London Branch of the A.C.B. Limited or a re-  
ceipt duly given by Carrerar Limited to the bank or even  
h  
some other documentary evidence showing the account of  
the Nigeria Branch of the bank with its London Branch, was  
ever debited with the various sums of money set out in the  
several counts in the indictment. Again, I should observe  
that none of the various bank drafts issued at the request of  
i  
the accused, was ever produced in evidence.

In view of my findings in respect of the first, second, third  
and fourth submissions, I was firmly of the view that none  
of the charges in the several counts of the indictment was  
j



*a* ever proved. Accordingly the accused is entitled to an acquittal. He is, therefore, discharged and acquitted on all counts in the indictment. Exhibits to the owners.

## Akwule and others v. R

FEDERAL SUPREME COURT

ADEMOLA CJF, DE LESTANG CJ BRETT AND BAIRAMIAN FJJ

Date of Judgment: 23 MAY 1963

F.S.C.: 325/1962

*Banking – Banker – Meaning of – Whether employee of a bank is a banker*

*Constitutional Law – Power of a region to legislate for peace, order and good government – Power to legislate on banks and banking*

*Criminal Law – Criminal breach of trust – Heavier penalty for bankers guilty of criminal breach of trust – Power of the Appeal Court to substitute one conviction for another*

### Facts

The first appellant was convicted in the Kano High Court, Northern Region, of an offence under section 315 of the Penal Code relating to criminal breach of trust on the footing that he was a banker. He was convicted of an offence under section 371 of the Penal Code of falsifying a clearing account relating to other banks in what is known as the impersonal ledger and also with forgery of a current account ledger. The other ten appellants were convicted each on a count of aiding and abetting the first appellant in the commission of the offence of criminal breach of trust. The case for the prosecution was that the first appellant, being a manager of the branch of the Bank of West Africa at all material time granted overdraft which exceeded his authority to some of appellants knowing full well that their credit facilities had been withdrawn and without making any report about them. The first appellant also granted credit facilities to the remaining appellants without making due reports. He was also alleged to have forged a page in the current accounts ledger.

*a* Also, the first appellant rendered false returns of the clearing accounts in order to reconcile his accounts with other banks.

*b* On appeal to the Federal Supreme Court of Nigeria Counsel for the plaintiff contended that in so far as section 315 of the Penal Code relates to bankers, it was unconstitutional and therefore null and void as banking is a subject within the exclusive legislative list of the Nigerian Constitution by virtue of section 63 thereof which only the Federal Government has power to legislate on banking. Counsel for the appellants further contended that by virtue of item 44 of the Exclusive legislature list, which empowers the Federal Parliament to legislate on “any matter that is incidental or supplementary (*a*) or any matter referred to elsewhere in this list” which under Part III of the Schedule included “Offences,” penal provisions on bankers are within the exclusive competence of the Federal Parliament. It was also the contention of the learned Counsel for the appellant that the appellant, being a bank manager could not be regarded as a banker within the provisions of section 315 of the Penal Code.

*f* **Held –**

1. That the first appellant is a mere employee of the bank and therefore not a banker within the meaning of section 315 of the Penal Code.
- g* 2. That by section 3(1) of the Banking Act, Cap 198 (as amended by Act, No. 19 of 1962), a bank can operate in Nigeria only by a company or body corporate. The word
- h* “person” in the definition of “bank” in Banking Act, Cap 19 has therefore been used primarily in the sense of corporation.
3. That by virtue of section 4 of the Constitution of Northern Nigeria, the legislature of Northern Nigeria has power “to make laws for the peace, order and good government of the region.”
- i*
4. That the true nature of sections 313, 314 and 315 of the
- j* Penal Code is that certain category of persons (including

bankers in section 315) should be liable to heavier punishments for criminal breach of trust which is an offence under section 311 and punishable under section 312. a

5. Section 315 of the Penal Code is constitutionally valid in so far as it includes bankers in the category of persons liable to heavier punishment for criminal breach of trust. This is not legislation in respect of bankers and banking but merely an incidental provisions in penal legislation enacted for the peace and good government of Northern Nigeria. b

6. The Federal Supreme Court has power under section 218 of the Criminal Procedure Code and section 27(2) of the Supreme Court Act, 1960 to substitute, in this case, section 312 of the Penal Code for the section 315 in the charge. c

The conviction of the first appellant under section 315 of the Penal Code was quashed and substituted with a conviction under section 312 thereof. Also, the conviction of each of the other appellants on a count of abetting the first appellant in his offence under sections 315 and 83 of the Penal Code was quashed and substituted in respect of each a conviction under sections 312 and 83 of the Penal Code. d

### ***Obiter***

“The relationship between a banker and a customer is that of debtor and creditor in respect of the money deposited with the banker by the customer.” e

### **Editorial**

The Court in *Sunday Oyinlola v. C.O.P.* (1975) N.N.L.R. 36 – followed f

### **Cases referred to in the judgment**

#### ***Foreign***

*Cooray v. R* (1953) A.C. 407 g

- a* *Copland v. Davies* (1871 – 1872) 5 H.L. 358  
*Gallagher v. Lynn* (1937) A.C. 863  
*Russell v. R* (1882) 7 App. Cases 829
- b* **Nigerian statutes referred to in the judgment**  
 Banking Act Cap 19 (as amended), section 2, section 3(1)  
 Constitution of Northern Nigeria, 1960, section 4  
 Criminal Procedure Code, section 218
- c* Federal Constitution of Nigeria, 1960, section 64, section 72  
 Federal Supreme Court Act, 1960, section 26(1), section 27(2)  
 Penal Code of Northern Nigeria, section 83, section 311,  
 section 312, section 315
- d* **Counsel**  
 For the first appellant: *Fiberesima*  
 For the second – eleventh appellants: *Williams* (with him  
*Thanni*)
- e* For the respondent: *Lewis* (with him *Nadaraja*)

### Judgment

- f* **ADEMOLA CJF:** The first appellant was convicted in the High Court, Northern Region, held at Kano, of an offence laid under section 315 of the Penal Code of the Northern Region relating to Criminal Breach of Trust in his capacity as a banker; the sum involved being £100,089.8s.5d. He was
- g* also convicted of an offence under section 371 of the Penal Code of falsifying a clearing account relating to other banks in what is known as the impersonal ledger and also with forgery of a current account ledger. The other ten appellants
- h* were convicted each on a count of aiding and abetting the first appellant in the commission of the offence of criminal breach of trust.

- i* The first appellant, who admitted the facts presented at the trial (except those relating to forgery), was at the time material to the charge the manager of the branch of the Bank of West Africa at Fagge in Kano. He had authority to grant overdrafts to customers of the bank up to a sum of £200, which must be reported at once. Contrary to the authority
- j* given to him, the first appellant granted overdrafts to the

other appellants, from time to time, far above the sum of £200 and without making a report, although it was clear that some of the appellants had been debtors of the bank before the first appellant took over, and it was to his knowledge that their credit facilities had been withdrawn; the other appellants became customers of the bank since the first appellant became the manager. Although credit facilities for heavy amounts were given to these men without making due reports, entries of these amounts were not made in the bank's books. Later false returns of the clearing accounts were rendered by the first appellant in order to reconcile his accounts with other banks. Forgery of a page in the current accounts ledger was also proved against the first appellant although he denied the facts. The other appellants, Nos. 2-11, aided and abetted the first appellant to commit criminal breach of trust knowing full well that they were without funds in the bank and that their accounts were not being debited with the amounts they had been drawing out; in some cases paying cheques into their accounts in the bank, to facilitate the rendering of the returns by the first appellant, which cheques to their own knowledge were worthless.

As the range of arguments in this appeal relates principally to the offence under section 315 of which the first appellant was convicted, it is necessary to set out sections 311, 312 and 315 of the Penal Code:

- “311. Whoever, being in any manner entrusted with property or with any dominion over property, dishonestly misappropriates or converts to his own use that property or dishonestly uses or disposes of that property in violation of any direction of Law prescribing the mode in which such trust is to be discharged or any legal contract express or implied, which he has made touching the discharge of such, or wilfully suffers any other person so to do, commits criminal breach of trust.
312. Whoever commits criminal breach of trust shall be punished with imprisonment for a term, which may extend to seven years or with fine or with both.
315. Whoever, being in any manner entrusted with property or with any dominion over property in his capacity as a public servant or in the way of his business as a banker, factor,

*a* broker, legal practitioner or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for a term which may extend to 14 years and shall also be liable to fine.”

*b* The first count of the charge is as follows:

*c* “Titus Akwule between the 1st October, 1960 and the 15th September, 1961 at Kano being entrusted with dominion over property to wit cash in your capacity as a banker to wit the Manager of the Bank of West Africa Limited Fagge Ta Kudu committed criminal breach of trust of a sum of £100,089.8s.5d and thereby committed an offence punishable under section 315 of the Penal Code.”

*d* The point will have to be decided whether the first appellant was a banker, within the meaning of section 315 of the Penal Code and, if so, whether the property in relation to which he was said to have committed a breach of trust was entrusted to him in that capacity. Before this point, however, the important issue as to the validity of section 315 under which the first appellant is charged has to be considered, because

*e* Counsel for the appellants have, in the first ground of appeal, attacked the constitutional validity of the section and if

*f* that submission was upheld it would mean that the first appellant was tried on a charge which was wholly void, so that no question of substituting a conviction under any other section could arise. The first ground of appeal is as follows:

*g* “The learned trial Judge erred in law in convicting these appellants (Nos. 2-11) of the offence of abetting the 1st accused to commit criminal breach of trust when the said offence and the alleged offence of the 1st accused are offences purporting to have been created by the legislature of the Northern Region which is not competent to create any of such offences.”

*h*

The submission which was made to us is that, with reference to the division of legislative powers, banking is a subject in

*i* the Exclusive Legislative List in our Constitution; that in accordance with section 64 of the Constitution of the Federation only Parliament can legislate on matters in the exclusive list, which list includes banks and banking; that section

*j* 315 of the Penal Code, in so far as it relates to bankers, is an

encroachment on the legislative powers of Parliament by the northern region legislature; that to the extent therefore that the section relates to bankers, it is unconstitutional and void. Counsel for the appellants have referred to item 44 of the exclusive list, which empowers the Federal Parliament to legislate on “any matter that is incidental or supplementary (a) to any matter referred to elsewhere in this list,” which under Part III of the Schedule includes “offences,” and they have argued that penal provisions on bankers are within the exclusive competence of the Federal Parliament. Their aim is to show that count 1, which is laid under section 315, is null and void, so that not only is the conviction on that count a nullity, but the court is also debarred from replacing it by a conviction under section 312 if it turns out that the first appellant was not a banker; which would also affect the conviction of all the other appellants on counts laid under sections 315 and 83.

For the Crown a number of cases have been cited on the validity of legislation by a legislature with limited powers; it will be enough if reference is made to *Gallagher v. Lynn* (1937) A.C. 863. The legislature of Northern Ireland had passed an Act on milk and milk products, which was attacked as being *ultra vires* section 4 of the Government of Ireland Act, 1920, on the ground that it interfered with the trade in milk between farmers outside Northern Ireland and customers within it, contrary to the limitation not to legislate on “trade with any place out of the part of Ireland within their jurisdiction.” Lord Atkin said at page 869:

“The short answer to this is that this Milk Act is not a law ‘in respect of’ trade; but is a law for the peace, order and good government of Northern Ireland ‘in respect of’ precautions taken to secure the health of the inhabitants of Northern Ireland by protecting them from the dangers of an unregulated supply of milk. These questions affecting limitations on the legislative powers of subordinate parliaments or the distribution of powers between parliaments in a federal system are now familiar, and I do not propose to cite the whole range of authority of which has largely arisen indis- cussion of the powers of Canadian Parliaments. It is well estab- lished that you are to look at the ‘time nature and character of the



*a* legislations’: *Russell v. R* (1882) 7 App. Cas. 829/ ‘the pith and  
character of the legislation.’ If, on the view of the statute as a  
*b* whole, you find that the substance of the legislation is within the  
express powers, then it is not invalidated if incidentally it affects  
matters, which are outside the authorised field. The legislation  
must not under the guise of dealing with one matter in fact en-  
croach upon the forbidden field. Nor are you to look only at the  
object of the legislator. An Act may have a perfectly lawful object,  
*c* eg, to promote the health of the inhabitants, but may seek to  
achieve that object by invalid methods, eg, a direct publication of  
any trade with a foreign country. In other words, you may cer-  
tainly consider the clauses of an Act to see whether they are  
passed ‘in respect of’ the forbidden subject.”

*d* Adopting those views for our guidance, it is clear that the  
legislature of Northern Nigeria has power “to make laws for  
the peace, order and good government of the Region”: sec-  
*e* tion 4 of the Constitution of Northern Nigeria. There is no  
suggestion that in including bankers in section 315 of its  
Penal Code, that legislature was using its power to legislate  
on an offence such as criminal breach of trust as a cloak for  
*f* encroaching on the field of banks and banking. The offence  
is created and defined in section 311; and any person guilty  
of it may be punished under section 312; the true nature of  
sections 313, 314 and 315 is that certain categories of per-  
*g* sons (including bankers in section 315) should be liable to  
heavier punishment. An example of this mode of penal leg-  
islation is found in the Criminal Code of the Federation and  
of the other regions. Section 390 of that Code provides a  
general punishment for stealing and goes on to provide  
*h* heavier punishments for graver cases of the offence. That is  
arranged in subsections. In the Penal Code of Northern Ni-  
geria, sections 312 to 315 could have been made or arranged  
as subsections in a single section dealing with punishments.

*i* We are of the opinion that section 315 of the Penal Code is  
constitutionally valid in so far as it includes bankers in the  
category of persons liable to heavier punishment for crimi-  
*j* nal breach of trust. We are of the view that this is not

legislation in respect of banks and banking but merely an incidental provision in penal legislation enacted for the peace and good government of Northern Nigeria. We therefore reject the submission of Counsel that this legislation is invalid in respect of bankers and that it is null and void.

We now come to the question whether the first appellant, at the material time was a banker. The learned trial Judge took the view that he was. For the Crown, it was contended that the Judge was right in holding that a bank manager is a banker. On the other hand Counsel for the appellants (and this includes Mr *Fiberesima* for the first appellant), argued that a bank manager is not a banker. Both sides have referred us to *Ratanlal and Thakore on the Indian Law of Crimes*, (9ed) at pages 1029 and 1030, that law being the source of the Penal Code of the northern region.

For the meaning of banker, we turn to our Law. The Banking Act (Cap 19) does not define bankers as such, but bank is defined thus: “Bank means any person who carries on banking business.” “Banking business” is defined as “the business of receiving money on current account from the general public, of paying or collecting cheques drawn by or paid in by customers and of making advances to customers” (as amended by Act No. 19 of 1962).

Section 3(1) of the Acts enacts:

“No banking business shall be transacted in Nigeria except by a company which is in possession of a valid licence, which shall be granted by the Minister after consultation with the Central Bank, authorising it to carry on banking business in Nigeria.”

From these provisions it is clear that a bank can operate in Nigeria only by a company or body corporate. The word “person” in the definition of “bank” above is, therefore, used primarily in the sense of a corporation. In *Copland v. Davies* (1871 – 1872) 5 H.L. 358, there is a definition of “banker” at page 375 of the report, where Lord Hatherley LC said:

“... it is not disputed that he was a banker in the ordinary sense of the word, as receiving people’s moneys and giving them receipts receipts not as for transfers of property, or for anything of that

- a* kind, but receipts acknowledging the receipt of money, and issuing passbooks and cheque books, and dealing with them in the ordinary way of a banker.”
- b* The relationship between a banker and a customer is that of debtor and creditor in respect of the money deposited with the banker by the customer. This position becomes clearer when a customer asks for his money. The bank undertakes to
- c* pay cheques of the customer drawn on his current account; thus the bank becomes a debtor for the amount, which must be paid on demand. If the amount is not paid, the customer can sue the bank. The action will lie against the bank, not
- d* the bank manager. It is, therefore, not possible to agree with the view that the first appellant in this case was a banker; if the bank defaults, the first appellant, as manager of the bank, will not be sued; the bank itself (B.W.A. in this case) will be sued. The cheques are drawn on the Bank of West Africa
- e* Limited and the customer’s account is with the Bank of West Africa Limited. The first appellant is no more than an official of the bank carrying out the Bank’s instructions as to the method its business should be carried out. The word
- f* “banker” in section 315 of the Code does not, in our view, include a person who is a mere employee of the bank. We would add that even if an employee of a bank could for any purpose be regarded as a banker within the meaning of the
- g* section the evidence in this case shows that the breach of trust was committed in relations to monies which were already the property of the bank, ie monies entrusted to the first appellant as an employee, not in any other capacity.
- h* Our attention has been called to the words “to wit cash” in count one of the charge; it was argued that there was no evidence before the court that the first appellant converted any of the cash of the Bank of West Africa Limited to his use or
- i* disposed of it in any dishonest manner. It is true, as Counsel said, that the first appellant “did not give cash to the co-accused” but it is correct to say that their cheques, in favour of various firms, on the Fagge Branch which he (first ac-
- j* cused) passed on to other banks at which the firms have

money, placed the Bank of West Africa Limited in the position of a debtor to the other banks, a debt which the Bank of West Africa Limited may be called upon to pay in cash. We are unable to agree that this is not an offence within section 311 of the Penal Code. If we are mistaken in our view on this point, and it were necessary, we would apply the proviso to section 26(1) of the Federal Supreme Court Act, as we are of the view that the mistake, if it was one, did not occasion any miscarriage of justice.

It was further argued on behalf of the other appellants that all they did was to overdraw, and if the first appellant authorised these overdrafts contrary to his instructions, they could not be guilty of abetting any offence under section 311. We think this argument devoid of any substance when one looks at the findings of the learned trial Judge with which we have no reason to disagree of the part played by these appellants in this gigantic fraud.

It remains for us to decide the point argued before us, having regard to the opinion we have expressed that the first appellant was not a banker, and that the laying of the count under section 315 was a mistake, the convictions should not be replaced by convictions of criminal breach of trust, or the abetting thereof, punishable under section 312, or under section 312 coupled with section 83 in the case of abetting.

Arguments have been put to us about the powers of the court to substitute another section for the one charged in such a case. We have given consideration to this, and we are satisfied that under section 218 of the Criminal Procedure Code, when read with section 27(2) of the Federal Supreme Court Act, 1960, we are not without power to substitute, in this case, section 312 of the Penal Code for the section 315 charged. An authority for this is the case of *Cooray v. R* (1953) A.C. 407.

We therefore discharge the conviction under section 315 of the Penal Code and substitute in case of the first appellant on the first count a conviction under section 312.

- a* On the question of sentence, it was pointed out that the sentence of seven years passed upon the first appellant is the maximum sentence which could have been passed on a conviction under section 312 of the Penal Code. It was urged, in the circumstances, that the sentence passed upon him on that count be reduced. After due consideration of the whole case, we are of the view that to reduce the sentence in any way would be minimising the gravity of the offence the first appellant has committed.

- We therefore pass on the first appellant, on the substituted conviction under section 312 a sentence of seven years I.H.L. less the period he has served from the date of his conviction in the High Court, namely, 6th August, 1962, and the date of this judgment namely the 23rd May, 1963, that is to say, seven years reckoned from the 6th August, 1962. His convictions and sentences on counts two and three of the charge remain unaffected.

- In regard to the other appellants, convicted on a count of abetting the first appellant in his offence under sections 315 and 83 of the Penal Code, we discharge the convictions, and substitute in respect of each a conviction under sections 312 and 83 of the Code.

The following sentences are passed:

- |          |                                  |                        |
|----------|----------------------------------|------------------------|
| <i>g</i> | second appellant .....           | five years I.H.L.      |
|          | third and ninth appellants ..... | four years I.H.L. each |
|          | 10th and 11th appellants .....   | two years I.H.L. each  |

- h* In each case the sentence dates as from the date of conviction in the High Court, namely, 6th August, 1962.

## National Bank of Nigeria Limited v. Makun

HIGH COURT OF JUSTICE AKURE

FATAYI WILLIAMS J

Date of Judgment: 13 JUNE 1963

Suit No: AK/19/62

*Banking – Overdraft – Action by bank to recover – Limitation Law – When does time begin to run*

*Banking – Overdraft – Right of action – When does it accrue to bank*

*Limitation of Action – Overdraft – Action by bank to recover – When time begins to run*

### Facts

The plaintiffs' claim against the defendants is for the sum of £3,938.15s.1d. due to them as bankers in respect of an overdraft granted to the defendant at his request and interest thereon at the current rate of interest. The plaintiffs also claim interest on the said sum from the 13th March, 1962 when the writ of summons was filed until judgment is delivered.

The case for the plaintiffs may be summarised as follows: On 7th September, 1955, the defendant opened a current account at the Akure Branch of the plaintiffs' bank with £200.8s.4d. As shown in the statement of account (exhibit "D"), he paid into this account another sum of £300 on 29th October, 1955. On 8th December, 1955, however, he cashed two cheques, one for £500 (exhibit "B"), the other for £3,500 (exhibit "C"), thereby overdrawing his account to the tune of £3,884.7s. 2d. Since then, the defendant had paid nothing into his account to reduce this large overdraft. As a result, the interest charged on the overdraft up to 31st March, 1956, had since brought the total amount owing at the time the writ was taken out to the sum of £3,938. 15s. 1d. Nothing appeared to have been done by the management of the Bank at Akure since March, 1956. until Samuel Adedeji (first plaintiff witness) took over the management in April, 1961.

- a* Noticing that the current account of the defendant had been in debit for a long time, the first plaintiff's witness wrote to the defendant asking him to make a refund of the outstanding amount, and although his letter was not returned, he received no reply. About a month after the first letter, the first plaintiffs' witness wrote again to the defendant at the same address but this time his letter was returned by the postal authorities as unclaimed. In addition to these two letters the first plaintiff witness further instructed. The bank's solicitor to write to the defendant but that letter was also returned unclaimed. Consequently, the first plaintiff's witness accompanied by the bank's Branch Manager at Owo, went to see the defendant at a place called Arimogija near Ifon. There he discussed the payment of the overdraft with the defendant who promised to see the first plaintiffs witness at Akure with a view to arranging repayment. When the defendant did not come as promised for about a month, the first plaintiffs' witness went to see him again but this time the defendant could not be found. About a month later he came to Akure to see the first plaintiffs witness and remonstrated with him not to take legal proceedings against him. As he still failed to repay the overdraft action was instituted against him in March, 1962.

- g* The defendant did not give evidence, but relied on the legal defence in paragraph 10 of the defence where he averred as follows:—

- h* “The Defendant will plead that the alleged debt, if there was such a debt, was and is BARRED by the Statue of Limitation in that according to the 4th paragraph of the statement of claim, the money was overdrawn in December, 1955 and no demand was made until 3rd April, 1962.”

**Held –**

- i* 1. The contractual relationship between banker and customer whereby a banker gives overdraft facilities to the customer, the limit of which may, in all probability, fluctuate from time to time should, considering all the circumstances, receive considerations which are different
- j*

- from those applying to simple contracts between creditor and debtor. a
2. In the case of money on current account, the statute does not run, in the absence of special contract or waiver, until after demand for payment, as a demand, either by the issue of a writ or otherwise, is an essential ingredient in the cause of action against the banker for money lent. b
3. For practical considerations, there is an implied term between banker and customer that where an overdraft is given, there should be no right of action until notice is given and demand made by the banker and that for that reason, the claim brought by the banker against the customer in respect of an overdraft granted over six years before the action was instituted was not statute-barred. c  
d

### Cases referred to in the Judgment

#### *Nigerian*

*Official Receiver and Liquidator v. Moore* (1959) L.L.R. 46 at page 50

#### *Foreign*

*Elder v. Northcott* (1930) 2 Ch.D. 422

*Gibbs v. Guild* (1881) 8 Q.B.D. 296

*Joachimson v. Swiss Bank Corporation* (1921) 3 K.B. 110

*Lloyd's Bank Ltd v. Margolis* [1954] 1 All E.R. 734 at 738 g

*Parrs Banking Company Ltd v. Yates* (1898) 2 Q.B. 460

*Rouse v. Bradford Banking Company* (1894) A.C. 586

#### Counsel

For the plaintiff: *Ogundare*

For the defendant: *Ajayi*

#### Judgment

**FATAYI WILLIAMS J:** The plaintiffs' claim against the defendants is for the sum of £3,938.15s.1d due to them as bankers in respect of an overdraft granted to the defendant at his request and interest thereon at the current rate of interest. i  
j



- a* The plaintiffs also claim interest on the said sum from the 13th March, 1962 when the writ of summons was filed until judgment is delivered.
- b* The case for the plaintiffs may be summarised as follows: On 7th September, 1955, the defendant opened a current account at the Akure Branch of the plaintiffs' bank with £200.8s.4d. As shown in the statement of account (exhibit "D"), he paid into
- c* this account the sum of £300 on 29th October, 1955. On 8th December, 1955, however, he cashed two cheques, one for £500 (exhibit "B"), then for £3,500 (exhibit "C"), thereby overdrawing his account to the tune of £3,884.7s.2d. since
- d* then, the defendant had paid nothing into his account to reduce this large overdraft. As a result, the interest charged on the overdraft up to 31st March, 1956, had since brought the total amount owing at the time the writ was taken out to the sum of
- e* £3,938.15s.1d. Nothing appeared to have been done by the management of the bank at Akure since March, 1956, until Samuel Adedeji (first plaintiff's witness) took over the management in April, 1961. Noticing that the current account of
- f* the defendant had been in debit for a long time, the first plaintiffs' witness wrote to the defendant asking him to make a refund of the outstanding amount, and although his letter was not returned, he received no reply. About a month after the first
- g* letter, the first plaintiffs' witness wrote again to the defendant at the same address but this time his letter was returned by the postal authorities as unclaimed. In addition to these two letters the first plaintiffs' witness further instructed the
- h* bank's solicitor to write to the defendant but that letter was also returned unclaimed. Consequently, the first plaintiff's witness accompanied by the bank's branch manager at Owo, went to see the defendant at a place called Arimogija near Ifon. There he discussed the payment of the overdraft with
- i* the defendant who promised to see the first plaintiffs' witness at Akure with a view to arranging repayment. When the defendant did not come as promised for about a month, the first plaintiffs' witness went to see him again but this time
- j* the defendant could not be found. About a month later he

come to Akure to see the first plaintiffs witness and remonstrated with him not to take legal proceedings against him. As he still failed to repay the overdraft action was instituted against him in March, 1962.

The defendant did not give evidence, but relied on the legal defence in paragraph 10 of the defence where he averred as follows:—

“The defendant will plead that the alleged debt, if there was such a debt, was and is barred by the Statute of Limitation in that according to the 4th paragraph of the statement of claim, the money was overdrawn in December, 1955 and no demand was made until 3rd April, 1962.”

Before considering the merits of this legal defence, I find as a fact, on the evidence adduced by the plaintiffs and which I believe—

- (a) that the defendant overdrew on his current account with the branch of the plaintiffs’ bank at Akure to the tune of £384.7s.2d in December, 1955;
- (b) that he has not repaid all or any part of this sum since his account was overdrawn; and
- (c) that there was no demand for repayment until the first plaintiffs’ witness wrote to the defendant in April, 1961.

I will now proceed to deal with the defence. In this connection, I should point out that since the Limitation Law, Cap 64 of the Laws of Western Nigeria, 1959, came into force on 9th April, 1959, the Statute of Limitation referred to in paragraph 10 of the defence ceased to have force and effect in Western Nigeria. However, as the learned Counsel for both the plaintiffs and the defendant argued this legal point on the basis that it was the Limitation Law that was meant, I will amend, even at this stage, paragraph 10 of the statement of Defence by the substitution of the words “Limitation Law for the words “Statute of Limitation” in the second and third lines thereof.

- a* In considering whether this defence has any merit, reference may be made to the provisions of section 4, subsection (1)(a) of the Limitation Law (Cap 64) which read as follows:—
- b* “The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:—
- (a)* actions founded on simple contract or tort.”
- c* This section is similar to section 2(1)(a) of the Limitation Act, 1939, which replaced parts of section 3 of the Limitation Act of 1623. In construing the phrase “date on which the cause of action accrued,” it was held in *Gibbs v. Guild* (1881) 8 Q.B.D. 296 that in the case of actions founded on contract, time runs from breach. It was further held in *Elder v. Northcott* (1930) 2 Ch.D. 422 that no separate cause of action accrues in respect of interest on a debt and when the principal becomes statute-barred the arrears of interest are also barred. In *Parrs Banking Company Ltd v. Yates* (1898) 2 Q.B. 460 where an action was brought to recover money upon a guarantee which had been given to the plaintiffs by the defendant to secure the overdraft of a customer of the plaintiffs, it was held that the plaintiffs right of action upon the guarantee in respect of the sums advanced by them to the customer was barred by the Statute of Limitation, but that the action was maintainable in respect of the interest which had accrued due from the customer within six years before the action and had not been paid. It should be pointed out, however, that the action in that case was brought by the bank neither against the guarantor nor against the customer who, as in this case was responsible for the overdraft.
- g*
- h* In view of these decisions which are rather conflicting, it would appear, on first consideration, that time began to run when the defendant failed to repay the overdraft in December, 1955. On reflection, however, it seems to me that the contractual relationship between banker and customer whereby a banker gives overdraft facilities to the customer, the limit of which may, in all probability, fluctuate from time to time should, considering all the circumstances, receive considerations which are different from those applying to simple contracts between creditor and debtor. It is, therefore, not without
- i*
- j*

satisfaction that I refer to the following passage based on the decision on *Joachimson v. Swiss Bank Corporation* (1932) 3 K.B. 110, in Halsburys *Laws of England* (3ed), Volume 24, article 396:—

“In the case of money on current account, the statute does not run, in the absence of special contract or waiver, until after demand for payment, as a demand, either by the issue of a writ or otherwise, is an essential ingredient in the cause of action against the banker for money lent.”

Conversely, in *Lloyds Bank Ltd v. Margolis and others* [1954] 1 All E.R. 734, Upjohn J has this to say at page 738, about dealings in an overdraft current account where the bank took a legal charge secured on a farm owned by the customer:—

“As between a customer and a banker who are dealing on a current account, it seems to me impossible to assume that the bank were to be entitled to sue on the deed on the very day after it was executed without making a demand and giving the customer a reasonable time to pay.”

Furthermore, the following observation of Herschell LC in *Rouse v. Bradford Banking Company* (1984) A.C. 586 would appear to be apposite:—

“It is not necessary to consider what the rights of the bank were with regard to their debtor when they had agreed to an overdraft. The transaction is of course of the commonest. It may be that an overdraft does not prevent the bank who have agreed to give it from at any time giving notice that it is no longer to continue, and that they must be paid their money. This I think at least it does; if they have agreed to give an overdraft they cannot refuse to honour cheques or drafts, within the limit of that overdraft, which have been drawn and put in circulation before any notice to the person to whom they have agreed to give the overdraft that the limit is to be withdrawn. That effect I think it has in point of law, whether it has more than that in point of law it is unnecessary to consider. Even if it has no greater effect in point of law it is obvious that their party would have it in contemplation that when the bank had granted an overdraft it would immediately, without notice, proceed to sue for the money; and the truth is that whether there were any legal obligation to abstain from so doing or not, it is obvious that, having regard to the course of business, if a bank which had

*a* agreed to give an overdraft were to act in such a fashion, the results to its business would be of the most serious nature.”

*b* Finally, these views of the Learned Lord Chancellor were considered with approval in the decision of *Official Receiver and Liquidator v. Moore* (1959) L.L.R. at 46 where after reviewing most of the relevant authorities, it was held that for practical considerations, there is an implied term between banker and customer that where an overdraft is given, *c* there should be no right of action until notice is given and demand made by the banker and that for that reason, the claim brought by the banker against the customer in respect of an overdraft granted over six years before the action was *d* instituted was not statute-barred. In that case, Dickson J in his judgment at page 50, expressed the following view with which I entirely agree:—

*e* “I would be inclined to take the view that it would be unreasonable for a bank, after having granted an overdraft to immediately proceed to sue for it, without making a demand, and giving the customer a reasonable time to pay. I can hardly think that it would be in the contemplation of a customer to whom an overdraft was *f* given that, the bank would without warning issue a writ. If the bank are at liberty to act that way commerce and industry would be greatly handicapped.”

*g* In the light of these authorities, I hold that the claim against the defendant is not statute-barred. In the circumstances there will be judgment for the plaintiffs for the sum of £3,938.15s. 1d claimed as overdraft plus interest thereon up to 31st March, 1956.

*h* The plaintiffs also claim interest in this amount from 13th March, 1962 until the date on which judgment is delivered. No evidence was adduced in respect of this second leg of their claim and for that reason no order would be made *i* thereunder.

*Judgment for the plaintiff.*

## Ogu v. R

FEDERAL SUPREME COURT

ADEMOLA, CJF BRETT AND TAYLOR FJJ

Date of Judgment: 20 JUNE 1963

F.S.C.: 186/1962

*Banking – Banker/customer relationship – Customer's fraud on drawer of cheque – Debtor and creditor relationship in contrast to trustee and beneficiary relationship – Title to proceeds of cheque procured fraudulently*

*Criminal law and procedure – Statutory power of Federal Supreme Court to substitute correct conviction on appeal where offence proved at trial is different from the conviction by the lower court*

*Tort – Conversion – Whether customer's cheque drawn on proceeds of funds in his own account which was obtained by his fraud, may constitute conversion of money obtained fraudulently – Whether drawing cheque on proceeds of funds obtained by fraud constitutes stealing*

### Facts

The appellant obtained a number of cheques by means of forged vouchers with intent to defraud and by false pretences that the vouchers were genuine while he was employed as a clerk in the Treasury Department in Jos. The appellant caused the proceeds of those cheques to be credited to bank accounts operated by him under different names. The total sum obtained by means of these frauds was over £6,000 and the offences were committed over a period of 14 months. The appellant drew cheques on his own account and the learned trial Judge upheld the submission of the prosecutor that in doing so he stole the money of the drawer of the cheques which he had paid into his account.

### Held –

1. If a cheque obtained by fraud is later honoured by the drawer's bank, the payee may become the debtor of the

- a* drawer; he is not his trustee, and he acquires a good title to the proceeds of the cheque.
- b* 2. By drawing cheques on his own account the appellant could not in law, be said to have stolen or converted money which still belonged to the drawer of the cheques.
3. The convictions on the counts for stealing cannot therefore, be upheld.
- c* 4. The convictions of the appellant, for stealing by the trial court shall be substituted under section 27 of the Federal Supreme Court Act, 1960 with convictions for the offence of obtaining cheques by false pretences and with intent to defraud which was actually proved at the trial
- d* court.

***Obiter Dictum***

- e* “. . . Even if it had been strictly proved that the appellants bank had collected the proceeds of the cheques on his behalf from the drawer’s bank, it could not be said that in drawing on his own account the appellant took or converted money which still belonged to the drawer of the cheques.”

*f* **Nigerian statutes referred to in the judgment**

Criminal Code, section 390

Criminal Procedure Code (Northern Nigeria), sections 216 and 217

- g* Federal Supreme Court Act, 1960, section 27(2)

**Counsel**

For the appellant: *Ezekwe*

- h* For the respondent: *Thomas*

**Judgment**

- i* **BRETT FJ:** (*Delivering the judgment of the court*) The appellant was convicted on six counts for uttering, contrary to section 467(3)(c) of the Criminal Code, or section 366 of the Penal Code, on four counts for stealing contrary to section 390(6) of the Criminal Code, and on two counts for cheating contrary to section 322 of the Penal Code. In outline the case against him was that while employed as a clerk
- j* in the Treasury he caused vouchers to be submitted to the

Treasury, Jos, purporting to show that various sums were due to contractors for work carried out on behalf of the Public Works Department, and that in consequence of these vouchers cheques were issued of which the proceeds were credited to bank accounts operated by the appellant himself under different names. The signatures on the vouchers purporting to be those of the officers controlling payment were forged, and the work supposed to have been done had not been done. The total sum obtained by means of these frauds was over £6,000 and the offences were committed over a period of 14 months.

There was no direct evidence of how the appellant caused the vouchers to be presented to the Treasury, but there was overwhelming circumstantial evidence that he either presented them himself or procured this to be done, and there is nothing in the submission that a vital link in the chain of evidence on the counts for uttering was missing. The submission that the judge assessed the evidence of the handwriting expert incorrectly is equally without substance, and the appeal is dismissed so far, as it relates to the counts for uttering and cheating.

The convictions on the counts for stealing, however, cannot be upheld. The evidence showed that the appellant obtained a number of cheques by means of forged vouchers and paid those cheques into his own bank accounts. Thereafter he drew on his own accounts and the judge upheld the submission of the prosecution that in doing so he stole the money of the drawer of the cheques which he had paid into his accounts. If a cheque obtained by fraud is later honoured by the drawer's bank, the payee may become the debtor of the drawer; he is not his trustee, and he acquires a good title to the proceeds of the cheque, so that even if it had been strictly proved that the appellant's bank had collected the proceeds of the cheques on his behalf from the drawer's bank, it could not be said that in drawing on his own account the appellant took or converted money which still belonged



- 
- a* to the drawer of the cheques. There is no doubt, however, that the cheques themselves were obtained with intent to defraud and by the false pretence that the vouchers were
- b* genuine, and as the obtaining of the cheques formed part of the same series of acts as the acts alleged to constitute stealing, the court below would have had power under section 217 of the Criminal Procedure Code to convict the appellant
- c* of obtaining the cheques by false pretences, and this Court has power under section 27(2) of the Federal Supreme Court Act to substitute a conviction for that offence. For the convictions for stealing money on counts 15, 16, 17 and 18 we
- d* therefore substitute in each case a conviction under section 419 of the Criminal Code for obtaining by false pretences and with intent to defraud a cheque for the same amount of money as is referred to in the count, and we pass a sentence
- e* of five years imprisonment for each of those four offences, and direct that those sentences shall run concurrently with each other and with the sentences imposed on the counts for uttering and cheating.

**Nigerian Breweries Limited v.  
Muslim Bank (W.A.) Limited**

HIGH COURT OF LAGOS STATE

ONYEAMA J

Date of Judgment: 1 JULY 1963

Suit No: L.D.: 457/62

*Banking – Bills of Exchange Act – Negligence thereof –  
Onus of proof*

*Banking – Collection of cheques by payee – Liability of  
banker thereto – Section 82 of Bills of Exchange Act – Ex-  
ception thereto*

*Words and Phrases – “Without negligence” – Meaning of –  
Section 82 of Bills of Exchange Act*

**Facts**

The plaintiff company drew a crossed cheque on the British and French Bank Limited payable to a company called Nigerian Tool and Die Company Limited, or Order. The cheque, exhibit 1, was crossed generally.

The cheque, by some unexplained process, found its way into the hands of one Clement Taylor who opened an account under a misleading business name with the defendant bank and paid the cheque into that account.

The defendant bank collected the amount of the cheque from the bank on which it was drawn, and within a day or two of this collection paid out the amount collected, £1,125.3s.4d, less £59 to Clement Taylor. Clement Taylor has since vanished, and it is clear from the evidence that he had not title of any kind to the cheque.

The defendant bank has invoked the protection of section 82 of the Bills of Exchange Act.

***a* Held –**

1. Where a bank is negligent in the payment of a cheque to a drawee, the bank cannot claim protection afforded by section 82 of the Bills of Exchange Act.
2. In order for a bank to escape liability in conversion under section 82 of the Bills of Exchange Act, the bank must show that it acted with due regard to the interest of the true owner of the cheque.
3. The onus of proving absence of negligence is plainly cast upon the bank. But for the section they are liable for conversion, and it is for them to bring themselves within the statutory exception.
4. “Without negligence” means without want of reasonable care in reference to the interest of the true owner.

***e*** *The claims of the plaintiff succeed.*

**Cases referred to in the judgment**

***f* Foreign**

*Carpenters Company v. British Mutual Banking Co Ltd* (1938) 1 K.B. 511

***g*** *Hannah’s Lake View Central (Ltd) v. Armstrong and Co* (1900) 16 T.L.R. 236

*Lloyd’s Bank v. Savory* (1933) A.C. 201

*Midland Bank v. Rickett* (1933) A.C. 1

***h*** *Motor Traders Corporation v. Midand Bank* [1937] 4 All E.R. 90

**Nigerian statute referred to in the judgment**

***i*** Bill of Exchange Act, 1964, section 82

**Counsel**

For the plaintiffs: *Sofola*

***j*** For the defendants: *Shyngle*

## Judgment

**ONYEAMA J:** This case concerns the liability of a bank for proceeds of a crossed cheque which it had collected on account of a customer who had no title to it.

The facts are that the plaintiff company drew a crossed cheque on the British and French Bank Limited payable to a company called Nigerian Tools and Die Company Limited, or order. The cheque was crossed generally: see exhibit 1.

The cheque by some unexplained process, found its way into the hands of one Clement Taylor who opened an account under a misleading business name with the defendant bank and paid the cheque into that account.

The defendant bank collected the amount of the cheque from the bank on which it was drawn, and within a day or two of this collection paid out the amount collected, £1,125.3s.4d, less £59 to Clement Taylor. Clement Taylor has since vanished, and it is clear from the evidence that he had not title of any kind to the cheque.

I am satisfied that the cheque was stolen at some time between its being drawn and its getting into the hands of the proper officers of the Nigerian Tools and Die Company Limited I am also satisfied from the circumstances that the endorsement on the cheque was forged in that it falsely purported to be made on the behalf of the Nigerian Tools and Die Company Limited.

On these facts the plaintiff company claims from the defendant bank the amount collected on the cheque and paid out to Clement Taylor.

The defendant bank has invoked the protection of section 82 of the Bills of Exchange Act. This section is identical with section 82 of the Bills of Exchange Act of England and provides:

“Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specifically to himself, and the customer has no title or a defective title

*a* thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment.”

*b* It is now necessary to consider the facts about Clement Taylor as they were known to the defendant bank. The evidence of these facts was given by Lawal Adeola Marquis, the manager of the bank. The facts are Clement Taylor on the 20th June, 1961, opened a savings account with the defendant bank. No references were requested as, according to witness, none were needed. He opened the account with a postal order value of which is not stated. There is no evidence of the history of the dealing with this account but in *d* August, 1961, that is to say about two months after the savings account was opened, there was less than two pounds in it.

*e* In August, 1961, Clement Taylor presented exhibit 1 to the witness and told him he wished to open a current account with it. At this time there was no account in the defendant bank kept by the payees of exhibit 1. The manager asked *f* Clement Taylor for his “names of business” which I understand to mean the certificate of registration of his business name under the Registration of Business Names Ordinance. Clement Taylor did not produce his “name of business” but showed the manager a receipt which showed he had paid the *g* fees for it. The receipt referred to the Nigerian Tools and Die Company Limited. On account of this variation the manager did not ask to see the memorandum and articles of association of the company as he would otherwise have *h* done. His evidence on this point, given in cross-examination, was:

*i* “I did not ask Clement Taylor for the memorandum and articles of association because the company was not limited.”

There can be no doubt therefore, that the manager knew the distinction between an unincorporated firm and a limited liability company of the same name, and that, according to *j* him, he drew it in this case.

Without further reference or inquiry he permitted Clement Taylor to open the current account and proceeded to collect the sum shown in exhibit 1. The cheque clearly showed that it was payable, not to the unincorporated firm, but to a limited liability company. As far as the defendant bank knew, Clement Taylor was engaged in the business of forecasting football results for persons interested in football betting pools and he had been the customer of the defendant only about two months.

In order to determine the good faith of the bank and whether there was or was not negligence, it is necessary to look at the inquiry which was made, for it, appears to me that the defendant bank dealt with the plaintiffs cheque in a manner which led them to open liability unless the defence under section 82 is made good.

The words “without negligence” in the Act were defined by Kennedy J in *Hannan’s Lake View Central (Ltd) v. Armstrong and Co* (1900) 16 T.L.R. 236, to mean “without want of reasonable care in reference to the interests of the true owner.” In that case the secretary of a company endorsed a cheque drawn in favour of the company to himself and paid the cheque into a private account he had kept with the defendant bank since 1896. He was well known at the bank and the bank had no reason to doubt his honesty. The good faith of the defendant bank was not doubted but on the issue of negligence Kennedy J said:

“This large cheque (£542) was on the face of it the property of the plaintiffs. It was an order drawn in their favour by the third parties upon the London and County Bank. The defendants knew not only from the form of the endorsement when Montgomery endorsed the cheque to them, but from earlier information, that he was the plaintiffs’ servant in the capacity of secretary. They knew also, that the plaintiffs had a banking account of their own at another London bank. It was apparent on the face of the transaction that in endorsing the cheque to them as his bankers and for the credit of his private account, Montgomery was using for himself a valuable document, which was upon its face created for the benefit of his employers.

- a* Of course it was possible that his employers had authorised Montgomery so to deal with the cheque. But the defendants had not had with Montgomery any like transaction before: it was not a transaction which would be, as I understand the evidence, a customary transaction which the secretary of a company in Montgomery's position, and the question is whether the defendants as businessmen, bound to act with reasonable care towards the plaintiffs, were entitled in the circumstances to assume without enquiry (which could have been made promptly and easily) that Montgomery was authorised to endorse to the defendants as he did."

There are, to my mind, quite a few features common to the case from which this quotation is taken and the present case.

- d* The cheque in the case in hand was a large one – £1,125 odd. The defendant bank knew that the payee of the cheque had no account with them and, therefore, if that company had a bank account at all, it must have been with some other bank. It was quite clear that the firm the name of which Clement Taylor claimed to have registered was different from the payee of the cheque and that Clement Taylor's endorsement on exhibit 1 was, at least, open to question. Clement Taylor presented a valuable document which was on its face created for the benefit of someone else. The defendant bank could quite easily have made enquiries but it chose not to do so.

- g* It is for the bank to show "under section 82 of the Act, in order to escape liability in conversion . . . That they have acted with due regard to the interests of the true owner of the cheque." See *Motor Traders Corporation v. Midland Bank* [1937] 4 All E.R. 90. In that case the cashier of the defendant bank made detailed enquiries from a customer who had presented a crossed cheque with a forged endorsement. The customer told him a plausible but quite false story but he had no cause to disbelieve the customer.

- i* Goddard J (as he then was) before whom the case was tried said at page 95:

- j* "But for one fact in this case, I think, I should have held that Mr Hatherell had made reasonable enquiries . . . But the difficulty in this case, from the point of view of the bank, is that it may be that Mr Hatherell – I do not doubt for a moment that it was so –

did not suspect Turner's honesty, but it is a little difficult to say *a*  
that Turner was a man whose banking record was so satisfactory  
that Mr Hatherell was entitled to take upon himself the duty of  
deciding whether or not this cheque should be accepted."

Further on in his judgment Goddard J refers to features of *b*  
that case which are not without relevance to the present  
case:

"... he (Turner) had run down from £503 in June, quite *c*  
quickly ... to being £7.8s.3d overdrawn ... then comes along this  
cheque, which was not an ordinary cheque, in the sense that it is  
not a cheque drawn payable to him; it is a cheque drawn payable  
to another person, a person unknown to the bank, but a person who  
was known to be in Bristol. Before the cheque was put through for *d*  
clearing, I should have thought it would have been quite simple to  
have rung up and asked if the cheque was in order, or to have  
asked the drawers of the cheque whether it was in order."

In the case under consideration, Clement Taylor's account *e*  
had been reduced from whatever it was to under £2. Then  
along comes this large cheque which is not drawn payable to  
him or his firm. It is a cheque drawn to another person, a  
person unknown to the bank. Without any inquiry worth *f*  
talking about the present defendants accepted the cheque  
and collected the amount due on it.

In the speech of Lord Atkin in *Midland Bank v. Rickett*  
(1933) A.C. 1, it is said that "the onus of proving absence of *g*  
negligence is plainly cast upon the bank. But for the section  
they are liable to conversion, and it is for them to bring  
themselves within the statutory exception ... "

In *Rickett's* case as in the other cases, and I would also re- *h*  
fer to *Lloyd's Bank v. Savory* (1933) A.C. 201 and *Carpenter's*  
*Company v. British Mutual Banking Company Ltd*  
(1938) 1 K.B. 511, the form of the cheque gave notice to the  
defendant bank that the money was not the money of the *i*  
customer presenting the cheque. In all cases, the bank was  
required to make satisfactory enquiries if it was to be ab-  
solved from liability.

In the case with which I am now concerned, a forecaster *j*  
offootball results whose account with the bank showed only



- 
- a* about £2 credit presented a cheque for a large sum of money drawn by a well known company of brewers in favour of Nigerian Tools and Die Company Limited. He showed no
- b* evidence of any connection with either the drawer or payee of the cheque nor did he explain how he came by the cheque. Relying only on the fact that this gambling customer had been known to them for two months the defendant bank
- c* collected the cheque and paid the proceeds into the customer's account. As I said before they made no enquiries worth the name and it is open to question whether they acted in good faith.
- d* I have not the slightest hesitation to say the defendant bank has failed to discharge the burden of proof cast upon it and in finding that the enquiry it made of the customer Clement Taylor (such as it was) was lamentably insufficient.
- e* For this reason the bank has failed to bring itself within the protection of section 82 of the Act and there will, therefore, be judgment for the plaintiff company against the defendant bank for £1,123.3s.4d as claimed and costs assessed at 60 guineas.

## Chobamide v. Bank of West Africa Limited

HIGH COURT OF MID-WESTERN NIGERIA

EKERUCHE J

Date of Judgment: 5 MARCH 1964

*Banking – Equitable mortgage – Mortgagor's lack of title in security; mortgagee's power to retain security – Mortgagee lack of care or bona fide*

*Banking – Security for advance – Customer's lack of title in the security deposited with Bank*

### Facts

The plaintiff claims against the defendant (bank) that an equitable mortgage deed was void and should be set aside on ground of fraud, mistake, or lack of consideration and the return of leasehold deed.

The plaintiff and his deceased brother were joint lessees of a property. The deceased brother of the plaintiff, mortgaged the property without the knowledge and consent of the plaintiff. Afterwards the plaintiff tried to pay back the loan but was unable to complete the payment. The defendant argued that by trying to pay back, the plaintiff has thereby consented to the mortgage.

### Held –

1. A banker who bonafide accept negotiable security from a borrower as security against an advance in the nature of a mortgage is entitled to retain them until the debt is satisfied, notwithstanding the borrowers lack of title in or wrongful dealing with, those securities, but a banker who fails to investigate the borrowers title properly is not so entitled.

*Judgment for plaintiff.*

**a Case referred to in the judgment**

***Nigerian***

*Olowu v. Desalu* (1955) 14 W.A.C.A. 622

**b Counsel**

For the plaintiff: *Etuwewe*

For the defendant: *Izuora*

**c Judgment**

**EKERUCHE J:** In this action the plaintiff claims from the defendant:

**d** “(a) A declaration that the deed of charge or equitable mortgage entered into by I.K. Alli Chobamide, deceased, in favour of the defendant in respect of the landed property situate at page 4, Omatsola Crescent, Warri, sometime in October, 1957 is void;

**e** (b) That the deed of charge or equitable mortgage on the landed property of the plaintiff’s deceased father, made some time in October, 1957 and signed by the deceased in favour of the defendant be set aside on the ground of fraud and/or mistake and/or failure of consideration;

**f** (c) An order for the return to the plaintiff of the deed of lease in respect of the property situate at 4, Omatsola Crescent, Warri, which deed was delivered by the deceased to the defendant some time in October, 1957.”

**g** Only the plaintiff gave evidence. The defence elected to call no evidence.

**h** The evidence before this Court is that one Alli Chobamide was father of the plaintiff. The plaintiff’s said father was a lessee of the Crown of the landed property situate at 4, Omatsola Crescent in Warri (*vide* exhibit 4). The father died in 1949, apparently intestate, leaving the plaintiff and another son Isaac Alli Chobamide, surviving him.

**i** On April 15th, 1957, the plaintiff and his brother obtained a certificate of inheritance (*vide* exhibit 5), which was issued by the Ode Itsekiri Native Court, certifying that the plaintiff and his brother were entitled under native law and custom to inherit the leasehold interest of their deceased father in 4,

**j**

Omatsola Crescent, Warri. On June 1st, 1957, the provincial land officer, Benin Delta Provinces, wrote to inform the plaintiff that he and his brother were recognised as Crown lessees from the date of the issue of the certificate (*vide* exhibit 7). It does not appear that any deed was executed effecting this recognition; no such deed was tendered. The plaintiff's brother, Isaac Alli Chohamide, died on October 8th, 1957. After the death of the brother, one DJ Knight, who was manager of the defendant's branch in Warri, invited the plaintiff to his office and told him that the plaintiff's brother owed money to the defendant and that the brother had mortgaged the property at 4, Omatsola Crescent, to the defendant. The plaintiff said he did not know before that his brother had an account with the defendant, but that he, the plaintiff, was the defendant's customer from about November, 1957. The plaintiff also told Mr Knight that his brother had no right to mortgage ("pledge" was the word used by plaintiff) the property to the defendant. At a later date the plaintiff, and a lawyer he had engaged, went to see Mr Knight. Mr Knight then called on him to pay his brother's debt and the plaintiff said he had no money. Mr Knight then offered to give the plaintiff an overdraft facility, so that plaintiff could obtain money to trade and pay off the debt. The plaintiff agreed to this. The overdraft facility was then given to the plaintiff.

Mr Knight later left Warri and the defendant stopped the overdraft facility previously given to the plaintiff. It would appear that the reason for stopping the facility was that the plaintiff was not making satisfactory payments to settle his brother's debt (*vide* exhibit 2).

The plaintiff, before instituting this action, requested the defendant to show him the mortgage deed which his brother signed, and also demanded his father's document of title to the property, but the defendant would do neither. The so-called mortgage instrument is exhibit 3.

The plaintiff denied knowing that his brother was going to enter into exhibit 3 and said that, if he had known, he would

*a* have objected to it. He said that on his father's death he had kept exhibit 4, his father's deed of assignment in respect of the property, and that his brother had got access to it when he, the plaintiff, was sick in hospital in 1957. The plaintiff  
*b* said he did not sue the defendant before 1960 because it was only then that he knew the defendant was not prepared to give him exhibit 4.

*c* The defence tendered exhibit 6, a certificate of inheritance issued by the Itsekiri Central Native Court on November 4th, 1957, declaring that the plaintiff was entitled under native law and custom to inherit the rights and interests of  
*d* his deceased brother.

A statement of account of the estate of the plaintiff's brother with the defendant, as operated by the plaintiff, was admitted by consent as exhibit 8.

*e* It is clearly established by the evidence given in this case that the property was the leasehold property of Alli Chobamide, the father of the plaintiff and the plaintiff's deceased brother, and that he died possessed of it and not  
*f* having assigned it to anyone before his death.

In the schedule to exhibit 3, the equitable mortgage of the said property executed by the plaintiff's brother, appear particulars of the original lease, whereby the property was  
*g* granted by the Crown to one Salamotu Ajibola, the assignor to the plaintiff's father, per exhibit 4 or exhibit 5.

There is no evidence of what the defendant did, and whether or not he investigated the title to the property further, when he saw that deed. If the defendant had investigated the title, he would have known that the deed conferred no title on the plaintiff's brother. If, however, he did not, having had notice of the deed, it will in my view be fixed  
*i* with notice that the plaintiff's brother never had title. The defendant, having had notice of the said deed, will be deemed to have known that that deed did not confer any title on the defendant's late brother who executed exhibit 3. He  
*j* would have discovered that there were two persons, namely,

the plaintiff and his deceased brother, who were entitled to inherit the said property as lessees of the Crown, *vide* exhibit 7, which was written on July 1st, 1957. Exhibit 3 was executed on October 5th, 1957, about four months after exhibit 7 was written.

The view I take of the position of the plaintiff and his deceased brother is that they were, by virtue of the certificate of inheritance (exhibit 5) and the letter of recognition from the Provincial Land Officer, Benin-Delta Provinces (exhibit 7), at least jointly entitled in equity to the entire beneficial interest of the unexpired residue of their father's leasehold interest. It has not been shown by the evidence led in the case that the unexpired residue of the legal estate had been vested in either the plaintiff or his brother by any instrument on the death of the plaintiff's father, but I take the view that whoever held the said estate then held it as trustee in trust for the use and benefit of the plaintiff and his brother jointly. Since the defendant and his late brother were entitled jointly, as I have stated, neither of them can, without the consent of the other, charge his interest in the property. By the defendant's pleading there is no suggestion that the plaintiff knew when his brother proposed to mortgage the property. The plaintiff said he did not and that, if he had known, he would not have consented to it. The defendant, as I said earlier, gave no evidence and I accept the plaintiff's evidence on the point. I hold, therefore, that the mortgage, exhibit 3, is void.

The defendant's Counsel referred this Court to the law as stated in *Chitty on Contracts*, (21ed) at 427, paragraph 769 (1955). The statement of the law he relied on is that, where a stranger pays off an existing mortgage, such payment raises a *prima facie* presumption in equity that he does not thereby intend to amortise the debt but proposes to keep the mortgage alive for his own benefit.

The plaintiff in this case by the intermittent payments he made only paid part of the mortgage debt. There is no doubt that in making the payments he was doing so with a view to

- a* ultimately extinguishing the debt, but it is clear from his evidence that his doing so was merely to purchase peace and not necessarily to obtain a benefit under the mortgage – see *Olowu v. Desalu* (1955) 14 W.A.C.A. 622. The said submission of the defendant’s Counsel in my view does not assist the defendant.

- The defendant’s Counsel also relied on the law as stated in Halsbury’s *Laws of England*, (3ed), Volume 2 at 232, paragraph 434, to the effect that, where a banker *bona fide* takes fully negotiable securities as cover for an advance or overdraft, he is entitled to retain them until his debt is satisfied, notwithstanding that the borrower had no property in, and was wrongfully dealing with the securities. Counsel argued that the defendant was entitled on the law as stated to retain the deed the plaintiff wants returned to him.

- There are two answers which dispose of that submission. The first is that the said deed is not a negotiable security as it is not being negotiated. One of the requisites of negotiability is that the instrument must be, by the custom of trade, transferable by delivery, like cash. The deed in question is not such an instrument.
- The other answer is that it can hardly be suggested that the defendant who proceeded to advance money without investigating the title of the borrower properly was acting in good faith.

- The defendant’s Counsel also argued that the plaintiff’s action was misconceived. He did not say in what way it was misconceived and I do not see how it was misconceived.

- The plaintiff is entitled to succeed in this action and I enter judgment in the case as follows. I declare the deed of charge or equitable mortgage, exhibit 3, void. As regards the second claim, as I had declared the said deed void, there is nothing to set aside. I order that the defendant do return forthwith to the plaintiff the deed of lease, exhibit 5, in respect of the property at No. 4, Omatsola Crescent, which was delivered to the defendant by IK Chohamide, deceased. The said deed of lease is in fact the deed of assignment tendered in the case.

The defendant will pay the plaintiff £26.5s.0d.

- j* Judgment for the plaintiff.

**Attorney-General of Northern Nigeria v.  
African Continental Bank Limited**

HIGH COURT OF JOS

BATE J

Date of Judgment: 18 APRIL 1964

J.D.: 93/1962

*Banking – Account – Opening and collection of cheques on behalf of customer – Duty on bank to make inquiries – Failure to make – Effect*

*Banking – Bills of Exchange – Cheques – Conversion of – Duty on bank in respect thereof – Negligence of banker to true owner – Scope of*

*Banking – Bills of Exchange – Conversion of cheques – Duty on banker in respect thereto – Defence available to banker under section 82 of Bills of Exchange Ordinance – When available – When not available – Principles guiding*

*Banking – Bills of Exchange – Section 82 of Bills of Exchange Ordinance – Purport of – Scope of – Action for negligence thereunder – Test for determining whether bank negligent – Whether bank need be abnormally suspicious*

*Bill of Exchange – Bills of Exchange Ordinance – Liability of banker thereunder – Protection available to banker – Purport and scope of – Section 82 of Bills of Exchange Ordinance construed*

**Facts**

Johnson Ogu, a clerk in the Government Sub-Treasury at Jos forged eight Government payment vouchers purporting to relate to money due from the Government to PN Oku for work done for the Government. The earliest was dated in June, 1959 and the last in January, 1961. They appeared on the face to have passed through the Ministry of Works, in some cases at Bauchi and in others at Yola. They purport to have been checked and passed and to be payable at Jos.



- a* There was also admitted in evidence eight cheques drawn on the Government account with the Bank of West Africa at Jos. Six of these were made out to the African Continental
- b* Bank for the account of PN Oku or to that effect and the amount on each cheque corresponds exactly with the amount on one of the forged payment vouchers. Of the other two,
- c* one was payable to “ACB. A/c for Sundry Persons” and does not correspond to the amount on any voucher; but the cheque had attached to it a document, referred to as a bank certificate, directing payment to the account of PN Oku of an amount appearing in one of the vouchers. These seven
- d* cheques were all crossed. The last cheque, exhibit 18, was made payable to the “manager” ACB Limited Jos” for an amount appearing on one of the vouchers and is accompanied by a bank certificate directing payment into PN Oku’s account. There is a dispute whether or not this last cheque
- e* was crossed.

In May, 1959, Johnson Ogu opened an account with the African Continental Bank, Jos, in the name of Patrick

*f* Nwokoye Oku.

The Sub-Treasury, Jos, sent the eight cheques and their accompanying bank certificates to the African Continental Bank, Jos. The latter cleared the cheques with the bank of

*g* West Africa and credited Oku’s account accordingly.

Oku’s account with the defendant bank shows that from the 12th May, 1959, when the account was opened to the 23rd February, 1961, the only credit entries relate to the

*h* eight cheques and a cash deposit of £6 with which the account was opened. But over the same period there were a considerable number of drawings which left the account in credit to the extent of only a small sum.

*i* The plaintiff’s case was that the Government was entitled to recover from the defendant bank the sum of the amounts payable on the eight cheques on the ground that the bank was negligent in not making inquiries or fuller inquiries

*j* when the account was opened in the name of PN Oku. It was

also argued that the bank was negligent on the ground that it failed to infer from the manner in which the account was operated and in particular from the absence of credit entries apart from those relating to the eight cheques, that Oku had no title to the cheques. The plaintiff does not allege bad faith but contends that the defendant bank was not entitled to the protection under section 82 of the Bills of Exchange Ordinance because it acted negligently.

Section 82 provides:

“Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specifically to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment.”

**Held –**

1. Under section 82(1) of the Bills of Exchange Ordinance where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specifically to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment.
2. Section 82 of the Bills of Exchange Ordinance only applies where the customer has no title or a defective title. In the instant case, it has not been argued that the customer had a good title to the cheques. The evidence shows that Oku or Ogu was a customer of the defendant bank, that he procured the payments by the eight cheques for his account by fraud, and that his title to the cheques was defective.
3. Under the common law principles applicable in Northern Nigeria, if a banker collects a cheque for his customer and that customer has not rightful title to it, the banker is liable in conversion to the true owner. But he is protected in relation to crossed cheques by virtue of section 82 of the Bills of Exchange Ordinance. In the instant

- a* case, so far as concerns the seven crossed cheques, there is the defence under section 82, the only remaining issue is whether or not the defendant bank was negligent.
- b* 4. The test of negligence in relation to section 82 of the Bills of Exchange Ordinance is whether the transaction of paying in any given cheque, coupled with the circumstances antecedent and present, was so out of the ordinary course that it ought to have aroused doubts in the bankers mind, and caused them to make inquiry.
- c*
- d* 5. It is now recognised to be the usual practice of bankers not to open an account for a customer without obtaining a reference and without inquiry as to the customers standing; a failure to do so at the opening of the account might well prevent the banker from establishing his defence under section 82 of the Bills of Exchange Ordinance if a cheque were converted subsequently in the history of the account. In other words, a banker who had omitted some proper precaution cannot be heard to say that he was nevertheless not negligent because the precaution, if it had been taken, might have been fruitless.
- e*
- f*
- g* 6. Every failure to make proper inquiries, whether or not they appear to be material, is fatal to a defence under section 82 of the Bills of Exchange Ordinance. It is not necessary that such carelessness is fatal even if the bank can show affirmatively that the failure was immaterial. If a bank manager fails to make inquiries which he should have made, there is, at the very least a heavy burden on him to show that such inquiries could not have led to any action which could have protected the interest of the true owner.
- h*
- i* 7. Negligence in relation to section 82 of the Bills of Exchange Ordinance is breach of a duty to the possible true owner, not the customer, created by the Statute itself, the duty being not to disregard the interests of such true owner. The test of negligence is whether the
- j*

transaction of paying in any given cheque coupled with the circumstances antecedent and present were so out of the ordinary course that it ought to have aroused doubts in the bankers' mind and caused him to make inquiry. The banker is bound to make inquiry when there is anything to raise suspicion that the cheque is being wrongfully dealt with in being paid into the customers account, but the banker is not called upon to be abnormally suspicious.

8. It is negligence not to make inquiries as to a customer upon opening an account and collecting a cheque for him. Unless the reference obtained in respect of a customer renders it superfluous, inquiry ought to be made concerning the character and circumstances of the customer.
9. It is no defence for the banker to excuse his failure to make inquiries on the ground that they might have been fruitless. In the instant case effective inquiries would have shown that the customer was a clerk in the Jos Sub-Treasury attempting to open an account in a false name. If the bank had with this knowledge allowed him to open an account, the arrival from the Sub-Treasury of large cheques purporting to be payments for contract work would have been a matter of grave and obvious suspicion. But the defendant bank asked for no references and made no effective inquiries whatever about the customer. That constitutes negligence and the defendant is not entitled to the protection of section 82 of the Bills of Exchange Ordinance in relation to the seven crossed cheques. Furthermore, the system of the defendant bank at Jos by which the ledger keeper was excused from referring to the manager before opening an account if the initial deposit was small and by which no inquiries were made if large sums were subsequently credited to the account, was in itself defective and amounted to negligence on the part of the defendant bank. The defendant bank was liable to the plaintiff for the amount for which the eight cheques were payable.

*a Judgment for the plaintiff.*

**Cases referred to in the judgment**

*b Foreign*

*Baker v. Barclays Bank Ltd* [1955] 2 All E.R. 571; (1955) 1 W.L.R. 838

*c Commissioner of Taxation v. English, Scottish and Australian Bank Ltd* (1920) A.C. 683

*E B Savory and Company v. Lloyd's Bank Ltd* (1932) 2 K.B. 122

*Lloyds Bank Ltd v. E.B. Savory and Co* (1933) A.C. 201

*d Nigerian statute referred to in the judgment*

Bills of Exchange Ordinance, sections 76(1), (2) and 82

**Book referred to in the judgment**

*e Halsbury's Laws of England* (3ed), Volume 2, pages 180-181

**Counsel**

*f For the plaintiff: Barreto*

For the defendant: *Agbakoba*

**Judgment**

*g BATE J:* The plaintiff, the Government of Northern Nigeria, claims £9,702.13s.8d from the African Continental Bank.

The main facts are not in dispute and I find them to be as follows. Johnson Ogu, a clerk in the Government Sub-

*h Treasury at Jos, forged eight Government payment vouchers purporting to relate to money due from the Government to PN Oku for work done for the Government. The earliest in*

*i June, 1959 and the last in January, 1961. They appear on the face to have passed through the Ministry of Works, in some cases at Bauchi and others at Yola. They purport to have been checked and passed to be payable at Jos. There was*

*j also admitted in evidence eight cheques drawn on the Government account with the Bank of West Africa at Jos. Six of these are made out to the African Continental Bank for the*

account of PN Oku or to that effect and the amount on each *a*  
cheque corresponds exactly with the amount on one of the  
forged payment vouchers. Of the other two, one is payable  
to “A.C.B. A/c for sundry Persons” and does not correspond *b*  
to the amount on any voucher; but the cheque has attached  
to it a document, referred to as a bank certificate, directing  
payment to the account of PN Oku of an amount appearing  
in one of the vouchers. These seven cheques are all crossed. *c*  
The last cheque, exhibit 18, is made payable to the “man-  
ager, A.C.B, Limited Jos” for an amount appearing on one  
of the vouchers and is accompanied by a bank certificate  
directing payment into PN Oku’s account. There is a dispute *d*  
whether or not this last cheque is crossed.

In May, 1959, Johnson Ogu opened an account with Afri-  
can Continental Bank, Jos, in the name of Patrick Nwokoye  
Oku. *e*

The Sub-Treasury, Jos, sent the eight cheques and their  
accompanying certificates to the African Continental Bank,  
Jos. The latter cleared the cheques with the Bank of West  
Africa and credited Oku’s account accordingly. *f*

Oku’s account with the defendant bank shows that from  
the 12th May, 1959, when the account was opened, to the  
23rd February, 1961, the only credit entries relate to the  
eight cheques and a cash deposit of £6 with which the ac- *g*  
count was opened. But over the same period there were a  
considerable number of drawings which left the account in  
credit to the extent of only a small sum.

The plaintiff’s case is that the Government is entitled to *h*  
recover from the defendant bank the sum of the amounts  
payable on the eight cheques on the ground that the bank  
was negligent in not making inquiries or fuller inquiries *i*  
when the account was opened in the name of PN Oku. It was  
also argued without objection, though the latter was not  
pleaded, that the bank was negligent on the ground that it  
failed to infer from the manner in which the account was  
operated and in particular from the absence of credit entries *j*

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- a* apart from those relating to the eight cheques, that Oku had no title to the cheques. The plaintiff does not allege bad faith but contends that the defendant bank is not entitled to the protection of section 82 of the Bills of Exchange Ordinance because it acted negligently.

*c* The defendant denies negligence and claims protection under section 82. The defendant has not pleaded reliance on section 82 but raised this defence in argument without objection by the plaintiff. The latter in opening his case clearly anticipated that the defendant would rely on section 82. I shall therefore regard this defence as properly raised.

*d* By his defence, the defendant raises other defences but these were not referred to at the trial and Counsel for the defence confined himself to his contentions that the defendant bank had not acted negligently and was therefore entitled to the protection of section 82.

*f* The only issue therefore is whether the defendant bank is excused from liability by section 82 of the Bills of Exchange Ordinance. Section 82(1) provides as follows:

*g* “Where a banker in good faith and without negligence received payment for a customer of a cheque crossed generally or specifically to himself, and the customer has not title or a defective title thereto, the banker shall not incur any further any liability to the true owner of the cheque by reason only of having received such payment.”

*h* In the present case, there is no issue whether the defendant bank acted in good faith; the plaintiff does not allege bad faith. But the section only gives protection in relation to crossed cheques. Consequently, it is necessary to consider whether the eight cheques are crossed. Seven of them are clearly crossed and there is no doubt about this. But with regard to the other cheque, exhibit 18, there is a dispute. Mr Edwin Ogu, an Inspector of the defendant bank, expressed the view that it is crossed and said that it had been dealt with in the same way as the other cheques. Mr Finch, an Internal Auditor in the Inland Revenue Department and Sub-Treasury

at Jos at the material time, said on the other hand that it is not crossed. The question may be answered by looking at the cheque in light of section 76 of the Bills of Exchange Ordinance which makes provision with regard to the crossing of cheques. Scrutiny of the cheque shows that it is not crossed generally within the meaning of section 76(1), because it does not bear across its face two parallel transverse lines or any of the words referred to in the subsection; there is only one transverse line and what appear to be some figures. Nor is the cheque crossed specifically within the meaning of section 76(2). I therefore conclude that this cheque is not a crossed cheque and so find. Consequently the defendant bank is not entitled to the protection of section 82 in relation to this cheque.

Section 82 only applies where the customer has no title or defective title. In the present case, it has not been argued that the customer had a good title to the cheques. The evidence shows that Oku or Ogu was customer of the defendant bank, that he procured the payments by the eight cheques for his account by fraud, and that his title to the cheques was defective. I so find.

Under the common law applicable in Northern Nigeria, if a banker collects a cheque for his customer and that customer has not rightful title to it, the banker is liable in conversion to the true owner. But he is protected in relation to crossed cheques by section 82 of the Bills of Exchange Ordinance. In present case, so far as concerns the seven crossed cheques and the defence under section 82, the only remaining issue is whether or not the defendant bank was negligent. This is a question of fact but guidance is to be found in some of the authorities cited in this case. I must refer first to the decision of the Judicial Committee of the Privy Council in *Commissioner of Taxation v. English, Scottish and Australian Bank Ltd* (1920) A.C. 683. There, approval was expressed of a statement of the law that the test of negligence in relation to section 82 is whether the transaction of paying in any given cheque, coupled with the circumstances antecedent and



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- a* present, was so out of the ordinary course that it ought to have aroused doubts in the bankers' mind and caused them to make inquiry.
- b* Then, in *E.B. Savory and Company v. Lloyds Bank* (1932) 2 K.B. 122, it was suggested by Scrutton, L.J., in the Court of Appeal that it was negligence on the part of the bankers to have failed to make sufficient inquiries in opening the accounts of the customers concerned. This view was approved on appeal to the House of Lords (*Lloyds Bank Ltd v. E.B. Savory and Co* (1933) A.C. 201), which also endorsed the view that a banker who had omitted some proper precaution could not be heard to say that he was nevertheless not negligent because the precaution, if it had been taken, might have been fruitless. Lord Wright, at page 231, said:
- c*
- d* "It is now recognised to be the usual practice of bankers not to open an account for a customer without obtaining a reference and without inquiry as to the customer's standing; a failure to do so at the opening of the account might well prevent the banker from establishing his defence under section 82 if a cheque were converted subsequently in the history of the account."
- e*
- f* The decision in the *Savory* case was applied by Devlin J (as he then was) in *Baker v. Barclays Bank Ltd* [1955] 2 All E.R. 571, (1965) 1 W.L.R. 822. Devlin J also said, [1955] 2 All E.R. at page 584, (1955) 1 W.L.R. at page 838:
- g* "I do not think that in this case I need go so far as to hold that every failure to make proper inquiries, whether or not they appear to be material, is fatal to a defence under section 82. It is not necessary that I should hold that such carelessness is fatal even if the bank can show affirmatively that the failure was immaterial. In my judgment, however, if a bank manager fails to make inquiries which he should have made, there is, at the very least, a heavy burden on him to show that such inquiries could not have led to any action which could have protected the interests of the true owner . . ." Counsel for the plaintiff also referred me to a compendious statement of law in Halsbury's *Laws of England* (3ed), Volume 2, at pages 180-181. There it is stated that negligence in relation to section 82 is:
- h*
- i*
- j* "... breach of a duty to the possible true owner, not the customer, created by the statute itself, the duty being not to disregard the

interests of such true owner. The test of negligence is whether the transaction of paying in any given cheque coupled with the circumstances antecedent and present was so out of the ordinary that it ought to have aroused doubts in the banker's mind and caused him to make inquiry. The banker is bound to make inquiry when there is anything to raise suspicion that the cheque is being wrongfully dealt with in being paid into the customer's account, but the banker is not called upon to be abnormally suspicious . . .

It is negligence not to make inquiries as to a customer upon opening an account and collecting a cheque for him. Unless the reference obtained in respect of a customer renders it superfluous inquiry ought to be made concerning the character and circumstances of the customer."

I will now examine the evidence in light of these decisions. The only witness who threw any direct light on what happened when Ogu opened an account with the defendant bank was Mr Ejechine. The latter is and at the material time was a clerk with the defendant bank. He said that he had authority to open accounts for new customers and where the first deposit was small he was not required to refer the matter to the manager. He admitted that he had met Ogu once before he came to open an account but said that when he came to open an account he had not recognised him. I accept this and the rest of his evidence. His evidence is that Ogu came to him at the bank and asked to open an account with a deposit of £6. He gave his name as Patrick Nwokoye Oku and said he was a general businessman. He gave an address in Jos. The witness had not asked for details but had taken specimen signatures from the customer and opened an account for him. In view of the smallness of the deposit he had not referred the matter to the manager, except in so far as he had sent the specimen signature card to him in accordance with routine practice. The manager had returned it the following day. It was, the witness said, the manager's duty to make inquiries when specimen signatures were sent to him. The manager at the time, who did not give evidence, was, the witness said, in the United Kingdom. The witness had handled the account and had seen nothing suspicious about it.

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*a* Payments by the Government on Treasury payment vouchers were, he said, common.

*b* Mr Edwin Ogu, now a bank inspector with the defendant bank but formerly manager of the Jos Branch in succession to a Mr Kalu, gave evidence of the defendant bank's practice at Jos in his time in opening accounts for a new customers. He confirmed that ledger keepers were authorised to open  
*c* new accounts without reference to the manager where the initial deposit was less than £30. New customers were not asked to give references and no inquiries were made if a large sums were later paid in. Where, as in the present case,  
*d* the new customer claimed to be self-employed, the practice was for the clerk to pass the specimen signature card to the manager who would make inquiries, such as whether the address was genuine, and might make further inquiries at the  
*e* address. If the manager was satisfied, he returned the card to the ledger keeper. Mr Ogu had been introduced to Ogu by Mr Kalu before the latter had left. He had seen nothing suspicious about the customer or his account. I accept Mr  
*f* Edwin Ogu's evidence except with regard to the cheque, exhibit 18.

There was, in my view, nothing in the cheques themselves or in the manner in which they were sent to the bank so out  
*g* of the ordinary as to put the bank on inquiry. But, in order to ascertain whether there was negligence, it is necessary to look also at the antecedent circumstances. When Ogu came to open an account the bank did not ask him for a reference.  
*h* The ledger clerk merely accepted at its face value the customer's statement of his name, address and occupation. He did not refer to the manager for his approval but contented himself with sending to the manager a specimen signature card. There is no evidence that the manager took any steps  
*i* to test the truth of the customer's statements. I accept the clerk's evidence that the manager returned the card promptly but I am unable to agree with Counsel for the defence that the proper inference to be drawn from this is that the man-  
*j* ager must have made inquiries about the customer. The

evidence is equivocal and it might equally mean that the manager made no inquiries at all or insufficient inquiries. I am also unable to draw the inference suggested by Counsel for the defence that because Mr Edwin Ogu said that the practice in his time was for the manager to make inquiries on receiving a specimen signature card, Mr Kalu must have made inquiries or even that he probably did. Such an assumption would be unjustified. Nor am I able to agree that the sort of inquiries which Mr Edwin Ogu described would necessarily have been sufficient. Merely to inquire whether a customer lives at the address he has given does not go to the heart of the matter at all.

It is no defence for the banker to excuse his failure to make inquiries on the ground that they might have been fruitless. But in the present case, effective inquiries would have shown that the customer was a clerk in the Jos Sub-Treasury attempting to open an account in a false name. If the bank had with this knowledge allowed him to open an account, the arrival from the Sub-Treasury of large cheques purporting to be payments for contract work would have been a matter of grave and obvious suspicion. But the defendant bank asked for no references and made no effective inquiries whatever about the customer. This constitutes negligence and the defendant bank is not entitled to the protection of section 82 in relation to the seven crossed cheques.

Apart from this, the system in the defendant bank at Jos by which the ledger keeper was excused from referring to the manager before opening an account if the initial deposit was small and by which no inquiries were made if large sums were subsequently credited to the account, was in itself defective and amounted to negligence on the part of the defendant bank. It seems illogical that the criterion for deciding whether an application to open an account is to be referred to the manager should depend on the amount of the initial deposit.

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- a* The defence that the bank is not liable for the acts of the ledger keeper, Mr Ejechina, was not argued. There is in any event no substance in this line of defence.
- b* I am unable to agree with the submission for the defence that the failure of the Attorney-General or his agent to give evidence is fatal to the plaintiff's claim.
- There is no defence in relation to the uncrossed cheque.
- c* I therefore find that the defendant bank is liable to the plaintiff for the amount for which the eight cheques were payable.
- d* Judgment is entered for the plaintiff for £9,702.13s.8d with costs.

*Judgment for the plaintiff.*

## CFAO v. Agbonmagbe Bank Limited

HIGH COURT OF LAGOS STATE

ADEDIPE J

Date of Judgment: 6 JULY 1964

Suit No.: L.D. 344/63

*Banking – Banker/customer relationship – Dishonour of cheques – Duty on banker to notify the customer within a reasonable time*

*Banking – Banker/customer relationship – Negligence – Bank's duty of care to the customer*

### Facts

The plaintiff claims against the defendants for special damages for deceit and or negligence.

The plaintiff company sold various goods to a customer and collected 37 cheques from the customer, which it deposited with the defendants for collection. The defendants returned them in a bunch two months later and marked R.D. (Return to Drawer), the plaintiff contended that the bank was negligent and owes it a duty to take care and notify it immediately the cheques were returned unpaid.

### Held –

1. The defendant had a duty of care in dealing with the plaintiff's cheques which were delayed for almost two months, as a result of which the plaintiff suffered damages owing to the negligence of the defendant, and the defendant is therefore liable.

*Judgment for the plaintiff.*

### Cases referred to in the judgment

#### *Nigerian*

*Gafai v. United Africa Company Ltd* (1961) A.N.L.R. (Part IV) 785

*a Foreign*

*Derry v. Peek* (1889) 14 A.C. 337, 374

*Donoghue v. Stevenson* (1932) A.C. 562, 581

*b Le Lievre and Dennes v. Gould* (1893) 1 Q.B.D. 491, 497

*Parr's Bank (Ltd) v. Thomas Ashby and Co* (1898) 14 T.L.R. 563

**Counsel**

*c For the plaintiff: Lampejo*

For the defendant: *Makanju*

**Judgment**

*d ADEDIPE J:* The plaintiff's claim against the defendant is for the sum of £10,197.8s.4d, being special damages for deceit and or negligence.

*e The plaintiff avers in paragraphs 3, 5, 6, 7, 8, 9, 11 and 14 of its statement of claim as follows:*

*"3. At all material times relevant to this case Mrs Esther Abiola Amushan was a customer of the plaintiff company buying goods both on credit and cash basis.*

*f 5. At all material times relevant to this case the Bank of West Africa Limited was the plaintiff company's bankers and collecting Agent.*

*g 6. The plaintiff company within a resonable time sent the cheques issued by the said Esther Abiola Amushan to its bankers for the purpose of collection from the defendant's Shagamu Branch.*

*h 7. The plaintiff company's bankers ie the Bank of West Africa Limited within a reasonable time sent the cheques to the defendant's Shagamu Branch for collection and made several enquiries about the fate of the cheques.*

*i 8. The cheques in question were returned in a bunch on the 10th day of August, (October) 1957, two months after the first was sent in and a week after the last cheque was sent in for collection when in actual fact the first cheque should have been returned within a week of presentation.*

*j 9. By this undue and negligent delay in returning the cheques the plaintiff company was led to believe that the said Esther Abiola Amushan was in fund and deal further with her.*

11. The plaintiff company has put into motion all machinery to get the said Esther Abiola Amushan to pay the debt without success. a
14. The plaintiff lost the sum of £10,197.8s.4d as a result of the Defendant bank's negligence and or deceit and has repeatedly demanded to be indemnified by the Defendant Bank but the Defendant Bank has failed to do so." b

The defendant on the other hand, made the following averments in paragraphs 2, 3, 4, and 5 of its statement of defence: c

- "2. With special reference to paragraphs 3, 6, 7, 8, 9 of the plaintiff's statement of claim, the defendants are not in a position to admit or deny these paragraphs and they (the defendants) therefore put the plaintiffs to the strictest proof thereof. d
3. With further reference to paragraph 7 of the statement of claim, the defendants will plead that this Honourable Court has no jurisdiction in this matter as the transaction (if any) took place in Shagamu within the jurisdiction of the High Court of Justice of the Western Region of Nigeria. e
4. The defendants aver that they are not liable to the plaintiff company in that the plaintiffs have obtained judgment against the said Mrs EA Amushan on the subject matter of this action in Suit No. L.D. 105/1960 – *CFAO v. Mrs EA Amushan*. f
5. The defendants state that the plaintiff failure to recover the judgment debt and costs from the said Mrs EA Amushan is not the responsibility of the defendants." g

The plaintiff's case is that between 17 August, 1957 and 5 October, 1957, one Mrs Esther Abiola Amushan, the second witness for the plaintiff in this case, purchased various goods from the plaintiff company for which she issued 41 cheques on different dates and for different amounts. The first cheque No. 03801 for £426.5s.0d was issued on 7 August, 1957 and the last cheque No. 02895 for £304.10s.0d was issued on 5 October, 1957. The 41 cheques were admitted in evidence and marked exhibits A to A40. The cheques were drawn on the defendant Bank, Shagamu Branch. h  
i  
j



- a* These cheques were presented immediately by the plaintiff company to their bankers, the Bank of West Africa Limited, Broad Street, Lagos, for collection from the defendant bank.
- b* On the 10th October, 1957, a batch of 37 cheques were returned to the plaintiff by the Bank of West Africa Limited. All the 37 cheques were marked 'R.D.' meaning 'Return to Drawer.' Letter No. 208/212 dated 10th October, 1957,
- c* which covered the return of the cheques by the Bank of West Africa Limited, to the plaintiff was tendered and admitted as exhibit B. The attachment to exhibit B shows the particulars of each cheque.
- d* When the plaintiff received exhibit B, the company enquired from their bankers the reasons for the delay in the return of the cheques. The bank sent to the plaintiff a statement showing the particulars and the movements of each
- e* cheque until it finally reached the Bank of West Africa Limited, Broad Street Branch. This statement was admitted as exhibit C.
- f* A letter No. DAF/TEEK of the 9th January, 1958, addressed to the plaintiff which also showed the particulars and movements of the remaining four cheques, exhibits A37 to A40, was also admitted as exhibit D.
- g* On the 11th October, 1957, the plaintiff wrote a letter to the defendant complaining about the undue delay in returning the 37 cheques, exhibits A to A36, and which delay the plaintiff said had occasioned considerable financial loss to
- h* the company.
- The plaintiff asked the defendant in the letter for an explanation, but the defendant did not reply the letter. The letter was admitted as exhibit E.
- i* When no reply was forthcoming, the plaintiff's Solicitors, David and Moore, wrote another letter on the 18th November, 1957, to the defendant, in which the defendant was held responsible for the loss of the sum of £10,197.8s.4d suffered
- j* by the plaintiff, owing to undue delay on the part of the

defendant in returning the cheques. The solicitors asked the defendant to forward a cheque for the above stated amount to the plaintiff within seven days. The defendant did not reply the letter. The letter was admitted as exhibit F. a  
b

A reminder was sent by the solicitors on the 5th December, 1957, with a copy of exhibit F attached, but still the defendant did not reply. The reminder was admitted as exhibit G.

On the 13th February, 1958, another firm of solicitors, Messrs Irving and Bonnar, wrote another letter to the defendant on behalf of the plaintiff in which the defendant was informed that the plaintiff has suffered enormous loss as a direct consequence of the delay in returning Mrs Amushan's cheques to the plaintiff. The solicitors asked for an early reply to their letter, but the defendant did not reply. c  
d

The plaintiff then sued Mrs Amushan and obtained judgment for £13,829.10s.10d in 1960. Up to date Mrs Amushan has paid only the sum of £250. e

Mr Dessaix, the District Manager of CFAO, Lagos, who gave evidence for the plaintiff stated that when the cheques were not returned within a reasonable time, the plaintiff company assumed that they must have been paid. He stated further that if the cheques had been returned within a week or so the plaintiff would have stopped delivering further goods to Mrs Amushan and the company's loss would have been minimised. f  
g

The cheques for which judgment was given against Mrs Amushan for £13,829.10s.10d consisted not only of cheques, exhibits A to A40 but also of cheques drawn by Mrs Amushan on the National Bank, Shagamu Branch. h

The National Bank was not sued by the plaintiff in respect of the amount of roughly £3,000, the value of the cheques issued by Mrs Amushan on it, as there was no negligence on the part of the bank. i

Mrs Amushan who gave evidence on behalf of the plaintiff admitted that she issued the cheques, exhibits A to A40, and j

*a* that judgment was obtained against her for the sum of £13,829.10s.10d out of which she has paid the sum of £250 to the plaintiff.

*b* She said that she did not ask the defendant not to pay to the plaintiff, the cheques drawn on the defendant by her and stated further that at the moment she has no feasible means of paying her debts.

*c* Mr Agbaje, a bank official with 29 years of banking experience with the Bank of West Africa Limited also gave evidence for the plaintiff, he was at the material time the manager of the Broad Street Branch when the cheques in question were sent by his bank to the defendant for collection.

*d* He gave evidence that as soon as the cheques were presented to his bank by the plaintiff for collection they were sent to the headquarters of the defendant bank for collection, which was the normal practice, and that his bank sent clerks to the defendant bank everyday to collect payments of the cheques but they were neither paid nor returned until 10 October, 1957.

*e* He told the court that from his long experience of banking in Nigeria, cheques not paid, if within Lagos, must be returned within 24 hours, and cheques not paid, if outside Lagos, must be returned within two weeks. In his opinion, two months is not a reasonable period within which unpaid cheques were to be returned to Lagos from any part of Nigeria. I accept the evidence of practice given by Mr Agbaje and I would even say that a week would be a reasonable period as far as this case is concerned.

*f* At the close of the plaintiff's case, Counsel for the defendant informed the court that he did not intend to call evidence on behalf of the defendant.

*g* I would first of all dispose of the question of jurisdiction raised by the defendant in its pleadings. The contracts between the plaintiff and Mrs Amushan were made and performed

in Lagos. Goods were sold and delivered to her in Lagos. <sup>a</sup>  
She signed and delivered the cheques, exhibits A to A40, to  
the plaintiff in Lagos. The plaintiff presented the cheques to  
the Bank of West Africa Limited in Lagos, and the bank sent <sup>b</sup>  
them to the defendant for collection in Lagos.

If the cheques were to be paid by the defendant they would  
have been paid in Lagos.

Both the plaintiff and the defendant are resident in Lagos, <sup>c</sup>  
within the jurisdiction of this Court. It is clear therefore that  
this Court has jurisdiction in the matter.

It requires to be determined whether or not the loss of the <sup>d</sup>  
sum of £10,197.8s.4d suffered by the plaintiff was as a result  
of the defendant's negligence or deceit.

Taking the matter of deceit first. Lord Herschell in *Derry*  
*v. Peek* (1889) 14 A.C. 337 at page 374 stated as follows: <sup>e</sup>

"I think the authorities establish the following propositions: First  
in order to maintain an action of deceit, there must be proof of  
fraud, and nothing short of that will suffice. Secondly, fraud is  
proved when it is shown that a false representation has been made <sup>f</sup>  
(1) knowingly or (2) without belief in its truth or (3) recklessly,  
careless whether it be true or false. Although I have treated the  
second and third as distinct cases, I think the third is but an in-  
stance of the second, for one who makes a statement under such <sup>g</sup>  
circumstances can have no real belief in the truth of what he states.  
To prevent a false statement being fraudulent, there must, I think  
always be an honest belief in its truth. And this probably covers  
the whole ground, for one who knowingly alleges that which is  
false, has obviously no such honest belief. Thirdly, if fraud is <sup>h</sup>  
proved, the motive of the person guilty of it is immaterial."

Throughout the hearing of this case no evidence was led that  
the defendant made any representation to the plaintiff which  
was false, and that the defendant has thereby induced the <sup>i</sup>  
plaintiff to act upon it to its detriment. There was no proof of  
actual fraud against the defendant.

It follows therefore that the plaintiff cannot succeed on the <sup>j</sup>  
ground of deceit.

- a* On negligence. To maintain an action for negligence it must be shown:
- b* (a) that there was a duty on the part of the defendant towards the person injured,
- (b) that the defendant negligently performed or omitted to perform this duty,
- c* (c) that such negligence, was the effective cause of injury or damage to the plaintiff.

The onus of proving that the result of the negligence was the case of the injury rests on the plaintiff.

- d* When cheques exhibits A to A40 were issued and delivered to the plaintiff, the plaintiff presented them to their bankers, the Bank of West Africa Limited, who as an agent for collection presented the cheques to the defendant a day or two after, for payment.

- e* It is clear on the cheques that the bank was the agent of the plaintiff for the purpose of collection. The cheques were sent to the defendant between 9 August 1957 and 19 September, 1957 and received in a bunch from the defendant on the 10 October, 1957. A period of about two months from the time the first cheques were received by the defendant.

- f* From the evidence of Mr Agbaje, it seems clear that cheques sent from Lagos to Shagamu should, if not paid, be returned within a week. Lagos to Shagamu is one hour drive by car.

- g* If I may refer to the case of *Parr's Bank (Ltd) v. Thomas Ashby and Co* (1898) 14 T.L.R. 563. This case raised a question of considerable importance with regards to the liability of country banks for failure to return by return of post, in accordance with the clearing house rules, a cheque which they did not intend to pay.

- i* If the defendant did not intend to pay the cheques it ought to have returned them in the ordinary course of business to the Bank of West Africa Limited, within a reasonable time.
- j*

It is the duty of the defendant to have sent back the cheques exhibits A to A36 as soon as they were received with an intimation that they would not be paid. In my opinion, the defendant has failed to fulfil this duty.

It is true that there is no privity of contract between the plaintiff and the defendant. In *Le Lievre and Dennes v. Gould* (1893) 1 Q.B.D. page 491 at 497, Lord Esher MR referring to the case of *Heaven v. Pender* stated as follows:

“That case established that, under certain circumstances, one man may owe a duty to another, even though there is no contract between them: If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property.”

In *Donoghue v. Stevenson* (1932) A.C. page 562 at 581, referring to *Heaven v. Pender*, Lord Atkin stated as follows:

“The decision of *Heaven v. Pender* was founded upon the principle, that a duty to take due care did arise when the person or property of one was in such proximity to the person or property of another that, if due care was not taken damage might be done by the one to the other. I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act. That this is the sense in which nearness of proximity was intended by Lord Esher is obvious from his own illustration in *Heaven v. Pender*.”

On the facts of this case and applying the principles laid down in the two cases to which I have referred, it seems clear that the defendant had a duty of care in dealing with the plaintiff's cheques which were sent to the defendant for collection and which were delayed for payment for a period of almost two months. That the plaintiff suffered damages owing to the negligence of the defendant was also obvious from the facts. The act of the Branch Manager of the Shagamu Branch of Agbonmagbe Bank Limited is no doubt the act of the defendant.

- a* Counsel for the defendant submitted that the cause of action in the suit against Mrs Amushan for which the plaintiff obtained judgment is the same as in this suit, and cited the case of *Gafai v. United Africa Company Ltd* (1961) A.N.L.R., Part IV, page 785. This is a case of a breach of contract which gave rise to different remedies. It was held in the case that where a breach of contract for the sale of goods gives rise to one remedy for return of money paid because of total failure of consideration, and another remedy for damages, both remedies must be claimed in one action and cannot be pursued by way of two separate actions.
- c*
- d* This decision has no bearing on the case before this Court. The cause of action in this case is different from that in which judgment was obtained against Mrs Amushan. The action against Mrs Amushan was in contract while the action against the defendant is in Tort.
- e*
- I find that the onus of proof which rests on a plaintiff in an action for negligence has been fully discharged by the plaintiff and I find the defendant liable. There will be judgment for the plaintiff in the sum of £9,865.4s.4d, that is £10,197.8s.4d the amount claimed by the plaintiff, less the sum of £1,332.4s.0d, the value of the four cheques, exhibits A37 to A40, which were returned to the plaintiff by the defendant within a reasonable time, with costs assessed at 60 guineas.
- f*
- g*

## National Bank of Nigeria Limited v. Awolesi

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

LORD REID, LORD HODSON AND SIR BENJAMIN ORMEROD

Date of Judgment: 15 JULY 1964

*Banking – Guarantee for overdraft – Principal debtor opening a second account without guarantor's knowledge – Whether amounts to substantial variation of contract – Effect of*

*Banking – Guarantee for overdraft – Principal debtor opening a second account without guarantor's knowledge – Where does not amount to substantial variation – Effect of*

### Facts

The appellant claims against the defendant the sum guaranteed by him under a guarantee agreement for the loan of money. The appellant (bank) granted overdraft facilities to one of its customers, which was later guaranteed by the respondent. The bank later permitted the customer to open another account and stopped paying into the first overdraft on account without notifying the respondent. The respondent contended at the trial that the opening of the second account forms is a substantial modification of the guarantee agreement which effectively discharges him from any liability. The High Court ruled in his favour the Federal Supreme Court allowed the respondents appeal the appellant appealed to the Judicial Committee of the Privy Council.

### Held –

1. If in a contract guaranteeing on overdraft with a bank, the principal debtor opens a second account without the guarantor's knowledge and on construction of the contract, this amounts to a substantial variation of that contract prejudicial to the guarantor, the effect is to discharge the guarantee and relieve the guarantor from liability.



- a* 2. Where there is no substantial variation the guarantee can be enforced against the guarantor.

*b* *Appeal allowed.*

### **Cases referred to in the judgment**

#### ***Foreign***

- c* *Holme v. Brunskill* (1878) 3 Q.B.D. 495 38 L.T. 838  
*Sherry, London and County Banking Co v. Terry, In re*  
 (1884) 25 Ch.D. 692; 50 L.T. 227  
*Ward v. National Bank of New Zealand Ltd* (1883) 8 A.C.  
*d* 755; 49 L.T. 315

#### **Counsel**

For the appellant: *Ellis and Gasson*

### ***e* Judgment**

- LORD HODSON:** (*Giving the reasons of the Board for advising that the appeal be dismissed*) This is an appeal from a judgment, dated March 30th, 1962, of the Federal Supreme Court of Nigeria, consisting of Unsworth, Taylor and Bairamian FJJ. This judgment by a majority allowed an appeal by the respondent from the judgment of Irwin J in the High Court of Western Nigeria and ordered that the appellant's claim against the respondent be dismissed with costs.  
*f*  
*g* Unsworth FJ gave dissenting judgment, agreeing with Irwin J.

- The claim by the appellant, the National Bank of Nigeria Limited (hereinafter called "the Bank"), was made against  
*h* EO Adeyemi Taiwo, sued as first defendant and principal debtor, and the respondent, sued as second defendant and guarantor, for the sum of £10,023.14s.3d. This sum represented money lent to Taiwo by the bank at his request, together with interest and bank charges.

- i* The material facts are these: Taiwo, who is a nephew of the respondent, was a customer of the Bank at their Shagamu Branch. Over the period from 26th September, 1955 to 24th December, 1955, Taiwo issued 14 cheques drawn on  
*j* his account at this branch for a total of £9,844. Each cheque

was endorsed “Refer to Drawer.” One cheque dated September 26th, 1955 for £1,120 was honoured on December 29th and the remaining 13 cheques, drawn for a total of £8,724, were honoured on December 30th and 31st, 1955. After payment of those cheques the account was on December 31st, 1955 overdrawn to the extent of £10,096.

On December 30th, 1955 the respondent executed a guarantee of Taiwo’s account in favour of the bank, such guarantee not to exceed the sum of £10,500.

The terms of the guarantee were as follows:

- “(1) In consideration of the bank (which expression shall include their successors and assigns) continuing the existing account with Emmanuel Olaseni Adeyemi Taiwo of 140 Akarigbo Street, Shagamu (hereinafter called ‘the Principal’), for so long hereafter as the bank may think fit, or otherwise giving credit or accommodation or granting time to the Principal, I, the undersigned, Moses Sowemimo Awolesi, of Afin Akarigbo, Shagamu hereby guarantee, on demand in writing being made to me, the due payment of all advances, overdrafts, liabilities, bills and promissory notes whether made, incurred or discounted before or after the date hereof, to or for the Principal, either alone or jointly with any other person or persons together with interest, commission and other banking charges, including legal charges and expenses.
- (2) It is mutually agreed that the total amount recoverable hereon shall not exceed £10,500 in addition to such further sum for interest thereon and other banking charges in respect thereof, and for costs and expenses as shall accrue due to the bank within six months before or at any time after the date of demand by the bank upon me for payment.
- (3) And further, that this guarantee shall be applicable to the ultimate balance that may become due to the bank from the Principal.
- (4) I agree that this guarantee shall be a continuing security to the bank, and shall not be determined except at the expiration of six calendar months, written notice given to the bank of my intention so to do, and in the event of my death the liability of my legal personal representatives and of my

- a* estate shall continue until the expiration of six months' notice in writing given to the bank of the intention of my executors or administrators to determine this guarantee.
- b* (5) A demand in writing shall be deemed to have been duly given to me or my legal personal representatives by sending the same by a messenger or by post addressed to me at the address hereon and shall be effectual notwithstanding any change of residence or death and notwithstanding notice thereof to the bank, and such demand shall be deemed to be received by me or my legal personal representatives after the despatch thereof, and shall be sufficient if signed by any officer of the bank, and in proving such service it shall be sufficient to prove that the letter containing the demand was properly addressed and despatched by a messenger or put into the post office.
- c*
- d*
- e* (6) I agree that a copy of the account of the Principal contained in the bank's books of account, or of the account for the preceding six months if the account shall have extended beyond that period, signed by the manager or any officer for the time being of the bank, shall be conclusive evidence against me of the amount for the time being due to the bank from the Principal in any action or other proceedings brought against me or my legal personal representatives upon, this guarantee.
- f*
- g* (7) I also agree that any admission or acknowledgment in writing by the Principal or any person on his behalf of the amount of the indebtedness of the Principal, or otherwise in relation to the subject matter of this guarantee, or any judgment or award obtained by the bank against the Principal shall be binding and conclusive on me and my legal personal representatives.
- h* (8) I waive in the bank's favour all or any of my rights against the bank or the Principal as far as may be necessary to give effect to any of the provisions of this guarantee."
- i* On January 12th, 1956 a new No. 2 account was opened by Taiwo at the Bank's Shagamu branch. It's opening and subsequent operation took place without the knowledge of the respondent. After the No. 2 account was opened, no cheque were drawn on the first account which remained
- j* overdrawn. The amounts paid in to the first account after

that date did not represent a serious attempt to reduce the overdraft and interest thereon, but were enough to pay off the monthly debits on account of interest. The resultant total overdraft on July 24th, 1957, after debiting interest due on July 23rd, was £10,023.14s.3d. a  
b

During 1956 approximately £29,000 was paid into the No. 2 account, and from January 1st, 1957 to March 31st, 1957, approximately £4,000 was paid in. The bank ledger shows that the No. 2 account was at times in credit to the extent of over £2,500, but that in May, 1957 the credit balance was only £2.19s.4d. Taiwo also had an account with the Bank's Lagos Branch, and on December 30th, 1955, he issued a cheque for £520 payable to the bank and this amount was transferred to the Lagos Branch account. c  
d

On May 21st, 1957, by a letter addressed to Taiwo and to the respondent, the bank demanded collateral security for the overdraft and payment of a substantial amount in reduction thereof before the close of business on June 10th, 1957. Legal proceedings were threatened in the event of non compliance with the demand. When there was no compliance, proceedings for recovery of the debt due were begun on August 21st, 1957 against Taiwo and the respondent. Taiwo submitted to judgment for £10,023.14s.3d., and judgment was given against the respondent as guarantor for £9,610.14s.4d., found to be due to the bank after a reference at which the resulting figure was obtained by the referee combining the two accounts at Shagamu with the Lagos account and taking the balance due on July 24th, 1957 after treating all three as one unbroken account. It is unnecessary to consider in detail how the total figure of indebtedness was ascertained; but the basis of the calculation, in accordance with the Judge's direction, was that the three accounts had been operated as one account from December 30th, 1955 to July 24th, 1957. e  
f  
g  
h  
i

It is clear, according to the terms of the guarantee, that it was a continuing security to the bank and it is assumed by j

- a* their lordships that the letter of May 21st, 1957 constituted a sufficient demand made upon the respondent for the purposes of the guarantee.
- b* The question for consideration, which depends in the main on the construction of the document of guarantee itself, is whether the majority of the Federal Supreme Court of Nigeria were right in arriving at the conclusion that, in the events
- c* which have happened, the respondent was discharged, from his responsibility as guarantor.

- The guarantee refers to “the continuing of the existing account” as consideration for the guarantee, which suggests
- d* that the parties had agreed that the account of the principal debtor existing on December 30th, 1955; should be continued in an unbroken state and that they did not contemplate the opening of a second account. It is true that the way in
- e* which consideration for a contractual obligation is expressed is not conclusive, but it is relevant in construing the terms of the contract itself. It would appear also that the words “ultimate balance” in Clause 3 and “account” in Clause 6 can
- f* most naturally be read in light of Clause 1 as relating to the existing account and that the words “or otherwise giving credit or accommodation or granting time” in Clause 1 *prima facie* refer to the existing account. Their Lordships agree with Taylor and Bairamian FJJ in construing the guar-
- g* antee in the narrow sense of a guarantee of the account as it existed at the date when the guarantee was given. When the bank allowed Taiwo to open the second account it was permitting the position of the respondent to be prejudiced as to
- h* his guarantee for, as happened thereafter, it was possible for Taiwo to make payments into the bank without releasing the respondent from his liability under the guarantee. The opening of the new current account was an unauthorised departure
- i* from the terms of the contract of guarantee.

In *Ward v. National Bank of New Zealand Ltd*, their Lordships said (8 A.C. at 763; 49 L.T. at 317):

- j* “A long series of cases has decided that a surety is discharged by the creditor dealing with the principal or with a co-surety in a

manner at variance with the contract, the performance of which the surety had guaranteed.” *a*

The same judgment adopted the language of Cotton LJ in *Holme v. Brunskill* (1) where he said (3 Q.B.D. at 505; 38 L.T. at 840): *b*

“The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the court will not, in an action against the surety, go into an inquiry into the effect of the alteration . . . but will hold that in such a case the surety himself must be the sole judge . . .” *c* *d*

In *Sherry, London County Banking Co v. Terry, In re* Lord Selborne LC referred to the rule (25 Ch.D. at 703; 50 L.T. at 220) saying: *e*

“A surety is undoubtedly and not unjustly the object of some favour both at law and in equity, and I do not know that the rules of law and equity differ on this subject.” *f*

On the construction of the contract so far accepted there was a substantial variation of the contract of guarantee to the prejudice of the respondent without his knowledge, for he lost the benefit of all sums paid in by the principal debtor into his No. 2 account, which was as the ledger shows, at times in credit to the extent of as much as £2,500. The respondent’s guarantee, therefore, must be taken to have been discharged. *g* *h*

If, on the other hand, the contract should be construed, as the bank contends, so as to cover any account which Taiwo opened at its branches, the opening of the No. 2 account would not necessarily be a variation of the contract and the guarantee, being a continuing security, would cover all the accounts since ultimately there would be only one debt due *i* *j*

- a* from the debtor to the bank. The various accounts were not, however, operated as one entity and each had its own independent existence. In the ordinary way there is no objection
- b* to a bank allowing a customer to open a number of accounts but, where there is a guarantor of the customer's indebtedness, his position may be affected. An examination of a copy of the bank's ledger shows that, in the original account,
- c* monthly debits were entered in respect of interest charged on the amounts outstanding by way of overdraft. If all the sums that Taiwo paid into the bank had been paid into this account this would have produced a reduction of the principal debt
- d* and a consequent reduction of the interest. Since this course was not followed the position of the respondent was prejudiced and the amount for which he became liable on his guarantee was increased.
- e* Taiwo, as principal debtor, was bound under Clause 6 of the guarantee to accept a copy of these accounts of the principal contained in the bank's books of account as conclusive evidence against him of the amount for the time being due to
- f* the bank. He submitted to judgment for the full amount stated in the original account as being due from him to the bank. By Clause 7 of the guarantee the judgment obtained against Taiwo was binding and conclusive against the respondent. On this footing the bank would be entitled to
- g* judgment for the full amount of £10,023.14s.3d. as claimed and not for the lesser sum of £9,610.14s.4d. awarded by the trial Judge. The bank is now content to accept the lesser sum
- h* as representing an approximation of. Further, the plaintiff has no cause of action until he has, according to rules of discipline, exhibit B and exhibit 4, availed himself of all the processes of appeal.
- i* If I had come to the conclusion that the plaintiff was wrongfully dismissed, I would only have awarded damages and assessed damages as the equivalent of a month's salary. I would not have granted him the injunction he seeks since
- j* that would entail inflicting the plaintiff upon the defendant.

It is quite clear to me that it would be impossible for both  
the bishop and many of his ministers to work with the plain-  
tiff. So, I will exercise my discretion against granting the  
injunction. *a*  
*b*

For the above reasons, I consider that the plaintiff's claim  
cannot be maintained, and dismiss it accordingly and enter  
judgment for the defendants with costs assessed at 75 guin-  
eas. *c*

*Judgment for the defendants.*



*a* **Ademiluyi and another v.  
African Continental Bank Limited**

*b* HIGH COURT OF WESTERN NIGERIA  
ADEMOLA J

Date of Judgment: 7 SEPTEMBER 1964

Suit No.: I/111/64

*c* *Banking – Cheques – Dishonoured – Construction of answers on such cheques*

*Banking – Cheques – Dishonoured – Countermanded written on – Meaning of*

*d* *Banking – Customer – Right to money deposited by him*

*Banking – Customer of Bank – Who is*

*e* *Banking – Jus tertii – Whether defence avails bank against its customer*

**Facts**

*f* The plaintiffs opened an account with the defendant and deposited a total sum of £49,605. This account, however, the defendants honestly believed was being operated by the plaintiffs on behalf of a political party, then N.C.N.C.

*g* When therefore an official of the party deposited a cheque of £5000 meant for N.C.N.C. into the bank, it was credited to the account opened in the names of the plaintiff.

*h* The plaintiffs however beyond the £49,605 paid in by them, issued a cheque for the sum of £54,605 which the bank dishonoured, the bank manager, on his own volition wrote the words “payment countermanded.”

*i* The plaintiffs aggrieved brought this action claiming the sum of £54,584 being “plaintiff’s money” kept with the defendants.

**Held –**

*j* 1. The word ‘Customer’ signifies a relationship in which duration is not of the essence. A person whose money

- has been accepted by the bank on the footing that they undertake to honour cheques up to the amount standing to his credit is a customer of the bank. a
2. A banker is bound to honour an order of his customer with respect to the money belonging to that customer which is in the hands of the banker; and it is impossible for the banker to set up a *jus tertii* against the order of the customer, or to refuse to honour his draft, on any other ground than some sufficient one resulting from an act of the customer himself. b
3. Nevertheless, it is still open to the bank to show as the defendants have done with respect to the proceeds of the cheque of £5,000, that the money in their hands, did not in fact belong to the plaintiffs. c
4. Unless and until restrained by legal process, the banker must recognise the person from or for whom he received the money as the proper person to draw on it and the money is available for that purpose. d
5. It is still open to the banker to show, as the defendants have done with respect to the proceeds of exhibit ‘T,’ the £5,000 cheque, that the money in their hands was not, as a fact, received from or for their customer. e
6. The test to be applied in the construction of answers on cheques refused payment has been laid down. The test is this: “It is not what the answer might convey to a particular class of person, but what they would ordinarily suggest to the mind of every person of average intelligence who read them.” f
7. Applying this test, the words – “payment countermanded” suggests that the customer had sufficient funds available to meet the cheque, but that, he had himself countermanded payment. g
8. As the plaintiffs being customers of the defendants did not have £54,584 belonging to them, in the hands of the defendants, the defendant were therefore within their h
- i
- j

*a* rights to have refused payment on the cheques drawn for that amount.

*b* **Cases referred to in the judgment**

*Foreign*

*Calland v. Lloyd* 6 M. and W. 26

*c* *Commissioners of Taxation v. English, Scottish and Australian Bank* (1920) A.C. 683

*Gray v. Johnston* (1863) 3 L.R.A.C. 14

**Counsel**

*d* For the plaintiffs: *Ajayi*

For the defendants: *Ogunsanya*

**Judgment**

*e* **ADEMOLA J:** The plaintiffs, by their writ of summons, claimed as follows:—

*f* “The plaintiffs’ claim is for the recovery of the sum of £54,584, *being plaintiffs’ money* kept with the defendants.

*g* The plaintiffs, who kept a banking account with the defendants have suffered damage by the defendants’ breach of contract *in not paying out of the moneys of the plaintiffs in their hands* applicable to that purpose on a Cheque drawn by the plaintiffs on the defendant bank on the 24th January, 1964 by persons entitled to receive the amount of such cheque and the defendants marked “Payment Countermanded.”

*h* Pleadings were filed and both parties adduced evidence at the trial. On the pleadings and on the evidence, the questions to be determined are as follows:

1. Were the plaintiffs customers of the defendants at all times material to this case?
- i* 2. Did the defendants have, on the 24th and 25th January 1964, the sum of £54,584 at their bank and in their hands belonging jointly to the plaintiffs?

*j* If the above issues are both resolved in favour of the plaintiffs, then,

3. Did the plaintiffs countermand the order for the payment of the cheque for £54,584?

The plaintiffs must fail if *any* of the three issues above stated are resolved against them. They can only succeed in this action if all the three issues are resolved in their favour.

On the evidence before the court, I have no difficulty in holding that the plaintiffs were, and still are, customers of the defendants. It is clear that the plaintiffs opened an account in their joint names with the defendants on the 28th October, 1963, with exhibit “M” a cheque for £24,720. The signature card, exhibit “H,” shows that the account was opened in the joint names of Alade Lamuye and Adeleke Ademiluyi, with an address shown as care of Adeleke Ademiluyi of Western Nigeria Development Corporation, Ibadan. Then there were exhibits “B” and “C,” the tellers with which the sums of £24,720 and £25,000 cash respectively, were deposited with the defendants. On both exhibits “B” and “C,” it is clear that the monies were paid into the joint account of the plaintiffs. Then there was the exhibit “A,” the teller book from which exhibits “B” and “C” actually came from. Both exhibits “B” and “C” were stamped with the official stamp of the defendants, which, *prima facie*, signified an acknowledgment that the moneys were received by the defendants for the persons named on the tellers, that is, the plaintiffs. Then again, there was the cheque book, exhibit “D” admittedly given to the plaintiffs by the defendants. Also, a ledger, exhibit “O,” was opened for the plaintiffs by the defendants. Finally there was the admission by the defendants that the plaintiffs were their customers when they opened the account on the 28th October, 1963. This was the evidence given by Mr Ibeneme, the Manager of the defendants in Ibadan. He said:—

“The bank accepted Ademiluyi and Lamuye as their customers when Ademiluyi opened the account on the 28th in the joint names of both of them.”

I hold therefore, that on the evidence before the court, the defendants accepted the plaintiffs as their customers as from

*a* the 28th October, 1963 and that the plaintiffs still remain customers of the defendants because, Mr Ibeneme said in evidence further:—

*b* “The account opened on the 28th October by Ademiluyi and Lamuye was never closed.”

In *Commissioners of Taxation v. English, Scottish and Australian Bank* the Judicial Committee of the Privy Council

*c* held as follows:—

“Their Lordships are of the opinion that the word ‘Customer’ signifies a relationship in which duration is not of essence. A person whose money has been accepted by the bank on the footing that they undertake to honour cheques up to the amount standing to his credit is, in the view of their Lordships, a customer of the bank.”

*d* On the evidence, I hold that this was exactly the relationship that was formed between the parties, when on the 28th October, 1963; Ademiluyi opened the account with the defendants in the joint names of the plaintiffs.

*e* This therefore, disposes of the first question, which is resolved in favour of the plaintiffs.

*f* The second question is whether on the 24th and 25th January, 1964, the defendants had £54,584 at their bank and in their hands belonging jointly to the plaintiffs?

*g* There is evidence, exhibit “B” that a cheque for £24,720, exhibit “M,” in Ademiluyi’s name, was paid into the joint account of the plaintiffs. This was on the 28th October, 1963.

*h* There is evidence; exhibit “C,” that £25,000 in cash was paid into the same account on the 29th October, 1963.

*i* There is evidence that the proceeds of a cheque for £5,000 was paid into the same account on the 4th November, 1963. I refer to exhibit “O” and also the evidence of Ibeneme. It is in respect of the payment of this cheque for £5,000 that there seemed to be a lot of confusion and contradictions.

*j* In any event, as a matter of fact, the proceeds of a cheque for £5,000, “T,” were credited, by the defendants, to the joint account of the plaintiffs that is “O”.

Therefore as a matter of fact, the plaintiffs have proved *a*  
that on the 25th of January, 1964, a credit balance of  
£54,584 was in their joint account with the defendants, there  
having been no withdrawal from that account from the *b*  
28th October, 1963 when it was first opened on the 25th of  
January, 1964 when this cheque for £54,584 was presented  
for payment.

It was in answer to this position that the defendants *c*  
pleaded paragraphs 2 and 3 of their statement of defence.

Paragraph 2 is as follows:—

“The defendants admit paragraph 3 of the statement of claim (that *d*  
is, that they admitted refusing to honour the cheque for £54,584)  
and say that the plaintiffs were not entitled to draw the cheque for  
£54,584 on the 25th of January, 1964.”

Paragraph 3 is as follows:— *e*

“There were no funds of the plaintiffs in the hands of the defen-  
dants to meet the cheque on that day or alternatively, funds of the  
plaintiffs were not sufficient and available to meet the cheque for  
£54,584 on the 25th January, 1964.” *f*

Evidence was also led by the defendants to prove that the  
plaintiffs and one Oluwole who was the Administrative  
Secretary of the N.C.N.C. had told the defendants that the  
account, exhibit “O,” which was standing in the joint names *g*  
of the plaintiffs was N.C.N.C. Special Account and that  
therefore they held the money in trust for the N.C.N.C.

Also, Mr Ogunsanya, Counsel for the defendants brought *h*  
out the effect of paragraphs 2 and 3 of the statement of de-  
fence very clearly in his final submissions.

He made two alternative submissions:—

- “(i) That the defendants, in fact, regarded the plaintiffs’ account *i*  
as N.C.N.C Special Account and therefore, the defendants in  
fact regarded the N.C.N.C as their customers. If that be so,  
then he submitted, the plaintiffs would have no moneys be-  
longing jointly to them on exhibit ‘O’ upon which they could  
draw the cheque for £54,584, and (2) in the alternative, *j*

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*a* that if, as the plaintiffs now claim, they held the account, exhibit ‘O,’ in their personal capacities and not on trust for the N.C.N.C, then the proceeds of the cheque for £5,000, exhibit ‘T,’ which cheque was intended and proved to be

*b* N.C.N.C. property, ought not to have been credited by the defendants, to the plaintiffs’ account. But as a matter of fact, the defendants, in their belief that all moneys in exhibit ‘O,’ were N.C.N.C. moneys any way credited the plaintiffs’ ac-

*c* count, exhibit ‘O’ with the proceeds of exhibit ‘T.’ If this amount were to be removed from exhibit ‘O,’ then, the plaintiffs had not sufficient funds *belonging to them* on the 25th January, 1964 to meet the cheque for £54,584. And so in my view therefore, on the pleadings and on the evidence,

*d* the *real* question for determination, in view of the defences set up by the defendants, is not whether £54,584 was standing to the credit and in the account of the plaintiffs on the 25th January, 1964, but whether, as the plaintiffs say in their writ of summons, the defendants had £54,584 at their

*e* bank and in their hands belonging jointly to the plaintiffs.”

As to the first submission – on the totality of all the evidences, it is obvious and I so find as a fact, that the defendants honestly regarded the account standing in the joint names of the plaintiffs as being held in trust for the N.C.N.C.; but this would not make the N.C.N.C. customers of the bank. The plaintiffs would still remain the customers of the bank.

As to the second submission, – it is true that the plaintiffs now claim all the money in exhibit “O”. The plaintiffs say they held the account in their personal capacities. If that be

*h* so, then it is necessary to investigate the circumstances surrounding the deposit of the proceeds of the £5,000 cheque, exhibit “T,” into the account of the plaintiffs. For it was true that the defendants, in the belief that the whole account, exhibit “O,” belonged in fact to the N.C.N.C., paid the proceeds of this cheque exhibit “T,” into this account, exhibit “O,” and if exhibit “T” is proved to belong to the

*i* N.C.N.C., then the plaintiffs could not claim the money as theirs.

*j*

Now Ademiluyi gave evidence as to the circumstances surrounding the deposit of the cheque for £5,000. I think it is best to quote him in full on this point. *a*

In evidence in chief, he said as follows:— *b*

“I know Ayinde Oluwole. I gave him a cheque for £5,000 drawn in my favour to be paid into this account of Ademiluyi and Lamuye. He paid the money into the account.”

That was all that was said in his evidence in chief about the deposit of this £5,000 cheque. Then cross-examined by Mr Ogunsanya, Ademiluyi said as follows:— *c*

“The £5,000 was a cheque by Aguda in my favour. Mr Aguda is from Ekiti. As far as I can remember, the cheque was drawn in my name. I have never heard the name of the timber company called ITEM. I would not be surprised to hear that ITEM drew the cheque in favour of Aguda. I don’t know if Aguda endorsed the cheque in favour of N.C.N.C. I handed the cheque to Oluwole, the Administrative Secretary of the N.C.N.C. in my office. I can’t remember how many days the cheque was with me before I handed it over to Oluwole. I never got the teller with which he paid the money. I never asked him. On that day, I had exhibit ‘A’ (the teller book) in my possession but I did not hand it over to him. The £5,000 belonged to me. At no time did I collect donations from N.C.N.C. party members to pay over to the bank. I have not seen Mr Agudalately. I cannot remember when I last saw him.” *d*  
*e*  
*f*

Mr Ibeneme said in evidence with regard to this £5,000 cheque, exhibit “T”— *g*

“After exhibits ‘B’ and ‘C,’ a cheque for £5,000 was paid in. The cheque was paid in by N.C.N.C. Administrative Secretary, Oluwole. I asked Mr Oluwole not to designate the account as we were not crediting the account direct and so I wrote paid into suspense account. I gave directions to the cashier. I wrote the words “Suspense A/C.” Oluwole had already told me he was coming to deposit £5,000 into the N.C.N.C. Special Account. I tender the teller, exhibit ‘P.’ When the money on exhibit ‘P’ was collected, it was credited to this account, exhibit ‘O.’ The payee was C.J. Aguda and the drawer was ITEM Nigeria Limited, by B.W.A., Sapele. The cheque was purchased from the N.C.N.C. This is the “cheque for collection” register for my bank. Tendered admitted and marked exhibit ‘Q.’ I refer to No. 378 schedule 94/63 of exhibit ‘Q.’ *h*  
*i*  
*j*



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*a* It shows that cheque was purchased from N.C.N.C. The teller also shows this.”

“Apart from the £5,000, the money in the account was £49,605.”

*b* It is only proper to remark that this witness was not cross-examined on this point of the deposit of the £5,000, exhibit “T,” and the crediting of its proceeds to exhibit “O,” the plaintiff’s account.

*c* Then Oluwole was called as a witness by the defendants. He said in evidence about this £5,000 cheque, exhibit “T”:-

*d* “The first plaintiff Ademiluyi did not give me any amount of £5,00 to pay to the A.C.B. at any time. He did not give me any cheque of that amount to pay into the A.C.B. at any time. Exhibit ‘P’ is the teller of the money I paid into the A.C.B. The amount was £5,000. The cheque was issued in the name of C.J. Aguda and he endorsed it to the N.C.N.C. He gave it to me. The cheque was drawn on B.W.A. Sapele. The money was meant for N.C.N.C. Special A/C.”

*e* This evidence by Oluwole was not challenged in any way by the plaintiffs. It was not even suggested to him that he was lying.

*f* Then one Eze, cashier of B.W.A. Sapele was called by the defendants to tender the cheque for £5,000, exhibit “T.” He also said in evidence:-

*g* “I am on subpoena to tender a cheque No. DG 145436 drawn by ITEM Nigeria Limited in favour of C.J. Aguda. The cheque was negotiated by C.J. Aguda in favour of N.C.N.C. and was cleared by A.C.B. Ibadan, the defendants.”

*h* He was not cross-examined.

*i* Now, exhibit “P,” the teller with which this cheque was deposited shows that the cheque, a B.W.A. cheque No. DG 145436 for £5,000 was paid by the Administrative Secretary of the N.C.N.C. It was paid in by N.C.N.C. and credited to Suspense Account just as Mr Ibeneme and Mr Oluwole had said. It is equally clear that the cheque, exhibit “T,” was drawn by ITEM Nigeria Limited in favour of CJ Aguda to

*j* N.C.N.C., Western Region, A.C.B., Ibadan and signed by

Aguda. It is also clear from exhibit “O,” that on the 4th November, 1963, the proceeds of Sapele B.M.A. cheque 145436, exhibit “T” less the exchange commission was credited to the account standing in the joint names of the plaintiffs, exhibit “O.”

It is therefore clear beyond any doubt and I so find, that:—

1. the cheque for £5,000, exhibit “T” was endorsed by CJ Aguda to the N.C.N.C. and was therefore N.C.N.C. property;
2. the N.C.N.C., in the belief that THEY had an account with the Defendants designated or known as “N.C.N.C. Special account,” paid exhibit “T” into the defendant bank, to be credited to THAT account, as N.C.N.C. money;
3. the defendants, in the belief that exhibit “O” the account standing in the names of the plaintiffs was the “N.C.N.C. Special Account,” paid the proceeds of exhibit “T” into the account, exhibit “O”.

If therefore the plaintiffs now say, that the account exhibit “O,” was held by them in their personal capacities and not on trust for the N.C.N.C. then, it is only right and proper that the defendants should deny the claims of the plaintiffs to this money, the £5,000, exhibit “T,” and say, that the plaintiffs are not entitled to claim the proceeds of the cheque, exhibit “T”.

It is true that it is settled law that a bank cannot, on its own motion, set up the claims of third parties as against that of its customer. The judgment of Lord Westbury in *Gray v. Johnson* (1863) 3 L.R.A.C. 14 is very illuminating on this point:—

“The relation between a banker and customer is some what peculiar, and it is most important that the rules which regulate it should be well known and carefully observed. A banker is bound to honour an order of his customer *with respect to the money belonging to that customer which is in the hands of the banker*; and it is impossible for the banker to set up a *jus tertii* against the order of the customer, or to refuse to honour his draft, on any other ground than

- a* some sufficient one resulting from an act of the customer himself. Supposing, therefore, that the banker becomes incidentally aware that the customer, being in a fiduciary or a representative capacity, meditates a breach of trust, and draws a cheque for that purpose,
- b* the banker, not being interested in the transaction, has no right to refuse the payment of the cheque, for if he did so, he would be making himself a party to an inquiry as between his customer and third persons. He would be setting up a supposed *jus tertii* as a
- c* reason why he should not perform his own distinct obligation to his customer.” (emphasis added)

- It should be noted that Lord Westbury spoke of “with respect to the money *belonging* to that customer which is in the hands of the banker.” Therefore, it is my view that it is still open to the bank to show, as the defendants have done, with respect to the proceeds of exhibit “T” that the money in their hands, did not, in fact, belong to the plaintiffs. Further
- d* in *Calland v. Lloyd* 6 M and W. 26, it was held that unless and until restrained by legal process, the banker must recognise the person from whom he received the money as the proper person to draw on it and the money is available for that purpose.
- e*
- f*

- And so again, it seems clear that it is still open to the banker to show, as the defendants have done with respect to the proceeds of exhibit “T,” the £5,000 cheque, that the money in their hands was not, as a fact received from their customer.
- g*

- If the plaintiffs had admitted that they held all the moneys in exhibit “O” in trust for the N.C.N.C. then, as they have been found to be the bank’s customers, it is doubtful if the bank, on its own motion, could have successfully set up the title for the N.C.N.C. as a defence, even in so far as this cheque exhibit “T” is concerned.
- h*

- But here, the plaintiffs claimed the account, exhibit “O” in their own right and for themselves, therefore it was open to the defendants to show that a particular amount of money credited to the plaintiff’s account, by the defendants themselves, did not in fact, belong to the plaintiffs and that the
- i*
- j*

money was not received by the defendants from or for the plaintiffs. *a*

And this was precisely what the defendants did, both in their statement of defence and by the evidence adduced in court, with respect to the £5,000 cheque exhibit “T” and its proceeds. But the plaintiff’s Counsel, Mr Ajayi, submitted, that this would mean that the defendants were relying upon a “mistake of fact” with respect to exhibit “T.” That, as such, the mistake ought to have been specially pleaded. That the defendants did not plead it and so could not rely on it at the trial. *b* *c*

There is a short answer to this contention. In my view, the question of “mistake,” as such, does not really come into this matter at all. *d*

Paragraph 3 of the statement of defence is the simple answer. It is averred in that paragraph that “alternatively, funds of the plaintiffs were not sufficient and available to meet the cheque for £54,584 on the 25th of January, 1964.” *e*

Therefore, in my view, the defendants were perfectly justified in adducing evidence to prove this averment. And they did more than this when they adduced evidence that they did not receive the cheque, exhibit “T” from or for the plaintiffs and its proceeds did not belong to the plaintiffs but to the N.C.N.C. and therefore, without the proceeds of exhibit “T” the plaintiffs had not sufficient funds to meet the cheque for £54,584. *f* *g*

On the conclusions that I have reached, it seems obvious, that the plaintiffs have not proved, and the onus is on them, that, on the 25th January, 1964, the defendants had £54,584 in their hands and belonging to them; whereas the defendants have conclusively proved that on that day, 25th January, 1964, they did not, as a matter of fact, have that amount in their bank and in their hands belonging to the plaintiffs. *h* *i*

This ought to conclude the matter. But it was urged on behalf of the plaintiffs that because the defendants wrote *j*

- a* “Payment Countermanded” on the cheque for £54,584, they must then be deemed to have admitted that they had sufficient funds in their hands belonging to the plaintiffs, but that
- b* payment was countermanded by the plaintiffs. In other words, it was urged that this would amount to an estoppel against the defendants. If, therefore, the plaintiffs could show, as they clearly did, that they did not in fact counter-
- c* mand payment on the cheque, then, it was submitted, the defendants would be liable.

- d* Now, it is true that in a series of cases, the test to be applied in the construction of answers on cheques refused payment had been laid down. The test is this:—

- e* “It is not what the answers might convey to a particular class of person, but what they would ordinarily suggest to the mind of every person of average intelligence who read them.”

- f* Applying this test, I find that the words – “payment countermanded” suggests that the customer had sufficient funds available to meet the cheque, but that, he himself countermanded payment. In this connection, however, it should be remembered that I have found as a fact that the defendants honestly believed that the N.C.N.C. were the true owners of the account, exhibit “O.” They believed that the plaintiffs
- g* held this account on trust for the N.C.N.C. I also found as a fact that the defendants honestly regarded N.C.N.C. as their true customers. I believe Mr Ibeneme on this point. It really
- h* does not matter whether or not the defendants were right in so regarding the N.C.N.C. In fact as I have found, they regarded the N.C.N.C. as their customers. If that is so, then when Mr McEwen who was the National Secretary of the N.C.N.C., and a person believed by the defendants to have
- i* overall control over all N.C.N.C. funds, directed the freezing of the account, the defendants, in consequence, regarded payment on that cheque as having been countermanded by their customers. This of course was clearly wrong as the
- j* plaintiffs were the customers, and not the N.C.N.C.

And so therefore the defendants were wrong in giving the answer “Payment Countermanded” on that cheque, but in my view, this does not affect the position in any way because, as I have found, the plaintiffs, the customers of the defendants, had not sufficient funds *belonging* to them to meet the cheque anyway, and the defendants did were within their rights to have refused payment on that cheque. In other words, the defendants did the right thing, but gave the wrong reasons for doing it. This does not affect the case in any way.

Generally, there are just a few other points I would like to make.

1. It is to be noted that no statement of account was ever sent to the plaintiffs, but on the 1st November, 1963 a statement of account, exhibit “O” was sent out. A note appears on exhibit ‘O’ to the effect that statement was sent. Mr Ibeneme said that the statement was sent to the N.C.N.C. The plaintiffs did not claim to have received any statement of their account from the defendants, at any time. So there was no question of the bank having made the plaintiffs believe they had money at the bank *belonging* to them than they had in fact.
2. Exhibit “O” was a ledger kept by the defendants themselves. It was their own internal record of their business dealings with their own customers. Therefore, the defendants were at liberty to show, by evidence, how the record was in fact kept up to date. They did more than this, when they adduced evidence to show how the proceeds of exhibit “T,” the £5,000 cheque, endorsed to the N.C.N.C., came to be credited to the account of the plaintiffs in exhibit “O.”
3. Exhibit “T,” the cheque for £5,000 was endorsed by CJ Aguda to the N.C.N.C. The plaintiffs did not suggest nor did they in any way seek to show, that the endorsement to the N.C.N.C. was a mistake. CJ Aguda was not brought before the court to say that the endorsement

*a* was a mistake and that he meant the cheque in fact for the plaintiffs. On the other hand, as against this, there is  
*b* Ademiluyi's evidence about the cheque for £5,000 which he claimed to have deposited through Oluwole. Clearly, exhibit "T," could not be that cheque. Again  
*c* exhibit "Q," the "Cheque for Collection." Register of the defendants show that the cheque, exhibit "T," was purchased from the N.C.N.C. and not from the plaintiffs.

Finally,

*d* 4. As Mr Ibeneme said in evidence, apart from the £5,000 cheque, the money in the account of the plaintiffs was £49,605.

*e* In the final analysis therefore, the true position in this case is this:

"That the plaintiffs, being customers of the defendants, did not, as a fact, on the 25th of January, 1964, have £54,584 *belonging* to them, in the hands of the defendants."

*f* The defendants were therefore within their rights to have refused payment on the cheque drawn for that amount.

The plaintiffs must therefore fail in this action and it is accordingly dismissed.

*g* *Claim dismissed.*

## Olofintuyi v. Barclays Bank DCO Limited

SUPREME COURT OF NIGERIA

BRETT, ONYEAMA, AJEGBO, JJSC

Date of Judgment: 11 DECEMBER 1964

S.C.: 125/1964

*Banking – Mortgage – Registration of – Whether the purchaser of a real property can be registered as a proprietor of same*

*Banking – Mortgage – Whether subsisting equitable mortgagee can prevent sale of legal title to third party by mortgagor*

*Contract – Vitiating elements – Fraud – Sale of legal title by mortgagor to third party despite subsisting equitable mortgage – Sale cannot be set aside where mortgagee is not prejudiced*

### Facts

The appellant was the first of two defendants in an action brought by the respondent to set aside a conveyance of a piece of land in Ibadan from the second defendant to the second appellant as having been made with intent to defraud the respondent. The second defendant GA Ibrinke, purchased the land from representatives of the Oganla family of Ibadan in 1954, and received a conveyance.

In the same year he executed an equitable mortgage in favour of the respondent bank for an overdraft and signed a memorandum of deposit.

In 1959 the bank obtained judgment against Ibrinke for £9,748 and as the judgment was not satisfied in full, the bank applied for and in October, 1960, obtained a writ of attachment against the immovable properties of Ibrinke. It was in the process of executing the judgment that the appellant's claim first became known to the bank. The claim rested on a deed of conveyance dated 13th February, 1960, in which Ibrinke purported to sell the property to the appellant in fee



- a* simple for the sum of £2,250. The bank thereupon brought these proceedings.
- b* The plaintiff merely alleged that the conveyance to the appellant was made to defraud the bank and gave no further particulars. The defendants admitted the substance of the facts alleged but denied fraud.
- c* The trial Judge gave judgment in favour of the plaintiff, setting aside the conveyance to the appellant resting his judgment on two grounds, the first being that the conveyance was made in breach of two clauses of the memorandum of deposit. The clauses (Clause 3 and 5) ousted the mortgagor's (in possession) power of leasing and also contained an undertaking by the mortgagor that no person or corporation shall be registered as proprietor of the property during the continuance of the security without the consent of the mortgagee in writing. He also held that the sell to the first defendant was with an intention to defraud the plaintiff/respondent.
- e*
- f* **Held –**
1. That in Nigeria a purchaser of a real property cannot be registered as a proprietor of it except in places where registration of title as opposed to registration of deeds is in force and that although the Land Titles Registration Law of Western Nigeria (Cap 57) makes provision for registration of titles in areas to which it applies, it has not been brought into operation anywhere in the region.
- g*
- h* 2. That from the construction of the memorandum of deposit, there was nothing preventing the mortgagor from selling the legal title to the property.
- i* 3. That on the evidence in this case and the arguments put forward before the court, the mortgagee (bank) did not show that it was prejudiced so as to have any right to have the conveyance set aside under section 181 of the Property and Conveyance Law.
- j*

***Obiter Dictum***

*a*

“In the absence of any evidence to show the true nature of the transaction between the two we prefer merely to say that if the appellant was indeed defrauded by Ibironke it might well be in his interest to have the conveyance set aside, and that in that case he may have been unwise to have common cause with Ibironke in the High Court, even to the length of being represented by the same legal practitioner.”

*b*

**Case referred to in the judgment**

*c*

***Foreign***

*Oldham v. Stringer* (1884) 51 L.T. 895

*d*

**Statutes referred to in the judgment**

***Nigerian Statutes***

Land Titles Registration Law of Western Nigeria (Cap 57)

Property and Conveyancing Law, Cap 100 of the Laws of the Western Nigeria, 1959, sections 114, 181

*e*

***Foreign Statute***

Law of Property Act, 1925, sections 93 and 99

*f*

**Counsel**

For the appellant: *Adebule*

For the respondent: *Ige*

*g*

**Judgment**

**BRETT JSC:** The appellant was the first of two defendants in an action brought by the respondent to set aside a conveyance of a piece of land in Ibadan from the second defendant to the appellant as having been made with intent to defraud the respondent. The second defendant, GA Ibironke, purchased the land from representatives of the Oganla family of Ibadan in 1954, and received a conveyance, which was produced in evidence as exhibit A. In the same year he deposited the conveyance with the respondent bank as security for an overdraft and signed a memorandum of deposit, which was produced as exhibit B. The consequence of this was to make the bank an equitable mortgagee. In 1959 the bank

*h*

*i*

*j*

*a* obtained judgment against Ibironke for £9,748, and as this judgment was not satisfied in full, the bank applied for and in October, 1960, obtained a writ of attachment against the immovable properties of Ibironke. When the sheriff tried to  
*b* sell the property in question, various people claimed it by interpleader proceedings and no sale took place. It was then that the appellant's claim first became known to the bank; it rests on a conveyance dated the 13th February, 1960, in  
*c* which Ibironke purports to sell, the property to the appellant in fee simple for the sum of £2,250. The bank thereupon brought these proceedings.

*d* Pleadings were ordered and the statement of claim, after reciting some of the facts set out above and referring to the memorandum of deposit, merely repeated the allegation that the conveyance to the appellant was made to defraud the bank, and gave no further particulars. The defendants admit-  
*e* ted the substance of the facts alleged, but denied fraud. Each of them pleaded that the paragraph alleging fraud should be struck out on the ground of vagueness but no motion to this effect was filed, and the case proceeded to trial on the original pleadings. The plaintiff called one witness and no evi-  
*f* dence was given for the defence.

The trial Judge rested his judgment in favour of the plain-  
*g* tiff on two grounds. In the first place he held that the conveyance was made in breach of two clauses of the memorandum of deposit. These are Clauses 3 and 5, which read as follows:—

- h* “3. The powers of leasing conferred on mortgagors in possession by section 99 of the *Law of Property Act*, 1925 and the restriction on consolidation contained in section 93 of the same Act shall not apply to this security and are hereby excluded.
- i* 5. I hereby undertake that during the continuance of this security no person or corporation shall be registered as proprietor of the said hereditaments or any part thereof without your consent in writing.”

*j* The memorandum is in a printed form provided by the bank and the bank must be supposed to know what meaning

it wishes the court to attach to its wording. It appears to be *a*  
designed for use in England rather than in Nigeria. The  
reference to the Law of Property Act, 1925, which has never  
applied in any part of Nigeria, is obviously out of place, but *b*  
whatever effect is to be given to Clause 3 it does not purport  
to preclude the mortgagor from selling the property. It is not  
clear to us what meaning is to be given to Clause 5, and no  
acceptable suggestion has been made by Counsel for the *c*  
bank. In Nigeria a purchaser of real property cannot be reg-  
istered as the proprietor of it except in places where registra-  
tion of title, as opposed to registration of deeds, is in force  
and although the Land Titles Registration Law of Western *d*  
Nigeria (Cap 57) makes provision for registration of titles in  
areas to which it applies, it has not been brought into opera-  
tion anywhere in the region. The document must be con-  
strued strictly as against the bank and we disagree with the *e*  
view of the trial judge that it precluded Ibiroinke from selling  
the legal title to the property.

The judge expressed his second reason for setting aside the  
conveyance as follows:— *f*

“I find as a fact that when he (Ibiroinke) sold the property in dis-  
pute to 1st defendant and conveyed it to the latter by virtue of ex-  
hibit D he did so with the intent to defraud the plaintiff, as such  
transaction could not but be to the prejudice of the right of the *g*  
plaintiff to hold it in an unencumbered condition to satisfy the debt  
the 2nd defendant was owing the bank.”

Here again we are, with all respect, unable to share the *h*  
judge’s view as to the effect of the conveyance to the appel-  
lant. The rights acquired by the appellant do not constitute  
any new encumbrance on the rights of the bank, if “encum-  
brance” is a correct description of them at all. Whatever atti-  
tude the appellant may have adopted over the proposal to sell *i*  
the property under a writ of execution, he admitted through  
his Counsel in the High Court, and has repeated the admis-  
sion in this Court, that his title is subject to the rights of the  
bank as equitable mortgagee, and this is clearly correct. The *j*

- a* conveyance contains nothing to prevent the bank from applying to the court under section 114 of the Property and Conveyancing Law (Cap 100) for an order for sale by virtue of the mortgage: see *Oldham v. Stringer* (1884) 51 L.T. 895.
- b* The appellant would have to be made a defendant to the application, but in view of his admissions in this case he would have difficulty in resisting the grant of an order, and
- c* he could not resist it on any ground which would not have been equally open to Ibironke. Alternatively the undertaking to create a legal mortgage may well be enforceable against the appellant, though as we have heard no argument on the point we express no concluded opinion on this. It is true that
- d* since Ibironke has no longer an insurable interest he cannot now comply with clause of the memorandum, in which he undertakes to insure the property against fire, and that this clause cannot be enforced against the appellant, but Clause 1
- e* permits the bank to insure the property and debit Ibironke, and this right remains unimpaired. Counsel for the bank suggested no further source of prejudice and did not submit that the conveyance was a fraud on the bank as judgment
- f* creditor; there was in any event no evidence, other than the fact that the conveyance was executed after judgment had been obtained, to support such a submission and having regard to the bank's rights as mortgagee the date of the conveyance is not, by itself, conclusive.
- g*

- On the evidence in this case and the arguments put forward before us, we do not consider that the bank has shown that it has been prejudiced, so as to have any right to have the conveyance set aside under section 181 of the Property Conveyancing Law. There is one further aspect of the case which we ought to mention. The conveyance to the appellant referred to the conveyance which Ibironke had deposited with the bank
- h* but not to the fact that it had been so deposited. The appellant clearly cannot have seen the original. It is immaterial in the present case whether the appellant was deceived and defrauded by Ibironke, but the trial judge felt warranted in expressing the opinion that Ibironke was fortunate not to have
- i*
- j*

been prosecuted for obtaining money by false presence. In *a*  
the absence of any evidence to show the true nature of the  
transaction between the two we prefer merely to say that if  
the appellant was indeed defrauded by Ibironke it might well *b*  
be in his interest to have the conveyance set aside, and that  
in that case he may have been unwise to have made common  
cause with Ibironke in the High court, even to the length of  
being represented by the same legal practitioner. *c*

The appeal is allowed, the judgment and order for costs are  
set aside as against the appellant, and judgment is entered  
dismissing the claim as against the appellant.

Onyeama, and Ajegbo, JJSC concurred in the judgment of *d*  
Brett JSC.

*a*

## Chief Ikomi v. Bank of West Africa Limited

SUPREME COURT OF NIGERIA

*b*

ADEMOLA CJN, BAIRAMIAN, COKER JJSC

Date of Judgment: 18 JANUARY 1965

S.C.: 172/1963

*c* *Banking – Guarantee – Prospective guarantor – Whether banker bound to volunteer information as to state of account to be guaranteed – When banker bound to disclose*

### Facts

*d* Before the trial High Court the plaintiff now appellant sued the respondent for a declaration that the guarantee he executed on 11th July, 1960 was void.

*e* The appellant's case at the lower court was that in June, 1960 Mr AG Yon-da Kolo requested the respondent for a loan of £2,500 and was told he could have it if he provided a guarantor. The appellant went to the respondent and offered to guarantee the promised loan of £2,500 and his offer was  
*f* accepted subject to depositing title deeds for security. He took his deeds and signed a document without reading it, and was told by the manager of the respondent to ask Mr Kolo to come for the money. When Mr Kolo went for  
*g* the money he was refused. Upon being told of the refusal on the 13th July, the appellant wrote for the return of his deeds, which was refused. He was to learn from the manager of the respondent that his deeds were being retained for Mr Kolo's  
*h* existing debt. He pleaded fraud on the ground that he was not told of Mr Kolo's existing debt, and also that he delivered his deeds only on the promise of a loan of £2,500 to Mr Kolo. In alternative, that he signed the document out of  
*i* misplaced confidence in the manager and mistake.

The respondent's case was that Mr Kolo asked but was refused a loan of £2,500. In June, 1960, the manager discussed with him the reduction of his account and future  
*j* accommodation, and suggested his proving a guarantor. The

discussion was in general terms and the respondents' manager did not agree to grant any loan upon deposit of deeds and a guarantee. On the 11th July, the appellant signed two documents, namely: the guarantee and a memorandum for the deposit of his deeds which were explained to him and which he read before he signed. He was not told to ask Mr Kolo to collect any money. Also, that it was true the appellant wrote on 13th July and later, asking for the return of his documents. The bank maintained that the appellant always knew that he was guaranteeing Mr Kolo's current account with a limit of £6,000, and deposited his deeds for that purpose. That he knew of Mr Kolo's existing debt, and no loan to the customer was even discussed.

Both parties gave evidence at the trial, at the end of which the trial judge accepted the bank's version and gave judgment against the appellant.

Aggrieved, the appellant appealed to the Supreme Court. Counsel to the appellant contended that the respondent's manager had a duty to tell the appellant the amount by which Mr Kolo's account was overdrawn, failure of which amounted to concealment enough to discharge the appellant.

### **Held –**

1. A banker is not bound to volunteer to an intending guarantor information as to the state of the account or whether the customer was or was not in the habit of overdrawing. If asked by intending guarantor, however, he must give the information, this being sufficient reason for disclosing the customers account. The proper presumption in most instances, is that the customer has been overdrawing and wishes to do so again, it is up to the intending guarantor to inquire if he wishes.
2. When a document containing contractual terms is signed, then, in the absence of fraud or misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not. The



- a* party cannot be heard to say that the document did not affect him because he did not know the contents. In the instant case, the signature of the guarantee is conclusive
- b* against the appellant, for he cannot advance the plea of *non est factum*, and his plea of being induced to sign the guarantee by fraud or misrepresentation on the part of the manager of the respondent is not true on the facts of
- c* the case.
3. The judicial task is not to discover the actual intentions of each party; it is to decide what each was reasonably entitled to conclude from the attitude of the others. In the
- d* instant case, it does not matter if the appellant had a loan to Mr Kolo at the back of his mind. Equally, Mr Knight was entitled to conclude that the appellant wished to guarantee Mr Kolo's current account with its existing
- e* overdraft and any further overdraft up to £6,000.

*Appeal dismissed.*

*f* **Cases referred to in the judgment**

***Foreign***

*Lloyds v. Harper* (1880 – 1881) 16 Ch.D. 290

*London General Omnibus Co Ltd v. Holloway* (1912) 2 K.B.

*g* 72

*L'Estrange v. F Graucob Ltd* (1934) 2 K.B. 394; (1934) A.E.R. 16 at 19

*McCutcheon v. David Macbrayne Ltd* (1964) 1 N.L.R. 125

*h* at 128; (1964) 1 All E.R. 430

*Tamplin v. James* (1880) 15 Ch.D. 215 at 222

*Webster v. Cecil* 54 Eng. R. 812

*Wigan v. English and Scottish Law Life Assurance Association* (1909) 1 Ch.D. 291; (1908 – 1910) A.E.R. Rep. 449

*i*

**History of the case**

- j* This was an appeal against the decision of the High Court of Western Nigeria which dismissed the appellant's action. The

Supreme Court dismissed the appeal.

*a*

### Counsel

For the appellant: *Cole*

For the respondent: *Bentley* (with him *Ariori*)

*b*

### Judgment

**BAIRAMIAN JSC:** (*Delivering the judgment of the court*) *c*

The plaintiff sued the bank for a declaration that the guarantee he signed on 11th July, 1960 was void, and for ancillary relief; he failed in the High Court and has appealed.

Briefly put, the allegations in the plaintiff's pleading are as follows. In June, 1960 Mr AG Yon-da Kolo asked the bank for a loan of £2,500 and was told he could have it if he provided a guarantor, the plaintiff went to the bank and offered to guarantee the promised loan of £2,500, and his offer was accepted subject to his depositing title deeds for security; he took his deeds and signed a document without reading it, and was told by the manager to ask Mr Kolo to come for the money, but when Mr Yon-da Kolo went for the money, he was refused; and upon being told by him on the 13th of the refusal, the plaintiff wrote for the return of his deeds; he repeated his request but it has been refused; it was later that he learnt from the manager of the bank that his deeds were being retained for Mr Yon-da Kolo's existing debt, but he had never agreed to guarantee that: at the trial he would plead fraud on the ground that he was not told of Mr Yon-da Kolo's existing debt, and on the ground that he delivered his deeds only on the promise of a loan of £2,500 to Mr Yon-da Kolo; alternatively, that he signed the documents out of misplaced confidence in the manager, with whom there never was any agreement to guarantee Mr Yon-da Kolo's debt, and that he explained to the bank as soon as he discovered the fraud or mistake: he claimed a declaration that the guarantee and charge was void and should be set aside for fraud or mistake or failure of consideration, and an order for the return of his deeds.

Briefly, the bank's defence is that Mr Yon-da Kolo asked but was refused a loan of £2,500; in June the manager discussed with him the reduction of his account and future *j*

*a* accommodation, and suggested his providing a guarantor: at  
the first interview with the plaintiff, Mr Yon-da Kolo's  
indebtedness and his being guaranteed was discussed in  
*b* general terms, but no loan was mentioned, and the manager  
did not agree to grant any loan upon deposit of deeds and a  
guarantee; on July 11th the plaintiff signed two documents  
(*viz.*, the guarantee and a memorandum for the deposit of his  
*c* deeds) which were explained to him and which he read  
before signing; he was not told to ask Mr Yon-da Kolo to  
collect any money; it was true that the plaintiff wrote on July  
13th and later, asking for the return of his documents; but he  
*d* always knew that he was guaranteeing Mr Kolo's current  
account with a limit of a principal sum of £6,000 and depos-  
iting his deeds for that purpose; it was not something he  
learnt later; he knew of Mr Yon-da Kolo's existing debt, and  
no loan to that customer was ever discussed.  
*e*

The plaintiff gave evidence to the following effect.  
Mr Yon-da Kolo told him that the Manager of the bank, Mr  
Knight, asked him to approach the plaintiff to guarantee him  
*f* for a loan of £2,500; he spoke with Mr Knight, who said he  
would lend that sum if the plaintiff guaranteed the loan and  
deposited deeds as security; he took his deeds, and Mr  
Knight asked him to sign a printed paper, which he signed  
*g* without reading it because Mr Knight, with whom he was  
familiar, was in a hurry to go to breakfast; there was nothing  
in manuscript on the document; he asked Mr Yon-da Kolo to  
go and take the money, but Mr Yon-da Kolo came to say it  
was refused; he saw Mr Knight, who would not explain  
*h* why, so he wrote on the 13th July, for the return of his  
documents. What he says in his letter (exhibit C) is this:

*i* "Further to our conversation yesterday morning in connection with  
my intention to guarantee Mr A.G. Yon-da Kolo for a loan from  
your bank, I deeply regret that I have to change my mind and  
withdraw my intention."

*j* And he asked for his documents. He withdrew his guarantee,  
not because Mr Yon-da Kolo told him that the manager

refused to give him the money, but because he changed his mind; and it looks as if he did so without telling Mr Yon-da Kolo. He had guaranteed someone at Barclays Bank; that person deceived him, and he withdrew after he had signed.

His evidence goes on as follows:—

“It is the same thing I found in this case. Yon-da Kolo told me nothing about his indebtedness to the bank. I wrote exhibit C because I changed my mind. I did not mention the sum of £2,500 in the letter because there was no need to do so. I had two interviews with Mr Knight before I signed exhibit B. Mr Knight discussed with me the question of the guarantee. He asked me to go home to think about it. I thought of it.”

And later he admits that he relied on what Mr Yon-da Kolo told him and that was why he went to the bank to sign the guarantee (exhibit B).

The plaintiff’s admissions virtually concede the defence of the bank and vindicate Mr Knight, its manager: far from snatching a guarantee, he tried to put the plaintiff off. The fact is that Mr Yon-da Kolo deceived him, the plaintiff; and after what the plaintiff said about him, he might as well not have been called.

Mr Yon-da Kolo’s evidence is that he was refused a loan of £2,500 and told to reduce his overdraft, but he says that on June, 20th. Mr Knight said he would consider his request for that loan if he produced a guarantor and suggested the plaintiff. He spoke to the plaintiff, who looked at his books and stocks and was satisfied. Later the plaintiff told him that he had signed the documents and was told by Mr Knight that Mr Yon-da Kolo could take the money; he telephoned Mr Knight, who said he should see him on Monday the 11th; but when he called Mr Knight said no, not before he heard from Lagos as he had sent the papers for the solicitor to see whether the deeds were good; and that made him suspicious, so he told the plaintiff that he was refused the loan.

- a* Mr Yon-da Kolo admits that there was no agreement for a loan of £2,500 but, he says, only an understanding. As to the interview with the plaintiff, he says this:–
- b* “I made a full and frank disclosure of everything to him. I did not show him my bank account. He did not ask for it . . . I know (read ‘knew’) that some of my cheques were not honoured and were referred back to me. I only told Chief Ikomi about the value of my trade.”
- c* At the time his overdraft was about £5,000; the disclosure was neither frank nor full. He may also have misled the plaintiff into thinking that if he found a guarantor, he would get a loan. What he told the plaintiff is not evidence of what
- d* Mr Knight had told him.
- Mr Knight had been Manager at Warri until July, 1959 and knew the plaintiff and Mr Yon- da Kolo well. He was at Warri between May 4th, 1960 and July 15th. Mr Yon-da Kolo had
- e* been trading with a fluctuating over draft running up to nearly £3,900, and the manager in April, 1960 wrote to him that he should reduce it. Mr Knight acceded to his request for more facility and let him run up to £5,000 or so, and then
- f* stopped honouring his cheques about mid-June or shortly after. In the meantime he refused a loan and told Mr Yon-da Kolo that he should reduce his overdraft by about a half and provide security, and then the bank would consider his application for a loan. The first gentleman to offer a guarantee
- g* was Mr Otuedon, but when Mr Knight explained to him what it meant he backed out. Then the plaintiff came saying he wished to help Mr Yon-da Kolo his present difficulties by guaranteeing him, and Mr Knight explained to him what that
- h* meant; he said he was aware, and Mr Knight asked him to think about it. He came again to pursue the matter, and Mr Knight told him that the guarantee would have to be supported by a charge on property. On a subsequent day the
- i* plaintiff came with his title deeds and was asked to come later in the morning in the meantime the forms were prepared; the plaintiff was asked to look at them and see what was in them, which he did and then signed. The plaintiff was never told he was guaranteeing a loan of £2,500; it was a
- j* guarantee for the current account and he knew it; neither

was he told to ask Mr Yon-da Kolo to come and collect *a*  
£2,500. Twenty four hours later he asked for the return of  
his documents; they had been sent to Lagos for verification.  
Mr Knight thinks it was at the second interview that he told *b*  
the plaintiff about Mr Yon-da Kolo's account being in debit  
about £5,000. His headquarters were not happy, but it was  
wrong to think that he was desperate on getting security;  
apart from legal action, if he were to deceive the plaintiff *c*  
that he was guaranteeing a loan and spring a guarantee for  
the current account on him, he would be dismissed. He  
never discussed with him Mr Yon-da Kolo's request for a  
loan; what the plaintiff told him was that he wanted to help *d*  
Mr Yon-da Kolo in his present difficulties. Later Mr Yon-da  
Kolo telephoned to ask for extra money, and Mr Knight told  
him he could have up to £6,000. That was the figure the  
plaintiff, when asked, said was as far as he wanted to go. For *e*  
Mr Yon-da Kolo it really meant a margin of about £500. If  
the plaintiff had not guaranteed the overdraft, the bank was  
going to pursue Mr Yon-da Kolo and sue him if he did not  
pay.

*f*  
Kester J the trial Judge, remarks that the fraud alleged is  
that Mr Knight accepted the plaintiff's guarantee for a loan  
of £2,500 to be made to Yon-da Kolo, but made him sign a  
blank form in which later he wrote in £6,000 as the amount *g*  
guaranteed. The learned judge reviews the evidence and  
states that in his belief the £6,000 was already written in  
before the plaintiff signed the guarantee. He accepts Mr  
Knight's evidence; it was not he but Mr Yon-da Kolo who *h*  
misled the plaintiff. That grave allegation of fraud was men-  
tioned but not pursued in the plaintiff's appeal.

In the appeal before us, the first argument is that the man- *i*  
ager of the bank had a duty to tell the plaintiff that Mr Yon-da  
Kolo owed about £5,000, but did not, and the concealment of  
it discharged the plaintiff. The trial judge was of opinion that  
Mr Knight did tell him at the second interview. As it is his  
case that he did not ask, the law is on the side of the bank: *j*

*a* See *London General Omnibus Co Ltd v. Holloway* (1912) 2 K.B. 72, cited as one of the cases in Halsbury's *Laws of England*, (3ed), Volume 11, page 237, where the law is stated thus:

*b* "A banker is not bound to volunteer to an intending guarantor information as to the state of the account or whether the customer was or was not in the habit of overdrawing. If asked by the intending guarantor, however, he must give the information, this being  
*c* sufficient reason for disclosing the customer's account."

The proper presumption in most instances is that the customer has been overdrawing and wishes to do so again (at page 83, per Farwell LJ); it is up to the intending guarantor to inquire if he wishes. That sort of guarantee differs from a  
*d* guarantee given to an employer for the fidelity of a servant, and the rule on disclosure which obtains in the latter case cannot be invoked here.

*e* Before dealing with the second argument, we have to observe that the plaintiff's learned Counsel, in our view properly and rightly, opened his address with this concession –  
*f* that he could not advance the plea of *non est factum*; his argument is that unilateral mistake is a defence to specific performance, for which he cites *Webster v. Cecil* 54 Eng. R. 812. In that case the defendant, who had refused an offer of £2,000 made by the plaintiff's agent, wrote to the plaintiff  
*g* offering to sell at £1,100, and the plaintiff wrote to accept; whereupon the defendant looked at his note and discovered that in adding up the items of property he was selling, he mistakenly made the total £1,100 instead of £2,100, and he  
*h* immediately told the plaintiff's solicitors about his mistake. Sir John Romilly, MR said that in that state he would not grant a decree of specific performance, but leave it to the plaintiff to bring an action at law if so advised. The argu-  
*i* ment here is that the plaintiff thought he was to guarantee a loan of £2,500 and ought not to be held to the guarantee he signed for the current account.

*j* In *Webster v. Cecil* the plaintiff was snapping at an offer which he must have well known to be made by mistake;

indeed, Brett LJ in *Tamplin v. James* (1880) 15 Ch.D. 215 at 222, says in regard to *Webster v. Cecil* that “the purchaser was acting fraudulently in seeking to take advantage of what he knew to be a mistake.” *Tamplin v. James* shows that a mistake made by a party through his own fault entirely is not necessarily a valid defence to a suit for specific performance, and that in the cases where specific performance is refused on the sole ground of mistake by the defendant, the court, as it now administers both law and equity, ought to give the same damages as would, under the old practice, have been given in an action at law. We do not think that *Webster v. Cecil* is relevant to the case in hand in point of law, as this is not a suit for specific performance; and as to the facts here, far from snapping at a guarantee for the current account, Mr Knight had tried to put the plaintiff off, neither did he trick or make any misrepresentation to the plaintiff which he could advance as a reason for making the mistake he alleges on his part. The plaintiff may have thought, in consequence of what Mr Yon-da Kolo said to him, that when he signed the guarantee the bank would give Mr Yon-da Kolo a loan of £2,500, but Mr Knight had no inkling of that; for in his conversations with the plaintiff no mention was made of any loan whatever. The plaintiff can read and write; he is in business as an auctioneer, he knows the difference between a loan account and a current account; he had guaranteed others before. He led Mr Knight to think that he was come to guarantee the current account, to help Mr Yon-da Kolo out of his difficulties. Mr Knight discussed the guarantee with him, and gave him a form of guarantee to sign which related to the current account, in which he could have read, right at the start, these words:—

“I, Chief Festus Makene Ikomi of . . ., in consideration of your granting or continuing banking accommodation at my request to A.G. Yon-da Kolo and Sons . . . hereby guarantee payment to you on demand of all sums which now are or at any time or times hereafter may become due etc.”

And at the end of the first paragraph he would have found the proviso limiting the guarantee to the principal sum of six thousand pounds, with the amount written in by hand. The signature of the guarantee is conclusive against the plaintiff;



- a* for he cannot advance the plea of *non est factum*, and his plea of his being induced to sign the guarantee by fraud or misrepresentation on the part of the Manager of the bank is not true or of facts of the case. Scrutton LJ states the law in *L'Estrange v. F Graucob Ltd* (1934) 2 K.B. 394; (1934) A.E.R. (Reprint) 16 at page 19 letter, which we quote, in these words:—
- b*
- c* “When a document containing contractual terms is signed, then, in absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.”
- d* Maugham LJ agrees and adds at page 20 (letter) F that the party cannot be heard to say that the document did not affect him because he did not know the contents. That case is cited by Lord Devlin in *McCutcheon v. David Macbrayne Ltd* (1964) 1 N.L.R. 125, at 128, as an unassailed decision that a signature to a contract is conclusive.
- e*
- f* Equally it does not matter if the plaintiff had a loan to Yon-da Kolo at the back of his mind. Lord Reid quotes in *McCutcheon etc.* (above) at page 128, from *Gloag on Contract*, (2ed), page 7, this passage:—
- g* “The judicial task is not to discover the actual intentions of each party; it is to decide what each was reasonably entitled to conclude from the attitude of the other.”
- h* Here Mr Knight was entitled to conclude that the plaintiff wished to guarantee Mr Yonda Kolo’s current account with its existing overdraft and any further overdraft up to £6,000. The finding of the trial judge is that such was his agreement with Mr Knight.
- i*
- j* The last plea in the statement of claim is failure of consideration; there it means that as the plaintiff was guaranteeing a loan but the loan was refused, the consideration for which he gave his guarantee failed. The plea is untrue on the facts.

But the third argument on appeal is that as the bank suffered no injury before the guarantee was withdrawn, there was no reason why the bank should hold the plaintiff to his guarantee. The statement of account put in by consent showed a debit of three pounds for the 12th July; it was for a cheque Mr Yon-da Kolo had given his club, but Mr Knight had said in evidence that it would have been paid anyway, so it should not be regarded as having been paid in pursuance of the guarantee; and in any case, it was argued, the payment on that date was not properly proved. For the bank it was submitted that as the argument did not accord with the plaintiff's pleading, which was binding on him, it should not be taken into account.

The proposition implied in the argument for the plaintiff may be summed thus: granted that a valid guarantee was given, if the bank has not given credit relying on the guarantee before it is withdrawn, the bank has no rights under the guarantee, on the ground that Mr Yon-da Kolo has not benefited. The plaintiff's learned Counsel referred to *Lloyd's v. Harper* (1880 – 1881) 16 Ch. 290, at 314 and 319. There the major point was whether the death of the father determined his guarantee for his son's admission as an underwriter, it did not in that case. At page 314 James LJ, said that:—

“It perhaps might be hardly equitable for a banker or merchant to go on making advances after receiving a distinct notice from the guarantor that he would not be further liable.”

At page 319 Lush LJ distinguishes between guarantees (*a*) in which the consideration is entire, eg one given for a lease, and (*b*) where the consideration is fragmentary, supplied from time to time, and therefore divisible, eg, a guarantee given to secure the balance of a running account at a bankers or a balance of a running account for goods supplied; and the learned judge goes on to say that:—

“It is reasonable to hold, unless the guarantee stipulates to the contrary, that the guarantor may at any time terminate the guarantee. He remains answerable for all the advances made or all the goods

*a* supplied upon his guarantee before the notice to determine it is given”;

But one discovers at page 320 that the learned Judge says  
*b* this too:–

“As at present advised, I think it quite competent for a person to do that where, as I have said, the guarantee is for advances to be made or goods to be supplied, and where nothing is said in the  
*c* guarantee about how long it is to endure.”

He is speaking of a guarantee for future advances. Here the guarantee covers both past and future advances. What is more, there is paragraph 2 on what the guarantee shall extend to cover, in which portion (*c*) has a bearing on the  
*d* cheque of £3, and there is paragraph 3 on when the notice of discontinuance takes effect which is three months after it is received. *Lloyd’s v. Harper (supra)* does not affect the present case, as the guarantee here has its own stipulations.  
*e*

The truth of the matter is that learned Counsel wished to argue that in effect the guarantee became a guarantee for an existing debt, and that there was no valuable consideration to sustain it as a contract which was not under seal; that is  
*f* plain from his citing *Wigan v. English and Scottish Law Life Assurance Association* (1909) 1 Ch. D. 291. The plaintiff’s pleading does not attack the guarantee for inadequacy of  
*g* consideration. In the argument of appeal this new attack is made, not as a frontal attack, but by a sidewind of implication. It is not a course to be encouraged. However, as pointed out for the bank, the guarantee here states that:–

*h* “I . . . in consideration of your granting or continuing banking accommodation at my request to . . . hereby guarantee payment . . . of all sums which now are or . . . may become due . . .”

Instead of pressing the customer for payment of his overdraft,  
*i* the bank is to grant or continue banking accommodation; and to continue accommodation includes forbearance – which is the chief aim of a guarantee for an overdrawn current account and further banking accommodation besides. The plaintiff’s  
*j* learned Counsel has not suggested that the consideration

stated is not adequate to sustain the guarantee; indeed in his reply he conceded that it would cover the existing overdraft of about £5,000; but he added that one must consider. *Webster v. Cecil (supra)* which we have considered.

In our opinion the third argument on appeal must also fail. As for the precise date when the £3 cheque was paid and the evidence of that date, that may be left for decision when the bank sues for payment as a matter which relates rather to the notice from the plaintiff withdrawing his guarantee and the time when it takes effect.

It is ordered that the plaintiff's appeal from the judgment of 31st January, 1962 in the High Court, Warri Suit No. W/50/60, be and the same is hereby dismissed with 40 guineas costs payable to the bank.

*a*

**Nigerian Advertising Service Limited v.  
United Bank for Africa Limited**

*b*

HIGH COURT OF LAGOS STATE

ADEDIPE J

Date of Judgment: 15 MARCH 1965

*c*

*Banking – Banker/customer – Duty of customer to inform banker of forged cheques – Whether breach of such duty amounts to estoppel from contesting payment*

*d*

*Banking – Banker/customer – Duty of customer to inform banker of forged cheques – Whether silence for a period constitutes an admission*

*e*

*Banking – Cheques – Payment of forged or altered cheques – Need for banker to credit the account of non-negligent customer thereof*

**Facts**

*f*

The plaintiff's company brought an action against the defendant Bank for a declaration that the defendant had wrongfully debited the plaintiff's account and that the amount was due and owing.

*g*

The defendant, which was at all material times the plaintiff's bank, paid out on three cheques belonging to the plaintiff which had been forged by a messenger in the plaintiff's employment. It debited the plaintiff's account with the value of these cheques and of others the forgery of which was not

*h*

proved in the present proceedings. Evidence showed that the plaintiffs' cheque books were kept in a locked drawer to which the messenger possibly had a master key. The plaintiff instituted the present proceedings to obtain a declaration that

*i*

the defendant had wrongfully debited its account with the value of the cheques and the amount was due and owing.

*j*

The plaintiff contended that the defendant had paid out on the cheques without the plaintiff's authority and was therefore disentitled from debiting its account.

The defendant maintained that: (a) the plaintiff had been negligent in its custody of the cheque; (b) the plaintiff was in breach of its duty to inform the defendant that its cheques were being forged and was therefore estopped from contending that the cheques should not have been paid.

The plaintiff further contended that it was not aware of the forgeries until they were disclosed by a police investigation, and that there was no negligence on its part.

**Held –**

1. Estoppel may arise through the breach by a customer of his duty to his banker to inform him that he has discovered that his signature is being forged on cheques. If a customer fails in this duty he represents in effect that later signatures, though in fact forged, are genuine, and he will be estopped from contending against his banker that payment should not have been made on such signatures.
2. The mere silence of the customer for a period after learning of the forgery of his signature during which time the position of the bank is not altered, cannot be held to be an admission of liability.
3. Where there are forgeries, which are not due to a customer's negligence, it is the duty of the banker to credit the account of the customer whose cheques have been forged.

*Plaintiff's claims succeed.*

**Cases referred to in the judgment**

***Foreign***

*Greenwood v. Martins Bank Ltd* (1993) A.C. 51; [1932] All E.R. Rep. 318

*Kepitigalla Rubber Estates Ltd v. National Bank of India Ltd* (1909) 2 K.B. 1010; (1909) 100 L.T. 516

*M'Kenzie v. British Lines Co* (1881) 6 A.C. 82; 44 L.T. 431

*a* **Counsel**

For the plaintiff: *Thompson*

*b* For the defendant: *Bentley*

**Judgment**

*c* **ADEDIPE J:** This is an action for a declaration that the defendant bank has wrongfully debited the plaintiff's account with cheques amounting to £165, and that the said sum is due and owing by the defendant to the plaintiff.

*d* The facts of this case are that at the material times the defendant was the banker of both the plaintiff company and its managing director, Mr Anyibofu Megafu.

*e* On January 9th, 1964 cheque No. L.D. 44093 for £15 was paid by the defendant to someone other than the plaintiff. The cheque was tendered and admitted as exhibit A.

On January 13th, 1964 cheque No. L.A. 21237 for £50 was paid by the defendant to someone other than the plaintiff. The cheque was tendered and admitted as exhibit B.

*f* On January 21st, 1964 cheque No. L.A. 025926 for £40 was paid by the defendant to someone other than the plaintiff. The cheque was tendered and admitted as exhibit C.

*g* On December 19th, 1963 cheque No. L.D. 044094 for £10 was paid by the defendant to someone other than the plaintiff. The cheque was tendered and admitted as exhibit D.

*h* On January 9th, 1964 cheque No. L.A. 21235 for £15 was paid by the defendant to someone other than the plaintiff. The cheque was tendered and admitted as exhibit E.

On January 15th, 1964 cheque No. L.D. 044096 for £20 was paid by the defendant to someone other than the plaintiff. The cheque was tendered and admitted as exhibit F.

*i* On January 29th, 1964 cheque No. L.A. 025937 for £15 was paid by the defendant to someone other than the plaintiff. The cheque was tendered and admitted as exhibit G.

*j* It was later discovered that all the cheques were forged by one Sikiru Balogun, a messenger in the employment of the

plaintiff who was convicted in a Lagos magistrate's court for the forgeries of exhibits A to C and sentenced to three years imprisonment with hard labour on March 5th, 1964. *a*

Evidence showed that the plaintiff's cheque books and those of Mr Megafu were kept in the drawer under lock, and that it was possible Mr Balogun had a master key with which he opened the drawer. *b*

The value of all the forged cheques is £165 and the value of the cheques exhibits A to C is £105. *c*

After the close of the defendant's case, Counsel for the plaintiff told the court he would concede that the plaintiff had not proved its case as far as exhibits D to G were concerned and would therefore limit their case to exhibits A to C, which both sides agreed were forgeries. *d*

The defendant's case is that the plaintiff was grossly negligent in the keeping of the cheque books. Mr Albert Allen, the Manager of the Lagos Central Branch of the United Bank for Africa, who testified for the defendant, said that he believed his bank had admitted that restitution would be made in the case of the three cheques, which had been proved to be forgeries. *e*

The defendant, in paragraph 6 of its statement of defence, is relying on estoppel, but this has not been substantiated by evidence. The plaintiff's case is that the company was not aware of the forgeries until the police investigation which brought the matter to light, and that there was no negligence on its part. *g*

Estoppel may arise through the breach by a customer of his duty to his banker to inform him that he has discovered that his signature is being forged on cheques. If the customer fails in this duty he represents in effect that later signatures, though in fact forged are genuine, and he will be estopped from contending against his banker that payment should not have been *h*

*i*

*j*



*a* made on such signatures: see *Greenwood v. Martins Bank Ltd* (1933) A.C. 51; [1932] All E.R. Rep. 318. Cases of this nature are decided mostly on the facts.

*b* It seems to me that where there are forgeries, which are not due to a customer's negligence, it is the duty of the banker to credit the account of the customer whose cheques have been forged.

*c* It was decided in *M'Kenzie v. British Linen Co* (1881) 6 A.C. 82; 44 L.T. 431 that a person who knows that a bank is relying upon his forged signature to a bill cannot lie by and not divulge the fact until he sees that the position of the bank

*d* is altered for the worse. But there is no principle on which his mere silence for a fortnight from the time when he first knew of the forgery, during which the position of the bank was in no way altered or prejudiced, can be held to be an

*e* admission or adoption of liability, or an estoppel.

In *Kepitigalla Rubber Estates Ltd v. National Bank of India Ltd* (1909) 2 K.B. 1010; (1909) 100 L.T. 516, where the secretary of a company forged the signatures of two of the directors of the company on a number of cheques which purported to have been drawn by the directors on behalf of the company upon the defendants, who were the company's bankers, and the defendants paid the cheques so drawn, it was

*f*

*g* held that the company was entitled to recover.

I find on the facts that the defendant has wrongfully debited the plaintiff's account with the cheques to the value of £105. The plaintiff is entitled to recover the value of the

*h* three cheques, which have been proved to be forgeries.

There will be judgment for the plaintiff against the defendant in the sum of £105, with 20 guineas costs.

*Judgment for the plaintiff.*

## Eyo v. Bank of West Africa Limited

HIGH COURT OF CALABAR

BALONWU J

Date of Judgment: 30 APRIL 1965

*Banking – Contract – Failure of bank to do what it is contracted to do – Damages recoverable*

*Banking – Debt – Failure to pay – Whether damages recoverable*

*Banking – Refusal of bank to pay premium on life policy – Whether failure to pay debt*

*Contract – Breach of contract – Nature of damage recoverable where damages claimed is too remote*

### Facts

The plaintiff was a businessman. The defendant was a commercial bank in which the plaintiff opened a current account in 1956. Before then the plaintiff as from 15th June, 1955 had taken out a life policy for £10,000 with profits to mature in 20 years, the annual premium payable by him being £567.9s.8d.

The plaintiff had an interest in a trading firm which also maintained a current account in the same bank. That firm in 1957 obtained an overdraft facility from the bank and repayment was guaranteed by the plaintiff by mortgaging the life policy to the bank whereby the policy was deposited with the bank.

Subsequently, it was agreed in writing between the plaintiff and the bank that the bank should pay from the plaintiff's account:—

- (a) The annual premium on the life policy promptly on every due date, and
- (b) £50 monthly to the firm's account to offset the overdraft given to the firm by the bank.

- a* The plaintiff was operating this current account normally and in January, 1961 he bought two oil mills for £8,000, paid £2,000 down on a cheque drawn from the account and  
*b* promised the vendor to liquidate the balance in six annual instalments of £1,000 each.

- In July, 1961, by a transaction to which the plaintiff was not a party, the bank erroneously debited the plaintiff's  
*c* account with a sum of £2,792 thereby reducing the account to a credit balance of £107 only. Consequently when in October, 1961 the plaintiff presented his cheque for £300 it was dishonoured. He protested and after some enquiry he  
*d* was allowed to cash that cheque. He later that month cashed another cheque for £600. But thereafter the bank refused to honour any more of his cheques. Despite protestations and reminders from the plaintiff, the bank refused to honour his  
*e* cheques, refused to pay the premiums on the life policy, but continued to pay from his account the £50 monthly towards the repayment of the firm's overdraft. Eventually in April, 1962 the plaintiff had to surrender the bonus allotted to the  
*f* policy in return for a ready cash of £750 and in October the same year he also surrendered the policy itself in return for a ready cash of £2,262.

- In June, 1963 the plaintiff sued the bank for breach of contract claiming payment of a sum of £2,225 being balance of  
*g* his current account and also £30,183 special and general damages for breach of contract for refusing him to operate his current account in order to carry on his business and for  
*h* refusal to pay the premium in his life policy whereby he was forced to surrender the policy and the bonus. The special damages consisted of the balance value of the life policy, balance value of the policy bonus, and expected profits from  
*i* the oil mills one of which he claimed was unable to be launched for lack of funds.

- The bank did not contest the issue of the breach of contract but disputed the measure of damages recoverable, arguing that  
*j* the damages claimed were too remote. The bank contended

that the relationship between the plaintiff and the bank was that of a creditor and a debtor and that failure to pay a debt cannot give rise to any claim in damages. The bank also contended that in all probabilities the plaintiff might have become insolvent as his account could not have been sufficient to pay all the premiums and meet all other liabilities. With regard to the oil mills in particular, the bank contended that it was unaware of their existence and their prospects.

**Held –**

1. Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally – ie, according to the usual course of things, for such breach of contract itself – or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the possible result of the breach of it.
2. The breach with regard to the non-payment of premium is not just a failure to pay a debt but indeed a refusal by the bank to do what it contracted to do-to-wit payment of the premiums, and with full knowledge of the consequences of the failure to pay the premiums.
3. Natural and normal loss resulting from the breach of a contract is generally recoverable; but exceptional and abnormal loss is recoverable only if it may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach.
4. The rule that damages are not recoverable for failure to pay a debt is not a rigid rule of law as it is based on the assumption that the consequences are generally considered too remote. When therefore the circumstances are such that there is a special loss foreseeable at the time of the contract as the consequence of non payment, then such loss may be recoverable.

- a* 5. With regard to the refusal to operate the account in order to operate the oil mills, general damages are recoverable since to the knowledge of the bank the plaintiff was a business man who depended on his funds at the bank for operation of his businesses; but special damages consisting of loss of profit are not recoverable since the bank was not aware of the prospects of the said oil mills.
- b*
- c* 6. Once the breach of a contract was established the question of the plaintiff's insolvency arising *ex post facto* legally irrelevant to the question whether the damage suffered is too remote.
- d* *Plaintiff's claim succeed.*

#### Cases referred to in the judgment

##### *e* Foreign

- Cory v. Thomas Iron Works Co* 1868 L.R. 3 Q.B. 181
- Gibbons v. Westminster Bank Ltd* (1939) 3 A.E.R. 577-578
- Hadley v. Baxendale* (1854) 9 Exch. 341
- f* *Huhammad Issa Shakhahad v. Alli* 1947 A.C. 414
- Monarch S.S. Co v. A/B Kalshamns* (1949) 1 A.E.R. 1 at page 10
- Morrison v. London County and Westminster Bank Ltd* (1914 – 1915) A.E.R. page 853
- g* *The Liesbosch* 1933 A.C. 449
- Trans Trust S.P.R.L. v. Danubian Trading Co Ltd* (1952) A.E.R. 970
- Victoria Laundry v. Newman Industries* (1949) 1 A.E.R. 997
- h* *Walls v. Smith* (1882) 21 Ch.D. 243

#### Nigerian statute referred to in the judgment

- i* Law Reform (Miscellaneous Provisions) Act, 1934, section 3

#### Counsel

- For the plaintiff: *Oku*
- j* For the defendant: *Dalby*

**Judgment**

**BALONWU J:** In this case, the plaintiff has sued the defendants (hereinafter referred to as “the Bank”) claiming as follows:

1. £2,225 being the amount standing to the credit of the plaintiff in his account with the bank which the bank refused to pay over to the plaintiff in spite of repeated demands;
2. £30,183 being special and general damages for breach of contract committed by the bank for refusing—
  - (a) to allow the plaintiff to operate his current account in order to carry on his business; and
  - (b) to pay premium due on plaintiff’s policy of life assurance as per agreement dated the 21st day of May, 1958.

The plaintiff says that, as a result of the said breach, he has been unable to carry on his business, and has been compelled to surrender his life policy, and has suffered special damages (as amended) as follows:

- (a) Balance due on the value of the life policy assured for 20 years from the 15th June, 1955, £7,738;
- (b) Balance due on the life policy bonus after deducting £1,250 already paid £8,455;
- (c) Net income and/or profits from two pioneer oil mills at £3,000 a year per mill for one and half years, that is, from 1st January, 1962 to 30th June, 1963, £9,000.

Thus the sum total of special damages claimed is £25,183. And the quantum of general damages claimed is £5,000. The facts of the case, which I accept they are for the most part admitted and are, in any case, uncontradicted may be summarised as follows:

The plaintiff is a politician and a business man, and, at all material times, normally resided and carried on business at Mbierbe Akpawat in Uyo Division in Eastern Nigeria. In 1955, he took out a life policy, exhibit “B” with the Graham Life Assurance Society Limited, London, England, whose Nigeria Agents are the Guinea Insurance Company Limited, of 46 Marina, Lagos. The sum assured was £10,000 with profits to mature in 20 years, and the annual premium on the

- a* said policy was £567.19s.8d, payable half yearly, on the 15th June and 15th December in each year, at the rate of £283.19s.10d. The plaintiff was the founder of a firm of partners, known as the Midland Trading Agencies. In 1956
- b* he started his own business which he built up by his own efforts.
- c* The bank is an incorporated company engaged in banking business, having their headquarters in Lagos, Nigeria, and branches throughout the Federal Republic of Nigeria, including a branch at Uyo. In 1956, the plaintiff opened a
- d* current banking account with the branch of the bank at Uyo. So, in 1957, he guaranteed the Midland Trading Agencies, the firm of partners aforementioned, with the bank for overdraft facilities, and deposited his life policy with them as security. Subsequently on the 21st May, 1958, that is the
- e* plaintiff executed in favour of the bank a formal deed of mortgage exhibit "C" on the said life policy. As a result of the discussion the plaintiff and the bank had on the matter, by a letter dated the 14th July, 1958 exhibit "S," the bank
- f* sought the plaintiff's authority to pay the premiums on the life policy as and when they fell due, and the plaintiff gave them a standing order to that effect. Henceforth, in pursuance of this agreement, until the breach, the bank on the 15th day of June, and on the 15th day of December in each
- g* year, paid to the Graham Life Assurance Society Limited, London, the premium on the plaintiff's life policy, from the plaintiff's current account with the bank, and by a letter dated the 3rd January, 1961, exhibit "D," the plaintiff gave
- h* another standing order to the bank, to debit his current account monthly with £35, commencing from 1st March, 1961, in favour of the Midland Trading Agencies, with a view to reducing the overdraft granted to this firm by the
- i* bank. This amount of £35 was subsequently, on the orders of the plaintiff, increased to £50 as from the 1st August, 1961. In pursuance of an agreement entered into between the plaintiff and the Western Nigeria Development Corporation, exhibit "Q" dated the 24th January, 1961, whereby the latter
- j* sold to the former, at a total cost of £8,000, two pioneer Oil

mills, the plaintiff, by a cheque drawn on the bank, paid the sum of £2,000 to the said Corporation, as is evidenced by an entry in exhibit “E” against the date 28th December, 1960, leaving the balance of £6,000 to be paid in six annual instalments of £1,000 each, the first instalment to be paid in January, 1962. Thereafter the plaintiff took delivery of the two oil mills and between March and November, 1961, he completely erected and installed them, one at Mberiebe Akpawat, and the other, at Afaha Effiong. The plaintiff had intended that the Mills should go into production in January, 1962. On the 27th July, 1961, a crossed cheque for £2,792, dated the 23rd July, 1961, to which the plaintiff’s name was forged, drawn in favour of one Tom Akpan Uwa, date stamped 25th June at the National Bank, Aba 27th June at the branch of the bank at Uyo, was erroneously debited by the bank to the plaintiff’s account. By reason of this debit, the total amount standing to the plaintiff’s credit at the bank at Uyo was reduced to £107. So, when on the 4th October, 1961 the plaintiff presented a cheque for £300 to the bank at Uyo, the latter refused to cash it, on the ground that the plaintiff had not sufficient funds in his account to meet that amount. The plaintiff informed the manager of the branch of the bank at Uyo that he did not issue the said cheque, exhibit “A,” and he later made a report to the police. Chief Inspector of Police, Gibson Onwuagbu (P.W.1), who investigated the case, informed one Mr Black, the then Manager for the Uyo Branch that the cheque exhibit “A” was forged, and the money involved stolen; that two of the bank’s clerks were involved in the forgery, and had been charged with conspiracy. Subsequently the bank allowed the plaintiff to cash the aforementioned cheque for £300, and also another cheque for £600 drawn by him on the said 9th October, 1961. Thereafter, the bank resolutely refused to allow the plaintiff to draw further on his current account, and all representations made on behalf of the plaintiff to the bank for a change of attitude were to no avail. The plaintiff, in accordance with the standing order given to the bank in July, 1958, reminded



*a* the latter to pay the premium on his life policy which, fell  
 due on the 15th December, 1961, and subsequently. The  
*b* bank, however, refused to make the said payments to the  
 Insurance Company, but continued on the other hand, for  
 nine months, to debit the plaintiff's current account with £50  
 very month, in order to reduce the overdrafts of the firm of  
 Midland Trading Agencies, that is to say, from 3rd October,  
*c* 1961 to 2nd August, 1962. See pages 18 and 19 exhibit "E."  
 Neither these various monthly sums of £50, nor the sums of  
 £300 and £600 cashed cheques dated the 4th October, and  
 9th October, 1961, respectively, were treated as overdrafts  
*d* by the bank, and no interests were charged thereon, Because  
 the bank would not pay the premium on the plaintiff's life  
 policy to the Insurance Company as agreed, and would not  
 allow the plaintiff to draw on his current account in order to  
 make the payment himself, and as well carry on his business  
*e* the plaintiff obtained money from other sources and was  
 only able to pay the premium which fell due in December,  
 and June, 1962. As a result, the plaintiff had to surrender in  
 April, 1962, the total bonus allotted for cash in a sum of  
*f* £750, and in October, 1962 surrendered the policy for  
 £2,262 gross. Furthermore, he was unable to put his oil mills  
 into operation, as he had planned, in January, 1962, which  
 mills constituted all his investment in 1961. The mill at  
*g* Mbierere Akpawat went into production on the 6th July,  
 1963 and yielded a net profit of £20,009.6s.2d for the period  
 extending from July, 1963 to March, 1964. See exhib-  
 its "CC" and "DD."

*h*

The issue of the breach of contract is uncontested. What is  
 disputed is the measure of damages recoverable consequent  
 upon the breach. The following authorities were cited:

*i*

1. *Hadley v. Baxendale* (1854) 9 Exch. 341.

*j*

2. *Victoria Laundry v. Newman Industries* (1949) 1 A.E.R.  
 997 page 1001-1002.

3. Morrison v. London County and Westminster Bank Ltd (1914 – 1915) A.E.R. Reprint page 853. a
4. Walls v. Smith (1882) 21 Ch.D. 243. b
5. Trans Trust S.P.R.L. v. Danubian Trading Company Ltd (1952) 1 A.E.R. 970.
6. The Liesbosch (1933) A.C. 449.
7. Gibbons v. Westminster Bank (1939) 3 A.E.R. 577 c
8. Monarch S.S. Company v. A/B Karlshamns (1949) I.A.E.R. 1 per Lord Wright from page 10.
9. Cory v. Thomas Iron Works Company (1868) L.R. 3 Q.B. 181 at page 188. d

I will now proceed to examine the above, as well as other authorities in so far as they afford some assistance in determining the question what damage, not being too remote, is irrecoverable by reason of the breach alleged and proved? The classic decision on the subject is *Hadley v. Baxendale* (1854) 9 Exch. 341, where Alderson B giving the judgment of the court said at page 354, e

“... we think the proper rule in such a case as the present is this: where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally ie, according to the usual course of things, for such breach of contract itself or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the possible result of the breach of it.” f

As has been pointed out by Blackburn J *Cory v. Thomas Iron Works Co* (*supra: ibid* at page 188), the above rule stated by Anderson B consists of two alternatives. The first rule speaks of damages “arising naturally, ie, according to the usual course of things from such breach of contract”; and the second rule talks of damages such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of g

- a* the breach of it.” So, under the first rule, damages are recoverable, if they represent the natural and normal loss resulting from the breach; and, under the second rule, exceptional and
- b* abnormal loss is recoverable, only if “it may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.”
- c* What is a “reasonable contemplation” as to damages, in the words of Lord Wright in *Monarch S.S. Company v. A/B Kalshamns* (1949) 1 A.E.R. 1 10 at page 14, is what the court attributes to the parties. The question whether damages
- d* are recoverable under the rules in *Hadley v. Baxendale* (1854) 9 Exchequer 341, or whether it is too remote, is one of fact, and can only be decided on a review of the circumstances of each case. As Lord Hadane LC said with a reference to the question of damages in *British Western House Electric and Manufacturing Company Ltd v. Underground Electric Rys Company of London Ltd* (1912) A.C. 673 at page 688:
- e*
- f* “In some of the cases there are expressions as to the principles governing the measure of general damages which at first sight seem difficult to harmonise. The apparent discrepancies are however, mainly due to the varying nature of the particular questions
- g* submitted for decision. The quantum of damage is a question of fact, and the only guidance the law can give is to lay down general principles which afford at time but scanty assistance in dealing with particular cases, the judges, who give guidance to juries in these cases, have necessarily to look at their special character, and
- h* to mould, for the purpose of the different kinds of claims, the expression of the general principles which apply to them, and this is apt to give rise to an appearance of ambiguity.”
- i* Where there are special circumstances in a particular case and these are unknown to the other party, Alderson B points out that the latter could at most be only supposed to contemplate the amount of injury which would arise generally, and in the great multitude of cases not affected by such special
- j* circumstances. If, however, exceptional and peculiar loss is

claimed, which involves special and extraordinary circumstances beyond the reasonable provision of the parties, it is laid down that knowledge of such special circumstances must have been brought home to the defendant at the time of the contract, and in such circumstances that the defendant impliedly undertook to bear abnormal loss resulting from a breach in those special circumstances. In *British Columbia Sawmill Company v. Nettleship* (1868) L.R. 3 C.P. 499 at page 509, Willes J summed up the position in these words:

“The knowledge (of the special circumstances) must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contracts with the special condition attached to it.”

In such a case, as the special circumstances under which the contract was actually made were by the plaintiffs to the defendants, and thus known to both parties, Alderson points out that the damages resulting from the breach of such contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from breach of contract under these special circumstances so known and communicated.

In this connection, a passage from the judgment of Asquith LJ in (*Victoria Laundry v. Newman Industries* (1949) 1 A.E.R. 997 at pages 1001-1002) is pertinent. His Lordship said:

“In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach.

. . .

3. What was at the time reasonably foreseeable depends on the knowledge possessed by the parties, or at all events, by the party who later commits the breach.
4. For this purpose knowledge ‘possessed’ is of two kinds one imputed, the other actual. Everyone, as a reasonable person, is taken to know the ‘ordinary course’. This is the subject

- a* matter of the ‘first rule’ in *Hadley v. Baxendale (supra)* but to this knowledge, which a contract breaker is assumed to possess, whether he actually possesses it or not, there may
- b* have to be added in a particular case knowledge which he actually possesses of special circumstances outside the ‘ordinary course of things’ of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the ‘second rule’ so as to make additional loss also recoverable.
- c*
- d* 5. In order to make the contract breaker liable under either rule it is not necessary that he should have actually asked himself what loss is liable to result from a breach. As has often pointed out, parties at the time of contracting contemplate, not the breach of the contract, but its performance. It suffices that if he had considered the question, he would as a reasonable man have concluded that the loss in question was liable to result: see certain observation of Lord Du Parc in *Monarch Steamship Company v. A.B. Kalamnans* (1949) 1 A.E.R. 1. Nor, finally, to make a particular loss recoverable need it be proved that on a given state of knowledge the defendant could, as a reasonable man, foresee that a breach must necessarily result in that loss. It is enough if he could foresee it was likely to result. It is enough to borrow from the language of Lord Du Parc in the same case, if the loss (or some factor without which it would not have occurred) is a ‘serious possibility’ or a real danger.”
- e*
- f*
- g* Having stated the fact in this action, and the damages claimed by the plaintiff as compensation for the loss he alleged he suffered consequent on the bank’s breach of contract, as well as the relevant rules of law involved in the cases already discussed, I will now pass on to consider the questions which arise on this claim. These question are as follows:
- h*
- i* 1. Was the loss occasioned to the plaintiff such as could, in accordance with the rules stated above, be recovered in damages for breach of the contract?
- j* 2. Or was the loss aggravated by the failure of the plaintiff to take reasonable steps to limit same?

3. If the loss is recoverable, what is the measure of such damages? a

I answer the first in the affirmative. It seems to me the plaintiff's loss is sufficiently proximate according to the rules in *Hadley v. Baxendale (supra)*. b

Learned Counsel for the bank has submitted that the damage is too remote. He pointed out that the relationship between the plaintiff and the bank is one of creditor and debtor, and that the breach consisted in the refusal of the bank, which had the plaintiff's money, to pay same to him. For, as the plaintiff's bankers, the bank were bound contractually on demand, he continued, to pay money on the direction of the plaintiff. He therefore, submitted that failure to pay money does not give rise to any claim in damages, but only gives rise to the claim of the money itself. And he cited in support the case of *Wallis v. Smith (supra)*. As regards the plaintiff's oil mill business, he contended that the bank did not know of these mills, and did not know they were built, so the damages claimed under this head of damage were too remote on the second rule in *Hadley v. Baxendale (supra)*. c  
With regard to the argument advanced on behalf of the bank on the first question, it must first be pointed out that there is not rigid rule of law that damages cannot be recovered for failure to pay money. It is, however, true to say that until the introduction in England of the Law Reform (Miscellaneous Provisions) Act, 1934, section 3(1), the law in that country did refuse to award interest, but this was because the consequences were as a rule considered too remote, interest being "generally presumed not to be within the contemplation of the parties." But, as Benning LJ said in *Trans Trust S.P.R.L. v. Danubian Trading Co Ltd* (1952) 1 A.E.R. 970 at 977F to H), when the circumstances are such that there is a special loss foreseeable at the time of the contract as the consequence of non payment, then such loss, may well be recoverable. Secondly, in so far as the life policy was concerned, attention must be drawn to the fact that the breach alleged d  
e  
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*a* and proved in the instant case did not consist merely in the bank's failure to pay money to the plaintiff. The breach was constituted by the bank refusal to pay premiums due on the plaintiff's life policy in accordance with the contract of agency which came into being when the plaintiff gave the bank a standing order in July, to pay all the premiums on his life policy as and when they fell due. By this standing order, the plaintiff, on the express demand of the bank exhibit," constituted the latter his agents for the payment of these premiums.

*d* This contract of agency was entered into for the mutual benefit of the parties. exhibit "C" was a legal assignment by way of mortgage, and so it passed the whole interest in the plaintiff's life policy to the bank, while reserving to the plaintiff, as the assignor, the equity of redemption. It was an absolute assignment, and it meant that the bank, as the assignees, took all the rights of the plaintiff, the assignor, and, as the legal mortgages, were entitled as against the insurers, to the whole of the insurance moneys: *Re: Waterhouse's Policy* (1937) 1 Ch. 415. This assignment of the plaintiff's (assured's) right to recover the policy moneys is only by way of security to the bank (the assignees) for payment of the debt due to them from the plaintiff, the assignor.

*g* Furthermore, any bonus payable under the policy, in law, belonged to the bank, as the assignees: *Countney v. Ferrers* (827) 1 S.I.M. 137; *Simpson v. Walter* (1832) 2 L.J. Ch. 55. So, the contract of agency, whereby the bank undertook the obligation to pay the premiums on the plaintiff's life policy from the plaintiff's funds at their Uyo Branch, was entered into because the bank were anxious to protect the rights they acquired under the mortgage, exhibit "C," just as the plaintiff, as the mortgagor, was anxious to preserve his equity of redemption, namely, his right of ownership of the life policy subject to the mortgage.

*j* As is well known, the mere assignment of a policy by itself does not oblige the assignor to pay the premiums, or otherwise

to keep up the policy. For this reason, the mortgage of a policy generally requires the mortgagor to covenant to pay all premiums. So in exhibit “C,” the mortgage of the policy, the bank got the plaintiff to give a covenant to that effect. This covenant was quoted in exhibit “S” which is in the following terms:

“With reference to our discussion this morning, we should be grateful if you would sign the attached form *to ensure that all future premiums due against your Life Assurance Policy are paid immediately when due*: In this connection, we would quote you a clause of the mortgage of the policy which reads as follows:

‘That I will punctually pay all premiums and other sums necessary for keeping on foot the said policy and will seven days at least prior to the last day for payment of such premiums deliver the receipts therefore to the Bank.’” (emphasis by the court)

Exhibit “S,” it will be remembered, was written by the bank to the plaintiff. It is important, therefore, to notice that the contract of agency, whereby the bank were to pay the premiums out of the plaintiff’s funds at their Uyo Branch, was made with a view to enabling the plaintiff effectually to perform the covenant given in the mortgage of the policy, exhibit “C.” All this involves the knowledge on the part of the bank that failure to pay the premiums might lead to the policy being dropped, and, ultimately, to the loss or reduction in the value of their security. It will be recalled that at this time the bank had in their possession the plaintiff’s life policy, exhibit “B.” That policy was handed by the plaintiff to the bank in 1957. At page 2 of this policy, under the heading “Privileges and Conditions Non-Forfeitability,” it is stated:

“After two years’ premiums shall have been paid this policy shall not become void by reason of the non-payment of further premiums but shall remain in force as a paid-up policy for a reduced amount, provided such reduced amount, calculated as below, be not less than £25. This paid up policy will not participate in future distributions of profits. If the policy shall have been issued under either Table 4, 6 or 24, the reduced amount shall bear such proportion to the original sum assured as the number of premiums paid



*a* bears to the number originally payable under the policy, the amount calculated being increased by the addition of any reversionary bonus already allotted to the policy and remaining as an addition to the sum assured.”

*b* The Life Policy, exhibit “B,” was issued under Table 4, as can be seen at the top right hand corner of the policy. So that it may reasonably be supposed to have been in the contemplation of the parties, at the time they made the contract of agency, that on failing to pay the premiums after two years premiums shall have been paid, as in the instant case, the policy shall remain in force as a paid up policy for a reduced amount in the proportion stated above, this amount increased by the bonus already allotted to the policy. Furthermore, the policy contains information in regard to the amount of the sum assured, as to whom payable and the event in which payable, as well as the amount of the premiums per annum, and how payable, the date or dates when due and the period during which payable.

*f* It is, therefore, true to say that the special circumstances in this case had in fact been communicated to the bank at the time the contract of agency was made, that is to say, in 1958, for these circumstances are contained in the life policy which the plaintiff handed to them, and which they had in their possession on that date. These circumstances are as stated above, namely:

- g* 1. The circumstances that the plaintiff had the assured expectation of having £10,000 paid to him on surviving up to 1975 or dying before that year;
- h* 2. The circumstance that the premium of £567.19s.8d is payable in half yearly installments of £283.19s.10d on the 15th June and December in each year until the death of the assured or until forty half yearly instalments shall have been paid; and
- i* 3. The circumstance that failure to pay the premiums after two years premiums shall have been paid was likely to lead to the policy being a paid up policy with reduced benefit, both in regard to the sum assured, and to the reversionary bonus payable.
- j*

In view of the declared purpose of the said contract of agency, which was concluded at the instance of the bank, namely, to ensure immediate payments of all future premiums when due, so as to keep on foot the life policy (see exhibit “S”); and in view also of the fact that knowledge of the aforesaid special circumstances had been brought home to them, I think it is legitimate for this Court to attribute to the bank the knowledge that the plaintiff, with whom, they had made the contract of agency, in the words of Willes J in *British Columbia Sawmill Company v. Nettleship (supra)*, “believed that they accepted the said contract of agency with the special condition attached to it,” namely, that of failing punctually to pay the said premiums they would bear any special loss resulting from such a breach. This would impose on the bank the obligation of paying to the plaintiff in the event of a breach, the difference between the sums originally assured and the reversionary bonus payable on maturity, on the one side, and the reduced amounts to which he would be entitled as a result of the breach on the order.

As to the oil mill, there is evidence, which I accept that the bank knew that the plaintiff was a business man, and that he depended on his funds at the bank’s branch at Uyo for operating his business. I agree that in order that the plaintiff should recover specifically the profits of this mill, the bank would have had to know, at the time plaintiff constituted them his bankers, the prospects of the said business. I also agree that the bank did not in fact know these things. In the circumstances, I think that the submission of learned Counsel for the bank that these profits are not recoverable under the second rule in *Hadley v. Baxendale (supra)* is well founded. But this is not to say that the plaintiff must be precluded from recovering some general (and, perhaps, conjectural) sum for loss of business. As reasonable businessmen, both the plaintiff and the bank must be taken to understand the ordinary practices and exigencies of each other’s trade or business. As Lord Wright said in (*Monarch S.S. Company v. A/B Kalshamns (supra) ibid* page 14F to G), that need not generally be the subject matter of special discussion or communication.

*a* Learned Counsel for the bank has also argued that the plaintiff cannot recover, because there was nothing to show that the cashing of the bonuses by the plaintiff, or the surrender of  
*b* his life policy, was a direct result of the failure of the bank to pay the premiums as they fell due, in accordance with the standing order, nor could the court be certain that, if the bank  
*c* had complied with the standing order the premiums would have been paid without cashing the bonus, or that the plaintiff, on a balance of probabilities in discharge of the burden of proof, would have been able to maintain the premium for the rest of the period of the policy. On November 24, 1961, he  
*d* continued, as could be seen from exhibit “N,” the plaintiff wrote to the insurance company about the encashment of his bonuses. And there was no evidence then to show that the bank had refused to pay the premium, which would fall due in December, 1961. Furthermore, as far back as 1960, he went  
*e* on, the Hastings Import/Export (London) Limited, which had brought Suit No. C/24/59 against the present plaintiff and his two partners in the firm of the Midland Trading Agencies, had obtained judgment in their favour for a sum amounting  
*f* approximately to £9,963.17s.8d. This judgment debt has not been paid. Also, the plaintiff had given a standing order, exhibit “D” that a monthly sum of £35, later increased to £50, should be paid from his account into that of the Midland  
*g* Trading Agencies, so as to reduce the overdrafts granted to the firm by the bank.

*h* In addition to the above, the plaintiff had by cheques dated the 4th and 9th October, 1961 withdrawn the sums of £300 and £600 respectively from his account at the Uyo Branch of the bank. And in accordance with his agreement with the  
*i* Western Nigeria Development Corporation, he was obligated to pay annually to the said Corporation the sum of £1,000 for six years running, commencing payment from January, 1962. So, even if all had gone well, learned Counsel contended, the plaintiff would have been insolvent at the  
*j* turn of the year. He further argued that the plaintiff would

have turned his life policy into a paid-up policy at the date <sup>a</sup>  
he surrendered it.

It is true that the bank had not in terms refused to pay any <sup>b</sup>  
premium on 24th November, when exhibit “N” was written  
but that was because the December premium had not in fact  
fallen due, the premium in June, 1961 having been already  
paid. exhibit “E,” plaintiff’s solicitor’s letter to the bank, <sup>c</sup>  
dated 6th November, 1961, shows that some three weeks  
before exhibit “N,” the bank had refused to allow the plain-  
tiff to make any further withdrawals from his account. If the  
bank had allowed the withdrawals, the plaintiff could him- <sup>d</sup>  
self have paid the premiums. In any case, the bank refused to  
pay the December, 1961 premiums when the time came.  
Furthermore, the argument that neither the cashing of the  
bonus nor the surrender of the policy by the plaintiff, could <sup>e</sup>  
be considered as a resulting directly from the breach, be-  
cause there was a possibility that the plaintiff would have  
been insolvent and unable to keep the policy, apart from the  
breach, is objectionable on a number of counts. First, once,  
the breach is conceded, as it had been conceded here, the <sup>f</sup>  
question of a party’s insolvency arising *ex post facto* is le-  
gally irrelevant to the question whether the damage suffered  
is too remote. That question depends on whether the damage  
is:

“such as may fairly and reasonably be considered either arising <sup>g</sup>  
naturally, ie, according to the natural course of things, for such  
breach of contract, or such as may reasonably be supposed to have  
been in the contemplation of both parties, at the time they made  
the contacts, as the possible result of the breach of it.” <sup>h</sup>

Secondly, such an argument would give rise to wide specu-  
lations in which it would be extremely futile for the court to  
engage. It would in this case, for example, necessitate con- <sup>i</sup>  
sideration of (1) what chances the plaintiff had to replenish  
his funds at the bank and how soon that could be done; (2)  
the various possible measures the plaintiff could adopt in  
setting his financial problems, including the payment of the  
policy premiums, and how efficacious they could be and (3) <sup>j</sup>

- a* what number of premiums could be paid by means of the funds then available at the bank, and whether plaintiff could have died before these funds were exhausted, death being one of the events in which the insurance moneys are payable.

*c* For if there is a way of ascertaining that plaintiff's death would in fact take place before his funds at the bank were exhausted in the payment of the premiums a possibility, and so open to speculation then it would be easy to see that the bank's refusal to allow the funds to be so used, up to a point when this contingency would occur, and so make the insurance moneys payable, would rightly be regarded as the direct cause of the plaintiff's loss, where such refusal has compelled the plaintiff to surrender the policy before the occurrence of the said contingency. In my opinion, if speculation in matters such as this is not permissible to the court, equally so is speculation not permissible as to the possibility of the plaintiff becoming insolvent after the funds have been used in paying the premiums. Nor will the law take cognisance of any change wrought in the situation *ex post facto* by either death or insolvency.

*g* The loss, which is recoverable on a breach of contract, depends on the knowledge possessed at the time the contract was made by the party who commits the breach. This knowledge is either *imputed* or *actual*, and it was fully dealt with in a passage from the judgment of Asquith LJ in the *Victoria Laundry* case (*supra*) already quoted. In regard to this knowledge, the operative words are "at the time the contract was made," not knowledge gained *ex post facto*. According to the plaintiff's evidence, which I accept, the standing order to pay premiums was given to the bank in July, 1958. So, the contract of agency came into being in that year. Hence the loss recoverable on a breach of this contract must depend on the knowledge possessed by the bank in that year, the date of the contract, whether it be imputed or actual, and not on their knowledge of events which occurred subsequently.

And all the circumstances relied upon as likely to bring about the insolvency of the plaintiff, eg, the judgment debt in Suit No. C/24/59, and the payment of the balance of the purchase price of two pioneer oil mills bought in 1961 from Western Nigeria Development Corporation, occurred either in 1960 or after that year, that is to say, two or three years after the contract of agency had been made.

As regards the contention that the plaintiff could have turned his life policy into a paid up policy, the test is not whether the plaintiff's act afforded the best solution imaginable, but whether the action taken by him was not a reasonable step to take, and one which might be expected to be taken as a consequence of such a breach of contract as that in the case in hand. The legal position on this point is summarised in two short passages, which I will now quote from the speeches of Lord Warrington of Clyeffe and Lord Macmillan made in the house of Lords in the case of *Banco De Portugal v. Waterlow and Sons Ltd* (1932) A.C. 452 at pages 481 and 506.

Lord Warrington said:

"Moreover, it is well settled that a voluntary act on the part of the injured party does not necessarily break the chain of causation between the wrong which occasioned the voluntary act and the damages. If the voluntary act is one which would be reasonably expected in the ordinary consequence of a breach of contract, it is not a sufficient answer to say that the damage would not have happened but for the plaintiff's voluntary act."

And the Lord Macmillan said:

"I confess I am not disposed to regard with much sympathy the criticism which Messrs Waterlow have directed at the bank's action. Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment—the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticise the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The

- a* law is satisfied if the party placed in a difficult situation by reason of the breach of duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in
- b* breach can suggest that other measures less burdensome to him might have been taken.”

- c* On the authority of the *Banco de Portugal* case above referred to it seems to me that the action taken by the plaintiff in cashing the bonuses and in surrendering the policy was reasonable in the embarrassing circumstances in which he found himself, especially if it remembered that the said action was not the cause of the breach, but is relevant only in
- d* relation to the question of remoteness of damage.

- e* It is further said that the loss was due to the plaintiff’s impecuniosity, and that in law such a loss is not recoverable. And the *Liesbosch* case (*supra*) was cited in support. First, it must be pointed out, it is artificial to talk of the plaintiff impecuniosity, for the plaintiff’s was not impecunious on the relevant date. He had some funds at the Uyo Branch of the bank. Secondly, although it was held in the *Liesbosch* case
- f* (*supra*) that loss due to the party’s impecuniosity was too remote, and, therefore, to be neglected in calculating the damages recoverable, the case of *Huhammad Issa Shakha-had v. Alli* (1947) A.C. 414 shows, however, that there is no rigid rule that damage suffered by a plaintiff, and resulting
- g* from his own impecuniosity is in all cases too remote to be recoverable in an action based on breach of contract. The *Ali* case (*supra*) was discussed by Lord Wright in his speech in *Monarch S.S. Company v. A/B Kalshamns* (*supra*) *ibid* at
- h* page 14, in which he said that damages consequent on impecuniosity were held in that case not to be too remote, because the loss was such as might reasonably be expected to be in the contemplation of the parties as likely to flow from the breach of the obligation undertaken. So also, in
- i* (*Trans Trust v. Danubian Trading Company Ltd* (*supra*) *ibid* at page 977), Lord Denning on this point said:

- j* “It was also said that the damage was the result of the impecuniosity of the sellers and that it was a rule of law that such damage is too remote, I do not think there is any such rule. In the case of a

breach of contract, it depends on whether the damage was reasonably foreseeable or not. In the present case, it clearly was.”

So, even if plaintiff’s loss was in fact due to his impecuniosity, the question whether the loss is recoverable would depend on whether it was such as might reasonably be expected to be in the contemplation of the parties as likely to flow from the breach of the obligation undertaken, and I have already answered this question in the affirmative.

Furthermore, the argument that plaintiff’s loss was due to his impecuniosity leads to the consideration of the second question, namely, whether the loss was caused or aggravated by the failure of the plaintiff to expend money in order to limit same. The bank have not shown (the burden is on them to show) in what respect, if any, the plaintiff has failed to limit his loss. In any case, it is now clear law that the plaintiff is not expected to expend money in order to minimise the damage. As Lewis J, *Jewelowski v. Propp* (1944) 1 A.E.R. 486 at page 484:

“A person cannot be called upon, when he has a claim for damages for fraudulent misrepresentation, to expend money in order to minimise those damages. It seems to me that such a rule would be going very far beyond the rule that a plaintiff has got to minimise his damages.”

The final question concerns the measure of damages recoverable. I have already shown earlier in this judgment that in view of their knowledge of the special circumstances involved in the contract of agency, the bank impliedly undertook to bear any exceptional loss resulting from a breach in those special circumstances. This loss would be the amount of injury, which would ordinarily flow from a breach of contract under those special circumstances so known and communicated. In regard to the life policy, more than two years premiums had been paid before the breach. If the plaintiff had turned it into a paid up policy, as was suggested in argument by learned Counsel for the bank, the policy would have remained in force as a paid up policy for a reduced amount which shall bear such proportion to the original sum



- a* assured as the number of premiums paid bears to the number originally payable under the policy. Now the premium is payable in half yearly instalments, so that the number payable in twenty (20) years is forty (40). The policy was taken out in August, 1955, and the first instalment paid was in December, 1955. In October, 1962, it was surrendered after the instalment of June, 1962, had been paid. In fact, the plaintiff paid 14 instalments as against 40 instalments payable under the policy. But the June, 1962 premium, which was held on deposit at the date of surrendered, was returned in full, and this reduced to thirteen the number of premiums paid. See exhibit "P". hence, if the plaintiff had turned the policy into a paid up policy, the reduced amount to which he would have become entitled would have been £10,000, which was the original sum multiplied by  $13/40$ . This gives the sum of £3,250 leaving a balance of £6,750.
- e*
- To the above sum would be added any reversionary bonus already allotted to the policy. The insurance company made a declaration of bonus for the years 1956 to 1960, exhibit "M," and in accordance with this declaration, reversionary bonuses were allotted to all policies which were entitled to participate, including the plaintiff's life policy. In respect of 1955-1956, the amount of bonus attaching to the policy was £175, and in respect of the years 1956 to 1960 inclusive, amount was £1,075. See exhibit "M." So, if in the five years extending from 1956 to 1960 the total amount of bonus allotted to the policy was £1,075, then the total amount, which would have been allotted in 20 years, would be £1,075 multiplied by  $20/5$ . This gives the sum of £4,300, and works out an average of £215, by  $20/5$  per annum. This average is understandably higher than £175, which was allotted for part of 1955, the year the contract of insurance was concluded. The total bonus allotted was, however, surrendered for cash in April, 1962, in a sum of £750. This step was taken, as has been seen, in order to keep on foot the said policy. And I have already held that the plaintiff's act in cashing the bonus was a reasonable step to take in the circumstances. So, as a result of the breach, his loss, in so far

as the bonuses were concerned, is £4,300, being the reversionary bonus payable on maturity, less £750 actually received. This gives a balance of £3,550. *a*

In regard to the plaintiff's oil mill business, only general damages for loss of business are recoverable, and these I quantify at 100 guineas. *b*

In the circumstances, there will be judgment for the sum of £12,630 being made up as follows:

1. £2,225 being the sum standing to the credit of the plaintiff in his current account with the Bank. *c*
2. £6,750 being special damages representing the difference between £10,000 the sum originally assured, and £3,250 the reduced amount to which the plaintiff would have been entitled if he had turned the policy into a paid up policy. *d*
3. £3,550 being special damages representing the sum £4,300 being the total reversionary on maturity, less £750 being the actual cash for which the total bonus allotted was surrendered in April 1962. *e*
4. £105 being general damages for plaintiff's loss in respect of his business.

Argument on costs

*Oku*: I ask for 1,000 guineas costs made up as follows: *f*

1. Summons fees £51.
2. Witnesses' subpoena £114 but only two witnesses were called.
3. Two Counsel were engaged. *g*
4. Five appearances.

*Dalby*: What plaintiff asks is too high. I offer 10 guineas.

Court: Costs to the plaintiff assessed at 150 guineas.

*a*

## Ikpeazu v. African Continental Bank Limited

*b*

SUPREME COURT OF NIGERIA

ADEMOLA CJN, BRETT, BAIRAMIAN, ONYEAMA, AJEGBO, JJ.S.C

Date of Judgment: 10 MAY 1965

S.C.: 593/64

*c*

*Banking – Overdraft and guarantee, nature thereof*

*Contract – Privity of*

### Facts

*d*

The first defendant now appellant was a customer of the plaintiff now respondent and operated a current account with the respondent Onitsha Branch in the name of Emordi Brothers and was subsequently granted overdraft facilities

*e*

by the respondent. Consequently, upon the default of the defendant in liquidating the overdraft facilities granted to them, the respondent as plaintiff in the lower court instituted this action against the defendant in the High Court of Onitsha claiming the sum of £28,013.19s.10d. being the amount

*f*

owed by the defendants to the respondents Onitsha Branch which sum the defendants failed to pay despite repeated demand for same by the respondents. The action was originally

*g*

against Emordi Brothers (William Emordi) as first defendant and Chuba Ikpeazu as the second defendant.

*h*

The respondent subsequently filed a motion in 1964 to amend the defendants names to read (i) Williams Emordi (carrying on business as Chuba Ikpeazu Emordi Brothers).

*i*

Subsequent to the amendment of the defendants names, Williams Emordi carrying on business as Emordi Brothers, first defendant in this case, wrote a letter dated 12th May, 1964 to the Registrar High Court Onitsha, by which he admitted the claim of the respondent against him and consequently submitted to judgment. The action thereafter

*j*

proceeded against the appellant ie second defendant as the only contesting defendant.

The respondents bank based their claim before the court on the ground: (a) that the appellant was a partner of Emordi Brothers, (b) that he was liable in any case because he guaranteed the overdraft to Emordi Brothers.

The respondent in their statement of claim averred that between 1955 and 1958 the appellant acted as a Managing Director of the said Emordi Brothers and signed a number of cheques with which various sums of money were withdrawn from the respondents Onitsha Branch.

The appellant filed a statement of defence in which he denied ever being a member of Emordi Brothers and also that he was not a party to the loan transaction nor guarantor of any loan, but the appellant admitted that between October, 1957 and May, 1958 he signed a number of cheques as alleged by the bank in the statement of claim but that he did so at the request of the bank with whom Williams Emordi had a dispute at that time. He denied that he signed these cheques as a Managing Director of Emordi Brothers.

The trial judge subsequently found the appellant liable because he guaranteed the overdraft to Emordi Brothers on the basis of a deed under seal (exhibit D) between Williams Emordi representing Emordi Brothers and appellant, and the bank was never a party to the aforesaid deed.

The trial judge equally found the appellant liable for the amount owed as a partner of Emordi Brothers.

The appellant being dissatisfied with the judgment of the trial court appealed against same to the Supreme Court of Nigeria.

**Held –**

1. Generally a contract, including a bank guarantee cannot be enforced by a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue upon it.

- a* 2. That (exhibit D), ie deed under seal executed between-  
William Emordi representing Emordi Brothers and the  
*b* appellant without the bank is involvement cannot be  
construed as guarantee to the bank by the appellant and  
is therefore not sufficient to make the appellant liable on  
it as a guarantor to pay the debt of Emordi Brothers to  
the bank.
- c* 3. That the first and primary duty of a bank solicitor is to  
the bank and it is therefore discreditable for a bank so-  
licitor to prepare a security document like a bank guar-  
antee in a discreditable circumstances which is at  
variance with the interest of the bank.
- d* 4. The bank has not proved on preponderance of evidence  
on which it can rely that the appellant was a partner of  
Emordi Brothers either in fact or by representation to  
make the appellant liable.

*e* **Cases referred to in the judgment**

**Foreign**

- f* *Chesterfield and Midland Silkstone Colliery Co v. Hawking*  
(1865) 3 H. and C. 677  
*Dunlop Pneumatic Tyre Co Ltd v. Selfridge and Co Ltd*  
(1915) A.C. 847  
*Tweddle v. Atkinson* 30 L.J. Q.B. 265

**Counsel**

- g* For the appellant: *Onyuike* (with him *Ofodile*)  
For the Respondent: *Ubezuonu*

**Judgment**

- h* **ADEMOLA CJN:** (*Delivering the judgment of the court*) The  
appellant was the second defendant in an action before the  
High Court of Onitsha which the bank instituted in April,  
1961 claiming the sum of £28,013.19s.10d. “Being the  
*i* amount presently owing by the defendants to the plaintiffs’  
Onitsha Branch.”

The action was originally against

- j* 1. Emodi Brothers (William Emodi).  
2. Chuba Ikpeazu as defendants.

In May, 1964 the bank moved the court *ex parte* to amend the name of the first defendant to read:— *a*

“William Emodi carrying on business as Emodi Brothers.”

On the 11th May, an order was so made; there was also an order for substituted service on the first defendant who will hereinafter be referred to as William Emodi. In a letter dated 12th May, 1964, addressed to the Registrar, High Court, Onitsha, he (Emodi) admitted the claim which he said was “money lent to me by the plaintiffs.” Thus the action proceeded against the present appellant as the only contesting defendant in the case and on the 23rd May, 1964 the bank filed a statement of claim; relevant paragraphs, to which we now refer, are as follows:— *b*

- “2. The defendant reside at Onitsha and at all times material to this action carried or still carry on business in the name of Emodi Brothers. *e*
3. The defendant operated a current account with the plaintiffs at the plaintiffs’ Onitsha Branch in the name of Emodi Brothers and were granted overdraft facilities by the plaintiffs. *f*
4. Between 1955 and 1956 the 1st defendant acted as the Managing Director of the said Emodi Brothers and signed a number of cheques with which various sums of money were withdrawn from the plaintiffs’ Onitsha Branch. The said cheque are hereby pleaded and relied upon. *g*
5. Between 1957 and 1958, the 2nd defendant acted as the Managing Director of the said Emodi Brothers and in that capacity signed a number of cheques with which various sums of money were withdrawn from the plaintiffs’ Onitsha Branch. The said cheques are hereby pleaded and relied upon. *h*
6. Throughout the period of the plaintiffs’ transaction with the defendants, the plaintiffs regularly sent to the defendants’ statements of their account until after the commencement of this action. The defendants’ statement of account as on 28th day of March, 1961, is hereby pleaded and relied on.” *i*

The appellant filed a statement of defence of an inordinate length, but for our purpose it may be summarised thus: that *j*

*a* the appellant was never a member of Emodi Brothers and never had any interest in it. William Emodi, according to the appellant, registered his river transport business in 1952 as

*b* Emodi Brothers; in 1956 he purchase from the Eastern Nigeria Development Corporation a boat for which the Corporation, in 1960, sued to recover the balance of the purchase price. Meanwhile, during the latter part of 1956, William

*c* Emodi bought a second boat for which he borrowed a sum of £14,000 from the bank. He (the appellant) was not a party to the loan, nor was he concerned in the running of the boats. In paragraph 10 of his defence, however, the appellant

*d* admits that between October, 1957 and May, 1958 he signed a number of cheques as alleged by the bank in the statement of claim, but that he did so merely as a go-between, between the bank and William Emodi, and at the request of the bank with whom William Emodi had a dispute at the time. He

*e* denied that he signed these cheques as a managing director of Emodi Brothers.

In paragraphs 11 to 15 of his statement of defence the appellant stated that in 1957 and 1958 he was a Director of the bank and its solicitor at Onitsha, and in about May, 1957 William Emodi came to his office at the request of a representative of the bank, and his accounts were gone into. It was discovered that he (William Emodi) was dealing with other banks to whom he was paying his earnings; the bank's representative thereupon insisted that Emodi should be sued and his boats attached or that he should hand over the second boat to the bank. After a lengthy argument a compromise was reached whereby Emodi was to pay all his earnings into the plaintiffs' bank only; that cheques would be allowed to be drawn for running costs only, plus a monthly allowance to Emodi, and we quote here from paragraph 14 of the appellant's statement of defence. It reads:—

*i* “... that the second defendant (appellant) as the Director and Solicitor of the plaintiffs' bank was to supervise the accounts in order to ensure that all earnings were paid into the account to Emodi

*j* Brothers in plaintiffs' bank and also to ensure that monies drawn

were confined to the running costs as agreed and no further. In order to accomplish this and protect the interest of the plaintiffs' bank, it was agreed that the second defendant (appellant) in his capacity as aforesaid was to draw the cheque himself and check the earnings paid in."

This, the appellant stated, was how he came to sign the cheques for expenditure when the Managing Clerk of Emodi Brothers brought his books to him from time to time. He continued to say in his statement of defence, however, that William Emodi did not live up to the arrangements made on the compromise and when he became dissatisfied with things generally. In May, 1958, Emodi's family and his (appellant's) family had a meeting at which it was decided he (appellant) "should completely hands off" and that William Emodi should be allowed to run his business; and here we quote a portion of paragraph 17 of the appellant's statement of defence:—

"... and in order to safeguard the undertaking of the second defendant (appellant) to the bank, four trustees be appointed to supervise the accounts and after deducting the running costs, should cause the balance of the daily earnings to be paid the plaintiffs' bank to meet the defendant's account."

The bank, according to the appellant, was informed of the decision.

The defence continued to state that nothing was paid into the bank. William Emodi and the trustees quarrelled constantly. He (William Emodi) took the boat to Lagos, where, shortly after, the boat foundered. The appellant maintained that as from May, 1958, when the two families held a meeting, he had nothing more to do with the Emodi Brothers business; he reiterated that he was not concerned, nor was he a party to any loan to Emodi Brothers, and the accounts which the plaintiffs' bank sent to him were directed to Emodi Brothers for whose misfortune he was not liable.



*a* Three days after the filing of the defence, and indeed on the 29th May, 1964, the bank filed a notice of motion for leave to amend the defendants names to read:—

- b* 1. William Emodi  
 2. Chuba Ikpeazu – defendants  
 (carrying on business as Emodi Brothers).

*c* The reason given in the affidavit supporting the notice of motion was that the cheques of Emodi Brothers were signed by the second defendant (the present appellant) as Managing Director of Emodi Brothers. On the 30th June, 1964 an order was made in terms of the prayer to amend the names of the defendants.

*d* The bank filed an amended statement of claim, but it adds nothing more to the claim save that the title was amended to show the defendants as carrying on business as Emodi Brothers. The statement of defence was not amended. The bank had alleged from the start that the appellant was a member of Emodi Brothers. When the trial began on the 30th July, 1964, the bank sought and was given leave to amend paragraph 5 of the statement of claim. The following words were added:—

*f* “Besides, the second defendant guaranteed the overdrafts to the said Emodi Brothers.”

*g* It is difficult to see why the amendment was made but it gives the bank a second ground on which to base its claim, which may be summarised as follows:—

- (*a*) That the appellant was a partner of Emodi Brothers, and,  
*h* (*b*) That he was liable in any case because he guaranteed the overdraft to Emodi Brothers.

*i* It became apparent during the hearing of the appeal that Counsel for the bank relied for this second claim on the deed under seal (exhibit D), which we now proceed to consider, since the learned trial Judge based his judgment in favour of the bank primarily on this document as a guarantee. An examination of the deed (exhibit D) reveals that it is a document between William Emodi representing Emodi Brothers and the appellant only: the bank was never a party

to it. In the deed, William Emodi, as transferor, renounces in favour of the transferee (the appellant): a

“and transfers the same to the latter all his powers as Managing Director of the before mentioned business, including the collection and disbursement of revenue and the control of staff and debt owing to the African Continental Bank which the transferee (appellant) guaranteed is liquidated.” b

Earlier, one of the recitals in the deed states as follows:— c  
“AND WHEREAS the transferee has guaranteed the before-mentioned loan.”

This deed was prepared by the appellant who was Solicitor to the bank to whom he gave a copy, but there is no evidence on whether he said anything to the bank, or what the bank understood by the deed. To William Emodi the appellant lied, because the recital represented the deed (exhibit D) as if he had guaranteed him with the bank and got him to hand over his river-craft etc., to him to manage as the director. As has been stated earlier, the bank was never made a party to the deed. d

What advantages, if any, can the bank gain from the deed, exhibit D? Can the bank sue on it as a guarantee? Not being a party to it we are of the view that the bank cannot acquire any rights under the deed. Generally a contract cannot be enforced by a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue upon it – *Tweddle v. Atkinson* 30 L.J. Q.B. 265. This view was supported by the House of Lord in *Dunlop Pneumatic Tyre Co Ltd v. Selfridge and Co Ltd* (1915) A.C. 847. f

The position is stronger with regard to contracts under seal: unless a person is named as a party to the deed, he cannot maintain an action upon it – *Chesterfield and Midland Silkstone Colliery Co v. Hawking* (1865) 3 H. and C. The only exemption to this rule relates to indentures made about land which was introduced by section 5 of the Real Property Act, 1845 to enable a stranger to a deed to take advantage of a benefit to him in the deed. g

i  
j

*a* Counsel for the bank agreed that the bank was not a party to the document (exhibit D) and cannot sue on it, but he said that this is so at common law. In equity, he submitted that as  
*b* the document is a compromise on the theory of trusteeship. Counsel has not referred to any case for likening the bank to a *cestui que* trust, nor explained how the recital of a representation made by the appellant to William Emodi, that he  
*c* had guaranteed the debt, can be read as the contract of a guarantee given by the appellant to the bank; and we do not know of any decided case which supports his submission. We therefore do not see by what stretch of imagination the  
*d* bank could rely on exhibit D as a guarantee by the appellant in its favour, to use the recital in the deed as a basis for making a claim based on guarantee.

It is our duty, however, to refer to the dual role played by  
*e* the appellant in this case. In the first place, in his position as solicitor to the bank, his first duty was to the bank, for whose sake he said he undertook to control the business of Emodi Brothers and took over the rivercraft, and he sent the  
*f* bank the document (exhibit D) to let the bank know what arrangements he had made with Emodi. In exhibit D he recited that he had guaranteed the debt to the bank; in his evidence he said he never guaranteed it; so he was telling Emodi a lie in that recital, and we can only infer that he told  
*g* that lie with a view to inducing Emodi to hand over his rivercraft and the management of his business. Later, apparently without telling the bank, in consequence of the meeting which the appellant's family had with Emodi's family, he  
*h* handed everything back to Emodi. It is clearly not an enviable position for which a solicitor can receive any commendation. It is saying the least that his behaviour is discreditable as a solicitor. We cannot, however, agree with the learned Judge  
*i* that this document can be construed as a guarantee to the bank by the appellant, and we are unable to find him liable on it as a guarantee to pay the debt of Emodi Brother.

*j* We now come to the first part of the claim, namely that the appellant was a partner of Emodi Brothers, and thus liable as

a  
a partner. In this regard, the learned Judge, after reviewing  
the evidence before him, said as follows:—

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c  
“There is no doubt that the second defendant (appellant) was not  
officially registered as the partner in Emodi Brothers as could be  
seen by the documents put in evidence . . . I am of the opinion that  
if even in actual fact the second defendant was not a partner in  
Emodi Brothers, he was doing all this in order to safeguard the  
loan which he has got for Emodi Brothers by the representation  
that he was a partner . . . and I believe that the plaintiffs’ company  
(the Bank) acted at least on his representation that he was a partner.”

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For this, the learned Judge relied very much on the evidence  
of the bank’s accounts clerk, Lawrence Okanime (first witness  
for the plaintiffs), whose evidence was to the effect that  
he was present in the office of the bank Manager at Onitsha  
in November, 1955 when the appellant and William Emodi  
came to see him (the manager) and asked for overdraft facilities  
for Emodi Brothers. The request was put in writing.  
At that time, according to this witness, the appellant stated  
that he was a partner in Emodi Brothers. The witness continued  
that the bank manager, as it was his duty to do when a large  
overdraft was to be made, phoned to the headquarters of the bank  
in Lagos, and eventually the headquarters handled the matter.  
He said two large overdrafts of £2,000 and £17,000 respectively  
were made at different times.

h  
There was no other witness or any other evidence on this  
point of partnership; the learned Judge said he believed the  
evidence of the witness.

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j  
This he is entitled to do; but it is our duty to examine the  
whole circumstances of the case. There are also two pieces of  
evidence on which the bank’s Counsel relied on the matter of  
partnership. He referred us to the fact that the appellant was  
writing and signing letters as Managing Director of Emodi  
Brothers. The second reference is something similar. In the  
latter, exhibit J written by the appellant to Mr Ibeziako, solicitor  
to the bank of West Africa, who was claiming a debt

- a* from Emodi Brothers on behalf of his client, the appellant wrote as follows:–
- b* “... the boats are being repaired at considerable expense and I have no doubt that as soon as they begin to ply, that our account with your clients will be made good. In the circumstances I have to ask you to hold on till the end of March when I think we can easily pay the amount.”
- c* The reason for the appellant identifying himself with Emodi Brothers in this way has been sufficiently dealt with in this judgment and the court cannot, on the evidence before it, presume partnership.
- d* It remains for us to deal with the evidence of the bank clerk Okanime (first witness for the plaintiffs) which the learned Judge believed. The witness stated that he was present when the conversation about the overdraft took place in 1955 between the appellant and the Bank Manager, Mr Chuike. It is strange that the bank did not call Mr Chuike to give evidence, nor was it explained why he was not called.
- e* Again, Mr Aniemana, who was the bank manager in 1957 when the deed, exhibit D, was given, was not called to give evidence, although there is evidence on record that he was present in Court at the hearing. The bank relies solely on the evidence of Okanime, the bank clerk, as to events up to nine years previously, and there was no attempt made to produce any contemporaneous record of any of the transactions. He (the bank clerk), stated in his evidence that the overdraft in the case, being a heavy one, had to be approved by the headquarters in Lagos. He said there was a telephone conversation between the manager at Onitsha and the Head Office in Lagos, in the presence of the appellant and William Emodi about the overdraft, and that both of them had submitted a letter of application for the overdraft in their joint names. It is strange that this letter was not produced in Court. In effect the bank clerk, who was not a principal party to the transaction, was the only witness called to testify to the representation alleged to have been made by the appellant
- f*
- g*
- h*
- i*
- j*

that he was a partner in Emodi Brothers. All the principal parties with whom the appellant dealt in the transactions, and the document by which he applied for the overdraft, were completely left out. It is odd to claim that the appellant guaranteed the debt of a firm for which he was liable as a partner, neither has the bank proved on the balance of the evidence on which it can rely that he was a partner either in fact or by representation.

Thus, the two grounds on which the bank stakes its claim against the appellant failed. We are however bound to say how much we deprecate the appellant's conduct as a solicitor in this matter.

For reasons we have set out earlier, however, we must allow the appeal and the following order is made. That the appeal of Chuba Ikpeazu from the judgment of the High Court of Eastern Nigeria dated 26th October, 1964 in the Suit No. O/48/1961 (Onitsha High Court) is allowed and the judgment against him is set aside; no order as to costs in this Court or in the court below.

*Appeal allowed, judgment of the lower court set aside.*

*a*

## African Continental Bank Limited v. Wogu and others

*b*

HIGH COURT OF PORT HARCOURT

PALMER J

Date of Judgment: 9 JUNE 1965

Suit No.: P/35/64

*c*

*Guarantee – Banker not telling guarantors of standing debt of customers – Whether contract vitiated thereby*

*d*

*Guarantee – Banker not telling guarantors that account already overdrawn above limit of guarantee – Effect*

*Guarantee – Surety – Demand to be made before action taken against*

*e* **Facts**

*f* The first defendant was a customer of the plaintiff bank and was sued in respect of his overdraft which was £11,278.7s.10d. at the time of taking action. He admitted his liability and judgment was entered against him. The second and third defendants are sued on the strength of the guarantee admittedly signed by them on the 19th April, 1961, but their liability is limited under the terms of the document to *g* £10,000. Neither of these defendants denies signing the guarantee. They both admit that they knew the nature of the document they were signing.

*h*

The case of these two defendants is in short this. They say that they were asked to sign this guarantee on the understanding that the first defendant wanted money to finance his produce business. The matter was discussed with the bank manager and they were given to understand that the ad-

*i*

advances required would be in the neighbourhood of £800 or so. The limit was not filled in on the form which they signed, but they thought it would be filled in for some amount much smaller than the £10,000 which was in fact

*j*

subsequently inserted – “without their knowledge”. But the

fact which was entirely concealed from them was that the first defendant was already overdrawn to the extent of £11,640.15s.8d. They do not assert that any misstatement was made about this, but simply that they were not told and did not ask. They say that the whole matter was put to them in such a way that they naturally assumed that the first defendant had not previously had an account with the bank, or at any rate had not had an overdraft, and they were simply guaranteeing future advances which would probably not exceed £800 at a time. They would never have signed if they had known that the first defendant was overdrawn to such an extent already.

**Held –**

1. It is well settled that a guarantee is not a contract *uber-rimae fidei* and that there is no universal obligation on the part of the creditor to make disclosure of facts to the surety.
2. It is not a matter of presumption that an account stands clear at the time the guarantee is given and it is for the surety to make enquiries.
3. This might be considered as the criterion whether the disclosure ought to be made voluntarily, namely whether there is anything that might not naturally be expected to take place between the parties who are concerned in the transaction, that is whether there be a contract between the debtor and creditor to the effect that his position shall be different from that which the surety might naturally expect.
4. “It must in every case depend on the nature of the transaction whether the fact not disclosed is such that it is impliedly represented not to exist, and that fact must be generally a question of fact for the jury.”
5. There is no presumption that an account stands clear at the time of the guarantee, but that there would normally



- a* be a presumption that the account is not already over-drawn to an extent greater than the limit of the guarantee.
- b* 6. In the present case, having regard to the general nature of the transaction, I am satisfied that the sureties could not naturally have expected to find that this was so and that it was therefore a matter which ought to have been disclosed voluntarily by the creditor without enquiry being made.
- c* 7. As I have held on the evidence that it was not so disclosed, the guarantee for an overdraft already granted by concealing that fact. That would not have been fatal if the overdraft had been a small one, well within the limit of the guarantee, as the sureties might reasonably have expected that. What they could not naturally expect was that there was already a very large overdraft, substantially larger than the limit of the guarantee. If the overdraft had been increased they might have been liable for the excess, but that of course is not the case; it was actually reduced.
- d*
- e*
- f* 8. A guarantee is a contract *strictissimi juris* and to make the surety liable the terms must be strictly complied with. Where the sureties have undertaken to pay on receipt of a demand in writing, there must be clear proof of such demand. In the case of the third defendant, there is
- g* none.

### Cases referred to in the judgment

#### Foreign

- h* *Bacon v. Chesney* (1816) 1 Stark 192  
*Cooper v. National Provincial Bank Ltd* (1946) K.B. 1  
*Hamilton v. Watson* (1845) 12 C.L. and Fin. 109  
*Kirby v. Duke of Malborough* (1813) 2 M.Q.S. 18
- i* *Lee v. Jones* (1864) 17 C.B. (H.S.) 503

#### Counsel

For the plaintiff: *Douglas*

- j* For the second and third defendant: *Obiora*

**Judgment**

**PALMER J:** The first defendant was a customer of the plaintiff bank and was sued in respect of his overdraft which was £11,278.7s.10d at the time of taking action. He admitted his liability and judgment was entered against him. The second and third defendants are sued on the strength of the guarantee admittedly signed by them on the 19th April, 1961, but their liability is limited under the terms of the document to £10,000. Neither of these defendants denies signing the guarantee. They both admit that they had an opportunity of reading it, although they say that they merely glanced through it before signing. The second defendant is of course a well educated man of affairs and the third, an engine driver, is undoubtedly literate, and has a good knowledge of English. The defence of *non est factum* is not raised and could not have been.

The case of these two defendants is in short this. They say that they were asked to sign this guarantee on the understanding that the first defendant wanted money to finance his produce business. The matter was discussed with the bank manager and they were given to understand that the advances required would be in the neighbourhood of £800 or so. The limit was not filled in on the form which they signed, but they thought it would be filled in for some amount smaller than the £10,000 which was in fact subsequently inserted – without their knowledge. But the fact which was entirely concealed from them was that the first defendant was already overdrawn to the extent of £11,640.15s.8d. They do not assert that any misstatement was made about this, but simply that they were not told and did not ask. They say that the whole matter was put to them in such a way that they naturally assumed that the first defendant had not previously had an account with the bank, or at any rate had not had an overdraft, and they were simply guaranteeing future advances which would probably not exceed £800 at a time. They would never have signed if they

- a* had known that the first defendant was overdrawn to such an extent already.
- b* Unfortunately the manager who signed on behalf of the bank has died and the only evidence before me is that of the defendants which I must naturally treat with some caution. On the question of the omission of the words “Ten thousand pounds” I feel that I cannot accept their evidence. After all
- c* they say themselves that they did not read the document carefully, but only glanced through it. It is a long printed form and I doubt whether at a glance it would be possible to see whether a space had been left blank or filled in with type
- d* written words. Undoubtedly the agreement between the bank and the first defendant was for a limit of £10,000 and although each advance was expected to be for about £800, several advances of that amount might have been made
- e* before there was a repayment. £10,000 was therefore quite a reasonable limit. But even if the words had not been filled in, I cannot see how that helps the defendants, because if the amount of the limit was left blank then they were guarantee-
- f* ing an unlimited amount. On this point therefore, I must find in favour of the plaintiff.

- The real question at issue is whether the defendants were ever told that the first defendant was already overdrawn by
- g* over £11,000 at the time they signed this guarantee for £10,000. All three defendants have given evidence to say that they were not. Of course I place no reliance on the first defendant; if he failed to reveal the fact that he was guilty of
- h* fraud. But I was on the whole favourably impressed by the other defendants, especially the second. In the circumstances they would without fear of contradiction have said that they were actually misinformed by the manager and where
- i* £11,000 is at stake I have no doubt that many witnesses would not have hesitated to say so. But the defendants did not say this; they simply say that the manager was silent about the fact and that they failed to ask about it, although
- j* they say that the whole nature of the discussion led them to

suppose that they were guaranteeing future advances not an existing overdraft which exceeded the limit of the guarantee. On this point I accept the evidence of the second and third defendants; they were not told of the existing debt.

The legal effect of this non-disclosure has to be considered. It is well settled that a guarantee is not a contract *uber-rimae fidei* and that there is no universal obligation on the part of the creditor to make disclosure of facts to the surety. In *Cooper v. National Provincial Bank Ltd* (1946) K.B. 1, it was held that a guarantee could not be avoided although the creditor bank had failed to disclose that the debtor's husband, an undischarged bankrupt, had authority to withdraw on the account and that there had been irregularities in the operation of the account as cheques had been drawn and payment stopped. It is not a matter of presumption that an account stands clear at the time the guarantee is given and it is for the surety to make enquiries – *Kirby v. Duke of Malborough* (1813) 2 M.Q.S. and section 18. On the other hand, as Lord Campbell said in *Hamilton v. Watson* (1845) 12 C.L. and Fin. 109.

“I should think that this might be considered as the criterion whether the disclosure ought to be made voluntarily, namely whether there is anything that might not naturally be expected to take place between the parties who are concerned in the transaction, that is, whether there be a contract between the debtor and the creditor to the effect that his position shall be different from that which the surety might naturally expect . . .”

In *Lee v. Jones* (1864) 17 C.B. (N.S.) 503, Lord Blackburn said:—

“It must in every case depend on the nature of the transaction whether the fact not disclosed is such that it is impliedly represented not to exist, and that fact must be generally a question of fact for the Jury.”

In this case therefore I have to decide, as a Jury would decide, whether there was anything between the parties that would not naturally be expected, anything that is to say that a surety would not expect. Now the sureties in this case might

- a* naturally have expected that the first defendant had already opened an account with the bank. They might naturally have expected that he had already overdrawn that account to some extent. If they made no enquiries they took the risk. But
- b* could they naturally have expected that a customer applying for an overdraft of £10,000 was already overdrawn £11,640.16s.8d? It meant in effect that they were not helping
- c* him obtain a future overdraft, or to increase an existing overdraft; they were simply guaranteeing part of an overdraft already incurred. There is no presumption that an account stands clear at the time of the guarantee, but I feel that
- d* there would normally be a presumption that the account is not already overdrawn to an extent greater than the limits of the guarantee. In the present case having regard to the general nature of the transaction I am satisfied that the sureties could not naturally have expected to find that this was so
- e* and that it was therefore a matter which ought to have been disclosed voluntarily by the creditor without enquiry being made. As I have held on the evidence that it was not so disclosed, the guarantee for an overdraft already granted by
- f* concealing that fact. That would not have been fatal if the overdraft had been a small one well within the limit of guarantee, as the sureties might reasonably have expected that. What they could not naturally expect was that there was
- g* already a very large overdraft, substantially larger than the limit of the guarantee. If the overdraft had been increased they might have been liable for the excess, but that of course is not the case; it was actually reduced.
- h* In the case of the third defendant, another difficulty stands in the way of the plaintiff. The guarantee provides that the sureties on receipt of a demand in writing shall pay the debt of the first defendant. There is no admission in the pleadings
- i* that any such demand was made. The second defendant has admitted in evidence that he received a written demand, but the third has refused to make any such admission and there is no evidence on the part of the plaintiff to show that any written demand was delivered to him. I may doubt whether

the third defendant was speaking the truth on this point, but that does not create positive evidence of a written demand. The guarantee is a contract *strictissimi juris* and to make the surety liable, the terms must be strictly complied with. Where the sureties have undertaken to pay on receipt of a demand in writing, there must be clear proof of such demand. In the case of the third defendant, there is none. *Bacon v. Chesney* (1816) 1 Stark 192.

The claim against the second and third defendants is therefore dismissed. In case of an appeal, I would say that if I had found for the plaintiff, the judgment would have been limited to £10,000 against the two defendants.

Costs of 20 guineas (inclusive) to second and third defendants.

Claim against the second and third defendants dismissed.

*a*

**Adereti and another v. Attorney-General,  
Western Nigeria**

*b*

SUPREME COURT OF NIGERIA

ADEMOLA CJN, ONYEAMA, AJEGBO JJSC

Date of Judgment: 7 JULY 1965

S.C.:459/64

*c*

*Banking – Overdraft – Unauthorised grant by bank manager does not amount to stealing in the absence of fraud – Section 324(2)(f) and section 329 of the Criminal Code Cap 28 Laws of Western Nigeria (1959) – Customer who receives same not liable for stealing in the absence of fraud*

*d*

*Criminal law and procedure – Conspiracy to steal must be established to sustain charge for stealing against two persons – Section 331 and section 443 of the Criminal Code*

*e*

*Cap 28 Laws of Western Nigeria 1959*

**Facts**

*f* The appellants were convicted on two counts, namely, conspiracy to steal the sum of £8,631 and stealing of the said amount contrary to sections 443 and 331 respectively of the Criminal Code Cap 28 of the Laws of Western Nigeria, 1959.

*g*

The first appellant who was a general manager of a bank granted overdraft to the second appellant, a customer of the bank for many years, contrary to a directive from the bank's headquarters prohibiting all managers from granting over-

*h*

draft to customers and forbidding them to allow customers to draw money on uncleared effects.

*i* The trial Judge convicted the appellants on the ground that any bank manager who gave an overdraft stole the money of the bank, unless he had the prior authority of his directors to give out the amount on that occasion or on any future occasion for which he had their approval.

*j* He also held that any customer who drew a cheque for an overdraft, or who paid in a cheque that needed to be cleared

and drew another for payment before the effects of the one <sup>a</sup>  
he had paid in were cleared, converted that amount to his  
own use even if he had the intent of repaying it later.

Dissatisfied, the appellants appealed to the Supreme Court. <sup>b</sup>

**Held –**

1. That the essence of stealing is that there must be a taking <sup>c</sup>  
of the property against the will of the owner. That the  
manager of a bank has a general authority to deal with  
the bank's money and in the absence of fraud, cannot be <sup>d</sup>  
said to have stolen his employer's money.
2. Therefore, interpretation by the trial judge of section <sup>e</sup>  
324(2)(f) and section 329 of the Criminal Code of West-  
ern Nigeria to mean that a bank manager who gives an  
overdraft without previous authorisation to do so com-  
mits an offence of fraudulently converting the amount so  
given is unacceptable.
3. That a client (customer) who receives the overdraft or <sup>f</sup>  
who is allowed to make withdrawal on an uncleared  
cheque in the absence of fraud cannot be said to be guilty  
of converting the money to his own use under the Crimi- <sup>g</sup>  
nal Code.
4. That there was no evidence to show that the facility to <sup>h</sup>  
draw on uncleared cheque was granted in furtherance of  
a conspiracy between the two appellants to defraud the  
bank. In the absence of such agreement being estab-  
lished they cannot be charged for stealing in respect of  
the overdraft which the bank gave. <sup>i</sup>

***Per Curiam***

“The taking of an overdraft from a bank, even in breach of instruc-  
tions, is no more than accepting a loan, it cannot be stealing – *R v.* <sup>j</sup>  
*Prince II*, Cox C.C. 193.”



**a Cases referred to in the judgment**

**Foreign**

- b** *Cuthbert v. Roberts Lubbock and Company* (1909) 2 Ch.D. 226  
*R v. Prince II*, Cox C.C. 193

**Nigerian statute referred to in the judgment**

- c** Criminal Code Cap 28 Laws of Western Nigeria, 1959, sections 324(2)(f), section 329, section 331, section 443

**Counsel**

For the first appellant: *Odunlade*

- d** For the second appellant: *Ademola*  
For the Respondent: *Sinai, Senior State Counsel*

**Judgment**

- e ADEMOLA CJN:** The appellants were convicted in the High Court at Ibadan in Western Nigeria on two counts namely:
- f** 1. Conspiracy to steal the sum of £8,631 contrary to section 443 of the Criminal Code Cap 28 of the Laws of Western Nigeria, 1959, and
  - g** 2. Stealing the amount of £8,631 the property of the National Bank of Nigeria, contrary to section 331 of the Criminal Code Cap 28 of the Laws of Western Nigeria, 1959.
- h** The first appellant, at the material time to the charge that is to say, between 30th June, 1960, and 30th July, 1960, was the Manager of the National Bank at Ibadan, and had completed at that time 20 years service with the bank. The second appellant was a customer of the said bank, and was carrying on business as a trader at Ibadan.
- The prosecution's case was based on a directive which was a circular issued in 1956 from the bank's headquarters in
- i** Lagos prohibiting all managers from granting overdrafts to customers, and also forbidding them to allow customers to draw money on uncleared effects. It would appear that in the months of June and July, 1960, the first appellant, as the Manager of the Bank at Ibadan allowed the second appellant,
- j** a customer of the bank to overdraw his account to the tune of

£8,631. This was made up of monies he was allowed to draw at different times before the cheques of other banks paid in by him were cleared with those banks. During the period, the second appellant paid in cheques of other banks 24 times and on each occasion he was allowed by the first appellant to draw on the cheque before the cheque was cleared. All National Bank cheques issued by the second appellant in the course of business and paid into the Bank of West Africa, and which later came to the National Bank for clearance, were at the instance of the first appellant debited to the second appellant's account in the normal way.

The total loss to the bank, according to Mr Dawodu, the auditor to the bank who audited the account in June and July, 1961, was £6,536, which represents overdraft and interest. As the charge before the court was for stealing an amount of £8,631, we can only assume that this figure represents the total amount of the overdraft on 30th July, 1960, and that the sum of £2,095 had been repaid before the check by the auditor to which we have referred.

The judgment of the learned trial Judge was attacked mainly on misdirection. Five instances of misdirection were referred to but for our purpose it will be enough to mention three of the five:

- “(b) If this is done, the position will be that the first accused took the said sum of money from the owners (ie, the National Bank of Nigeria, Ibadan) by drawing cheques on the bank, and converting it to his own use, with intent of repaying it at some future time.
- (d) It is true that the defence has been able to establish through one of the prosecution witnesses, Tajudeen Onigbanjo (eighth prosecution witness) who is a graduate of the Institute of Bankers, that in normal banking practice the manager of a bank has a discretion whether or not to allow any customer to draw upon uncleared effects or to grant him overdrafts, but as I interpret the provisions of section 324(2)(f) of the Criminal Code, read along with section 329 thereof, there is an absolute prohibition in law even for a bank manager to part with the money of the bank to a customer who may intend at some future time to repay it, and the only way he can escape criminal liability for the

- a* fraudulent conversion of the sum, and therefore for stealing it is to obtain the prior sanction of the authorities of the bank for such transactions.
- b* (e) Even without the instructions in exhibit '1,' I hold as a matter of law that if any manager of the National Bank or any other bank for that matter, parts with the bank's money to a customer who may wish to repay it at some future time without the prior sanction of his authorities, he will be
- c* guilty of stealing."

From the above and other instances in the judgment the main burden of the learned Judge's statement of the law in his judgment is as follows (1) any bank manager who gives an overdraft steals the money of the bank, unless he has the prior authority of his directors to give out the amount on that occasion or on any such future occasion for which he had their sanction; and (2) any customer who draws a cheque for an overdraft, or who paid in a cheque and drew another for payment before the effects of the one he paid in were cleared, converted that amount to his own use, though he might have had the intent of repaying it at a future date.

*f* The question in this appeal, therefore, is whether the learned trial Judge was right in his interpretation of section 324(2)(f) of the Criminal Code of Western Nigeria, that a bank manager who gives an overdraft to a customer without the previous approval of his directors steals the bank's money; and also that the bank's customer who draws a cheque for an overdraft without the previous approval of the directors and gets the money, steals that money.

*h* We find it difficult to accept the proposition of law propounded by the learned trial Judge in this matter. The essence of stealing is that there must be a taking of the property against the will of the owner. The manager of a bank has a general authority to deal with the bank's money, and it is difficult to see in the absence of fraud on his part, how he can be said to have stolen his employer's money merely because he parts with money to a bank's client whose funds are low. The same applies to the client who, in

the absence of fraud, receives an overdraft; we are unable to agree that he is guilty of theft. If, however, the cashier has limited authority about parting with the bank's money, the giving of credit to a customer of the bank does not in the absence of fraudulent intent, in our view, amount to stealing the bank's money.

The taking of an overdraft from a bank, even in breach of instructions, is no more than accepting a loan: it cannot be stealing *R v. Prince II*, Cox C.C. 193. In *Cuthbert v. Roberts Lubbock and Company* (1909) 2 Ch.D. 226, it was held that when a client paid a cheque to his banker and drew another for payment before the effects of the one he paid was cleared, he was only asking the bank for a loan.

The essence of the charge before the learned trial Judge was that the two men (appellants) the bank manager and the client had conspired together to defraud the bank, and that they both defrauded the bank by stealing the sum of £8,631 by means of asking for and the giving of overdrafts. In his consideration of the case the learned Judge did not deal with the charge of conspiracy, the absence of which, in our view, renders the case of stealing by both appellants nebulous. For if there was no agreement between the bank manager (first appellant) and the client (second appellant) to defraud the bank, clearly they cannot be charged with stealing in respect of the overdrafts which the bank gave.

There was no scintilla of evidence proving conspiracy; on the contrary the evidence showed the opposite. The second appellant had been a customer of that branch of the bank before the first appellant became the manager in 1959. His account from 1957 to 1959 showed credit balances throughout. Early in 1959 he was allowed to draw on uncleared effects by the previous Manager, Mr Adebisi, whom the first appellant succeeded in April of that year. In May, 1960, the second appellant paid into his account at the bank a sum of £41,500 in all, he, however, made a withdrawal of about one thousand pounds over that figure during that month. There was no

- a* evidence to show that the facility to draw on uncleared cheques was granted in furtherance of a conspiracy between the two appellants to defraud the bank. So much for the learned  
*b* Judge's failure to consider the count of conspiracy.

- With regard to the count of stealing, we find it difficult to accept the learned trial Judge's interpretation of sections 324(2)(f) and 329 of the Criminal Code of Western Nigeria  
*c* in so far as they relate to the matter in hand; namely that a bank manager who gives an overdraft to a customer, unless there is a previous authorisation to do so, commits an offence of fraudulently converting the amount so given;  
*d* equally so, we are not ready to subscribe to the view that the client who receives the overdraft, or who was allowed to make a withdrawal on an uncleared cheque, is guilty of converting the money to his own use under the Criminal  
*e* Code. We think the learned trial Judge clearly misdirected himself as to what the law is on this matter. The misdirections are of such a grave nature that, apart from other considerations in the case which we pointed out earlier, his  
*f* judgment cannot be allowed to stand. On the view of the law taken by the learned trial Judge, one wonders how any bank can carry on business.

*Appeal allowed.*

## Obaseki v. African Continental Bank Limited

SUPREME COURT OF NIGERIA

BAIRAMIAN, ONYEAMA, AJEGBO JJSC

Date of Judgment: 17 NOVEMBER 1965

S.C.: 538/1963

*Banking – Security for banker’s advances – Auction of security by banker – Auction sale subject to the approval of the banker – Refusal to approve Auction sale because notice of proposed sale of mortgage property was not served on customer – Whether condition requiring approval of banker limited to “purchaser” or “price” – Banker’s staff approval of sale of auction property – Whether such approval is binding on banker – Authority recognised to execute conveyance on behalf of banker – How such authority could be ascertained by the public*

### Facts

A branch manager of the defendant/respondent instructed the auctioneer to give notice of sale and sell a mortgaged property in favour of the bank with a condition that “the highest bidder shall be the purchaser, subject to approval of the mortgagees.”

The plaintiff/appellant emerged as the highest bidder and was aware of the condition of sale before the auction. The auctioneer took the plaintiff/appellant to the office of the branch manager and he issued his cheque for the auction price in favour of the defendant/respondent. The appellant bank paid the money into a suspense account and the auctioneer gave him a receipt for the purchase price. The branch manager gave the plaintiff/appellant the documents relating to the house and requested him to prepare and forward a conveyance for the execution of the respondent bank. When the branch manager received the conveyance from the plaintiff/appellant, he forwarded same with the documents of title to the Head Office, for execution.

- a* However, the Board of directors of the respondent bank refused to execute the conveyance in favour of the plaintiff/appellant when they discovered that no notice of sale was served on the mortgagor before the sale. When the
- b* Board Secretary wrote to inform the appellant about the decision of the Board, the appellant sued the respondent and the auctioneer for specific performance and damages on the ground that the bank refused to execute a conveyance. The
- c* High Court dismissed the suit and the plaintiff appealed to the Supreme Court contending that “approval of the purchaser” as stated in the auction notice meant no more than “approval of the purchase or the price.” He urged the court
- d* to grant his request since the bank did not object to either the purchaser or the price. He also argued that since the bank manager apparently approved the sale on behalf of the respondent, the manager’s approval was binding on the bank.
- e* The respondent argued that it was not bound by the decision of its manager since its articles of Association only authorised its Board of Directors to authorise and execute the conveyance.
- f* **Held –**
- g* 1. That since the auction notice stated that “the highest bidder shall be the purchaser, subject to approval of the mortgagees” the auction sale to the highest bidder is not binding until it is approved by the mortgagee and the condition cannot be restricted to approval of the purchaser or the price.
- h* 2. The respondent could not be compelled to execute the Conveyance since its Board of Directors, which was the appropriate authority, refused to approve the sale.
- i* 3. In view of the fact that the appellant was deemed to be acquainted with the respondent’s registered Articles of Association, he was taken to have known that the manager exceeded his actual authority when he apparently approved the sale on behalf of the respondent.
- j* 4. The respondent was not bound by the manager’s apparent approval of the sale since such approval could only be granted by its Board of Directors.

## Cases referred to in the judgment

*a*

### *Foreign*

*Balfour v. Ernest* (1859) 5 C.B. (N.S.) 601, 141 E.R. 242

*b*

*Ernest v. Nicholls* (1857) 6 N.L. Cos 401

*Mahoney v. East Holyford Mining Co* (1875) L.R. 7 N.L. 869 at 893

### Counsel

*c*

For the appellant: *Marke*

For the respondent: *Okafor*

*d*

## Judgment

**BAIRAMIAN JSC:** (*Delivering the judgment of the court*)

The plaintiff (above appellant) sued the bank and the auctioneer who conducted the sale on the bank's behalf, for specific performance and damages on the ground that the bank refused to execute a conveyance; the High Court dismissed his suit, and he has appealed.

*f*

The bank had a manager at its Yaba Branch, who asked the auctioneer to give notice of sale and sell a house mortgaged to the bank with (among other conditions of sale) a condition that:—

*g*

“The highest bidder shall be the purchaser, subject to approval of the mortgagees.”

That condition was known to the plaintiff at the auction. He was the highest bidder, and some days later he was taken by the auctioneer to the branch manager, who asked him to give a crossed cheque for the price to the auctioneer; he did so, and the auctioneer gave him a receipt for the purchase price: (the money found its way into the bank). The manager gave the plaintiff the documents relating to the house and asked him to prepare a conveyance; he did so through his solicitor, and the manager sent it with the documents to the head office. The solicitor to the board of directors wrote on 5th January, 1960 to the manager requesting him to ask the

*h*

*i*

*j*



*a* plaintiff to make space for the signature of two directors and  
the secretary in a certain manner, and went on to say that he  
*b* would like to have the original deed of mortgage or a certi-  
fied copy, the copy of notice served on the mortgagor before  
the sale, and a statement of when and how the notice was  
served, or if the sale was made by order of court, then a copy  
*c* of the order. It came to light that no notice of sale had been  
given; and when the board of directors met, they did not  
approve the sale owing to want of notice to the mortgagor.  
Their secretary wrote to the plaintiff on 5th May, 1960 to  
inform him of that, and added that the board decided that  
*d* proper notice should be given to the mortgagor, and if he did  
not pay the house would be sold to the plaintiff at the price  
he had offered. Thereafter the plaintiff sued both the bank  
and the auctioneer. In fact he had no complaint to make  
*e* against the auctioneer and in this appeal nothing was said  
about his being liable. The dispute was and is with the bank.

A little must be said on the intermediate correspondence.  
The plaintiff's solicitor wrote on 19th January, 1960 to the  
*f* branch manager asking him about the execution of the con-  
veyance; he wrote again on the 26th to the manager to say  
that if he did not execute the conveyance, proceedings  
would be taken against the bank. The manager answered on  
*g* 6 February to say that if the board of directors approved,  
they would execute the transfer and in the meantime the  
money deposited would be held in suspense. The solicitor  
wrote to him on the 11th to say that the money was not a  
*h* deposit but the purchase price, and would he kindly have the  
conveyance submitted, executed, and returned. The manager  
wrote on 29th February to say that, when the plaintiff was  
bidding he knew that any price agreed upon with the auc-  
*i* tioneer must be approved by the management of the bank,  
and that according to the Articles of Association it was the  
board of directors who could give formal approval. It ap-  
pears that the plaintiff and his solicitor saw the solicitor of  
*j* the bank, who also told them that the sale would need the  
approval of the board of directors.

We have given a summary of the letters because the judgment under appeal states that: *a*

“The handing over of the title deeds and the instructions given by the manager to the plaintiff to prepare his conveyance were according to the correspondence that I have referred to, done subject to the fact that the directors of the Bank had to approve the sale.” *b*

Mrs Marke has argued that when the manager wrote about the need for the approval of the directors, it was an afterthought. We have no doubt it was: in between the manager had realised that no notice of sale had been given to the mortgagor; and we have no doubt that in December, 1959, when the auctioneer took the plaintiff to the manager, the manager thought all was well and the conveyance would be executed. Neither the manager nor the auctioneer was called by the bank to testify to what happened at the interview, and we must accept it as true that nothing was said about the directors. *c*  
*d*  
*e*

The dominant fact is that the manager gave the plaintiff certain documents and asked him to prepare a conveyance. That might mean either that he would recommend approval, or that he approved the sale on behalf of the bank. The latter is the meaning urged on the plaintiff’s behalf as the one he would reasonably put on the manager’s conduct at the interview, and it is his case that the bank became bound by the manager’s approval and ought to have executed the conveyance. We shall consider that in a moment. *f*  
*g*

We must first deal with the argument that the condition of sale already quoted means no more than approval of the purchaser or, rather, of the price, and that the bank did not object to either. The condition is:– *h*

“The highest bidder shall be the purchaser, subject to approval of the mortgagees.” *i*

In our view that means that the sale made by the auctioneer to the highest bidder is not binding until it is approved by the mortgagees, and the condition cannot be narrowed down to approval of the purchaser or of the price. *j*

- a* On the basis that the manager apparently approved the sale on behalf of the bank, the two crucial questions are (*a*) whether the agent was exceeding his actual authority and (*b*) whether the plaintiff was in law fixed with notice that he was.

The principle is stated in article 82 of *Bowstead on Agency* (1959) at page 186 as follows:—

- c* “No act done by an agent in excess of his actual authority is binding on the principal with respect to persons having notice that in doing the act the agent is exceeding his authority.
- d* Where the regulations of a company are registered, persons dealing with the directors and other agents of the company are for the purposes of this article deemed to have notice of such regulations.
- e* A signature ‘per procuration’ on a bill of exchange, promissory note, or cheque, operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority.”

- f* We are not concerned with the third paragraph but with the first two. The second paragraph is based on *Balfour v. Ernest* (1). The Judges there cite one or two earlier cases for that principle, and we are in no doubt that the principle applies without unfairness seeing that our Companies Act provides in section 231, subsection 5 that:

- g* “Any person may inspect the documents kept by the Registrar on payment of such fees as may be appointed by the Minister not exceeding one shilling for each inspection; and any person may require a certificate of the incorporation of any company, or a copy or extract of any other document or any part of any other document, to be certified by the Registrar, on payment for the certificate, certified copy, or extract, of such fees as the Minister may appoint, not exceeding five shillings for a certificate of incorporation, and not exceeding four shillings for each folio of one hundred words or part thereof for the first three folios of a certified copy or extract and two shillings for each subsequent folio of one hundred words or part thereof.”

- j* It is in evidence that the bank’s Articles of Association were registered. The plaintiff was asked to prepare a conveyance

and he or his solicitor could, by looking at the Articles of Association, learn who were competent to sign and seal the conveyance on the bank's behalf and realise that it was not the Manager who was to authorise or execute the conveyance, as his solicitor mistakenly thought, but that the approval for the execution of the conveyance had to come from the board of directors according to Registered 76 in Table A, which is appended to the bank's Articles of Association.

Registered 76 provides that:—

“The seal of the Company shall not be affixed to any instrument except by the authority of a resolution of the Board of Directors, and in the presence of at least two Directors and of the Secretary or such other person as the Directors may appoint for the purpose; and those two Directors and Secretary or other person as aforesaid shall sign every instrument to which the seal of the Company is so affixed in their presence.”

We accept the argument for the bank that the board of directors was the body to approve the sale. The finding that they did not approve it is not in question.

Mrs Marke concedes that if the plaintiff had known of the manager's want of competence, he could not be covered by the doctrine of ostensible authority on which he was relying to make the manager's apparent approval binding on the bank, but she submits that the doctrine of constructive notice would only come into play after the conveyance was executed, if trouble arose later.

For this submission no authority was cited. On the bank's behalf Mr Okafor referred to paragraph 833 at page 430 of Halsbury's *Laws* (3ed), Volume 6, on Companies, which begins as follows:—

“Notice of constitution of company.

Persons contracting with the company, whether they are shareholders or not, are bound to know, or are precluded from denying that they know, the constitution of the company and its powers as given by statute and the memorandum and articles.”

- a* A number of cases are cited in the footnote; as to outsiders the two cases cited are *Ernest v. Nicholls* (1857) 6 N.L. Cos 401, and *Mahoney v. East Holyford Mining Co* (1875) L.R. 7 N.L. 869 – we quote from page 893 of the latter case,
- b* where Lord Natherley said that:–
- “Every joint company has its memorandum and articles of association; every joint stock company, or nearly every one, I imagine (unless it adopts the form provided by the statute, and that comes to the same thing) has its partnership deed under which it acts.
- c* Those articles of association and that partnership deed are open to all who are minded to have any dealings whatsoever with the company, and those who so deal with them must be affected with notice of all that is contained in those two documents.”
- d* That reinforces *Balfour v. Ernes* (1859) 5 C.B. (N.S.) 601, 141 E.R 242 and article 82 in *Bowstead on Agency* (quoted above). The plaintiff must be taken to be acquainted with the bank’s registered Articles of Association as soon as he knew that he
- e* was dealing with the bank. Thus, on the basis that the manager apparently approved the sale on the bank’s behalf, he was exceeding his actual authority and the plaintiff was in law fixed with notice that the manager was exceeding his authority.
- f* The court is able to decide this appeal on the ground that the bank was not bound by the manager’s apparent approval of the sale (which was taken as the basis of argument) and there is no need to say more.
- g* Here it was open to the bank to refuse approval of the sale under the condition of sale, which was known to the plaintiff at the auction, and his appeal must fail. We think, however, that the bank ought to have only half its costs of the hearing of the appeal. The other defendant appeared through Counsel for the
- h* bank and will not be allowed separate costs.
- The appeal from the judgment of Dufus J dated 14 September, 1961 in Suit No. HK/50/60 in the High Court of the Western Region (Ikeja Judicial Division) is dismissed with costs to
- i* the defendant, African Continental Bank Limited.

*Appeal dismissed.*

## Aderoungboye v. National Bank of Nigeria Limited

SUPREME COURT OF NIGERIA

BRETT, ONYEAMA, AJEGBO JJ.S.C.

Date of Judgment: 14 JANUARY 1966

S.C.: 106/1964

*Banking – Banker – Whether a moneylender within the meaning of the Moneylenders Act – Section 2(1) of Moneylenders Act*

*Banking – Banker/customer relationship – Sale of mortgage property – Insured sum – Whether a guide to the market price*

### Facts

The plaintiff/respondent's claim against the defendant/appellant was for the sum of £9,390.12s.11d being balance of loan it granted to the appellant sometime in 1954. The appellant on the other hand counter-claimed for a sum of £10,000 which he said was the value of the property he mortgaged to the respondent as security for the loan and which property, according to him was sold by auction; alternatively, he wanted an account of the sale.

In its statement of claim, the respondent pleaded that they were moneylenders but evidence led to the trial was to the effect that they are bankers. The appellant in his statement of claim denied that the respondents are moneylenders.

The learned trial Judge gave judgment for the respondent and dismissed the counter-claim.

The defendant appealed to the Supreme Court. It was argued that the trial Judge erred in not dismissing the plaintiff's claim as moneylenders when they failed to comply with provisions as to account, interest and period of limitation under the Moneylenders Ordinance. It was also submitted that because the plaintiffs insured the property for £10,000,

*a* that was the value of the property although the property was bought in 1958 for £250.00.

**Held –**

*b* 1. By section 2(c) of the Moneylenders Act, “money-lender” shall not include any person *bona fide* carrying on the business of banking.

*c* In the instant case, although the plaintiff/respondent pleaded that they were moneylenders, the defendant/appellant denied their status. The appellant cannot on appeal call in aid the Moneylenders Act. He cannot approbate and reprobate.

*d* 2. The sum for which property is insured is no guide to the price which it will fetch in the open market.

**Counsel**

For the appellant: *Akinrele*

*e* For the respondent: *Okunnu*

**Judgment**

*f* **AJEGBO JSC:** (*Delivering the judgment of the court*) The plaintiffs sued the defendant in the High Court of Western Nigeria for a sum of £9,390.12s.11d being balance of a loan they granted to the defendant sometime in 1954. The defendant, on the other hand, counter-claimed for a sum of £10,000 which, he said, was the value of the property he mortgaged to the plaintiffs as security for the loan and which *g* property, according to him, the plaintiffs sold by auction; alternatively, he wanted an account of the sale rendered to him. Delumo J who tried the case, gave judgment for the plaintiffs and dismissed the counterclaim. The defendant has *h* appealed from the judgment.

Three grounds of appeal were filed and argued and they are as follows:–

*i* “(1) The learned trial Judge erred in law in not dismissing the Plaintiffs claim as moneylenders when they have failed to comply with provisions as to account, interest and period of limitation under the Moneylender Ordinance.

(2) The learned trial Judge erred in law in not awarding damages on the counter-claim when on the exhibits the fact of sale was admitted and they were not denied in the pleadings.

*j* (3) Judgment against the weight of evidence.”

Arguing the appeal for the defendant, Mr *Akinrele* submitted in respect of the first ground that although the plaintiff were bankers they elected to sue as moneylenders and the transaction should, therefore, be governed by the provisions of the Moneylenders Act. It is true that for some unknown reason the plaintiffs pleaded in paragraph 1 of their statement of claim that they were moneylenders whose head office was at 82/84 Broad Street, Lagos, but instead of exploiting the situation created by the averment the defendant, rather unwisely, denied in paragraphs 1 and 7 of his statement of defence that the plaintiffs were moneylenders. Having denied the plaintiffs' status as moneylenders, the defendant cannot call in aid the Moneylenders Act; he cannot approbate and reprobate. Mr *Okunnu*, for the plaintiffs, has rightly pointed out that throughout the evidence the plaintiffs were referred to as "the bank" and not as moneylenders, and that according to section 2(c) of the Moneylenders Act "moneylender" shall not include "any person *bona fide* carrying on the business of banking." With this submission we agree and this ground of appeal, therefore, fails.

On the second and third grounds of appeal, which were argued together, learned Counsel submitted that because the plaintiffs themselves insured the property for £10,000 that was the value of the property. He argued that the houses were sold by the plaintiffs and that no account of the sale was rendered to the defendant; he referred to the evidence of the third witness for the defendant, Erastus Oyeniya who testified that he bought a house in 1958 at Ondo for £250. The plaintiffs denied selling any of the defendant's houses; there was no evidence of sale nor was there anything to connect the houses that Oyeniya said he bought with exhibit G or with any of the mortgaged houses in exhibit E1. The house was not conveyed to Oyeniya.

It is a notorious fact that the sum for which property is insured is no guide to the price which it will fetch in the open



- a* market. If, on the defendant's own showing, one of the houses was sold for £250 one fails to understand the basis for the claim of £10,000 for the three houses under mortgage. The learned trial Judge did not believe the story about the sale and we agree with him that the counterclaim should be dismissed.
- b*

- There is no merit in the appeal and it is dismissed with costs assessed at thirty-five guineas.
- c*

Brett and Onyeama JJSC concurred in the judgment of Ajegbo JSC.

**Aduke and others v. British and French Bank  
Limited and another**

HIGH COURT OF JUSTICE IBADAN

FATAYI-WILLIAMS J

Date of Judgment: 29 APRIL 1966

F.S.C.:1/235/65

*Banking – Security for banker's advances – Certificate of title to land used as security – Banker not aware that land not owned solely by the judgment debtor – Execution levied by banker on the land – Other joint owners of land with the judgment debtor challenged the attachment – Whether the undivided share of judgment debtor in land can be attached*

*Execution – Attachment of land jointly owned by judgment debtor with others – Sheriff required to state in auction notice that only undivided share of judgment debtor will be sold*

**Facts**

A writ of execution was issued by the sheriff as a result of non-payment of the judgment debt and costs amounting to £3,054.18s.2d by Alhaji Busari Raji (judgment debtor). The claimants stated in this interpleader proceedings that the attached land and building thereon is the joint property of one Bello Adeshiyan (the father of the claimants) and the judgment debtor, and that it cannot therefore, be attached for non-payment of debt incurred by the judgment debtor alone.

Latifu Folorunsho, the second claimant said that the land was bought by one Madam Adeshiyan for her two sons namely, Bello Adeshiyan and the judgment debtor in 1934 for £45. Madam Adeshiyan died in 1936 and Bello died in 1939 survived by four children. After the death of Bello, the land devolved on the four children and their uncle, the judgment debtor, jointly. It was then let out and the rent of £16 per month paid by the tenants was used for the payment of the children's school fees. The claimants asserted that they

*a* owned the land jointly with the judgment debtor and that it had not been partitioned.

*b* The judgment creditor however contended that the land belonged to the judgment debtor alone by virtue of a certificate of title dated 12th December, 1953, issued by the Olubadan of Ibadan certifying that the land in dispute was owned by the judgment debtor. It was on the security of this certificate that the amount for which judgment was obtained  
*c* against the judgment debtor was lent to him by the judgment creditor.

**Held –**

- d* 1. That the undivided share of the interest of the judgment debtor in the land in dispute could be attached in the execution of the judgment debt and the buyer of such land at the auction sale would only acquire the right, title and interest of the judgment debtor in the disputed land.
- e* 2. The purchaser of such undivided interest in the land could apply to the court to have the land partitioned or sold.

*f* *Claim dismissed.*

***Per Curiam***

*g* “I am unable to see any insurmountable difficulty in the sale of the land in dispute. To hold otherwise would mean that although a judgment debtor may have valuable land which he owns jointly with another person, the judgment creditor had no remedy for securing payment of the debt but must just sit back and watch the judgment debtor enjoy the proceeds of his share in such land. This,  
*h* to my mind, will be clearly unjust.”

**Case referred to in the judgment**

***Nigerian***

*i* *Odejoke v. John Holt Co Ltd* 8 W.A.C.A. 52

**Nigerian statute and referred to in the judgment**

Property and Conveyancing Law, Cap 100 of the Laws of Western Nigeria 1959, section 63

*j* Sheriffs and Civil Process Law, section 33

**Counsel**For the Claimants: *Agbaje*For the Judgment Creditors: *Esan* (with him *Oloko*)**Judgment**

**FATAYI-WILLIAMS J:** Pursuant to its attachment by the Sheriff under a writ of execution issued as a result of non-payment of the judgment debt and costs amounting to £3,054.18s.2d by Alhaji Busari Raji (hereinafter, referred to as the “judgment debtor”), the claimants are claiming in this interpleader proceedings that the attached land and building thereon situated at No. N1/277, Alekuso Area, Ibadan, is the joint property of one Bello Adeshiyan (the father of the claimants) and the judgment debtor, and that it cannot therefore be attached for non-payment of a debt incurred by the judgment debtor alone.

At the hearing on 14th April, 1966, the application of the third and fourth claimants to withdraw from the suit was granted and their names were accordingly deleted from the list of claimants. According to Latifu Folorunsho, second claimant, the land in dispute was bought by one Madam Adeshiyan from one Gbadamosi Balogun for her two sons namely, Bello Adeshiyan and the judgment debtor (who is also known as Busari Adeshiyan and Busari Akande) in 1934 for £45 (as evidenced by the purchase receipt).

Two years after the purchase, Madam Adeshiyan died, and five years after, that is in 1939, Bello died. Bello was survived by four children namely, Silifatu Aduke, first claimant, Latifu Folorunsho, second claimant, Risikatu, aged about eight, five, and four years respectively at the time, and Simiatu born after the demise of Bello. After the death of Bello, the land devolved on the four children and their uncle, the judgment debtor, jointly. It was then let out and the rent of £16 per month paid by the tenants was used for the payment of the children’s school fees. Under cross-examination, the second claimant denied that the land had been partitioned but admitted that if there was any partition the judgment debtor would be entitled to half of it while they would

- a* be entitled to their father's half. When questioned about the certificate of title shown to him under cross-examination, he replied as follows:
- b* "I have not seen this certificate of title shown to me before. It is in respect of the property which we are claiming. I admit that one Agunleyinju is the original owner of the land. The judgment debtor was in court this morning. He has never told us that he had applied to the Olubadan and Council for a certificate of title in respect of the land or that he had been given one. I did not ask him about the certificate of title but I asked my lawyer. My lawyer told me that I was asked to produce it but I replied I have not got it."
- c* Another witness called by the claimants is Raji Fadejin, first witness, the husband of Madam Adeshiyan and the father of both Bello and the judgment debtor. He confirmed that his wife bought the land in dispute about thirty years ago from one Gbadamosi Balogun for their two sons for £45. He also confirmed that the present owners of the land which has not been partitioned, are the judgment debtor and the four surviving children of Bello. Under cross-examination this witness admitted that these children lived with him and that he paid their school fees from the rents collected by the judgment debtor from the tenants occupying the building on the land. To further questions about a court case in respect of the land and of the issue of the certificate of title, he replied as follows:
- d*
- e*
- f*
- g* "I know there had been a court case on this land. After Busari went to Mecca, the Agunleyinju family instituted an action against Busari claiming possession. Judgment was given for Busari, the judgment debtor, who contested the case on his return from Mecca. I did not hear that Busari asked for a certificate of title to the house from the Olubadan and Council. I do not know if he took a surveyor to the land to survey it. I agree that both Busari and Bello should share the rent equally."
- h*
- i* The judgment debtor did not give evidence.
- In resisting the claim, the judgment creditors contended that the land belonged to the judgment debtor alone and tendered the certified true copy of a certificate of title dated
- j* 12th December, 1953, in which the Olubadan of Ibadan,

four of his senior chiefs and two councillors certified in their opinion, that the land in dispute is the property of the judgment debtor. Curiously enough, it is on the security of this certificate that the amount for which judgment was obtained against the judgment debtor was lent to him by the judgment creditors.

In my opinion, the certificate of title which was neither executed nor given under the authority of any law in force in the region could not, and did not, confer any title to the land in dispute on the judgment debtor. The opening clause of the certificate reads as follows:

“We the undersigned, the Olubadan, Chiefs and Councillors certify that in our opinion the land described in the Schedule attached to page 2 of this certificate, and which is more particularly delineated and shown surrounded by a border coloured PINK on the plan attached to page 3 of this certificate, together with all the buildings thereon forms a single estate and is the property of Alhaji Busari Adeshiyan at Alekuso, Ibadan.”

At the highest, the certificate is, therefore, merely an expression of opinion by the Olubadan, his chiefs and councillors that the land is the property of the judgment debtor: To have any legal force or to be regarded as proof of the title of the judgment debtor, this opinion, in my view, must have been expressed either by the signatories sitting together as members of a court of competent jurisdiction or by each of them in evidence given on oath before a court of competent jurisdiction and accepted as true in the judgment of that court. Not knowing how or by what means, whether fair, thorough, or reliable this opinion was arrived at, it will be doing violence to the standard of proof required in a claim for declaration of title to land if this certificate is accepted as proof of the judgment debtor's title to the land.

Notwithstanding these strong views on the certificate of title, the onus is, nevertheless, still on the claimants to prove that the land in dispute is not the property of the judgment debtor. If they fail to do this, their claim will be dismissed. The substance of the judgment in the Ibadan Lands Court

*a* No. II delivered on 25th July, 1952 tendered by claimants merely showed that the Lands Court believed that the land in dispute was bought from Gbadamosi Balogun by the mother of the judgment debtor for £45. On the other hand, they have admitted that they jointly own the land with the judgment debtor in equal proportion and also that it had not been partitioned. I accept this testimony and find as a fact that the land in dispute and the building thereon situated at No. NI/277, Alekuso, Ibadan, after the death of their mother Adeshiyan, became the joint property of both the judgment debtor and Bello, his deceased brother. Having regard to the evidence, the two judgments put in evidence the purchase receipt and the certificate of title, however, there is no doubt in my mind that the land was, and still is, subject to customary law.

The next question is, can this undivided share of the judgment debtor be attached in execution of the judgment debt? I have no doubt in my mind that it can be so attached. In the first place, I do not think that the common law incidents of a joint tenancy, such as the incident of survivorship, apply to land held under customary law. This may account for the fact that although there is provision in section 63 of the Property and Conveyancing Law, Cap 100 of the Laws of Western Nigeria, 1959, with regard to joint tenancies, that provision, because of the limitation in section 1 subsection (3) thereof, does not apply to land held in accordance with customary law. It seems to me, therefore, that since the death of the said Bello Adeshiyan, his undivided share in the land in dispute has passed to his children namely, Silifatu Aduke, Latifu Folorunsho, Risikatu Ashake and Simiatu Apinke. Secondly, whoever buys the land and building (and the Sheriff, to avoid any misrepresentation should make it clear in the Auction Notice that it is only the judgment debtor's undivided share that is being sold) buys subject to the undivided share of these children. Thirdly, all that such a purchaser will be entitled to, and can get, having regard to the provisions of section 33 of the Sheriffs and Civil Process Law, is, pursuant to the sale, right, title and interest of the

judgment debtor in the disputed land. Support for the above *a*  
views will be found in *Odejoke v. John Holt and Co Ltd* 8  
W.A.C.A. 52, where it was held that a purchaser of property  
alleged to be family land and sold under a writ of *fifa*, could *b*  
acquire and did acquire at the sale, no more than the undi-  
vided interest of the judgment debtor who is a member of  
the family claiming the property.

Since there is nothing to prevent a purchaser of such undi- *c*  
vided interest, and particularly in this case where it is admit-  
ted that the judgment debtor has a share in the land, from  
applying to the court to have the land partitioned or sold, I  
am unable to see any insurmountable difficulty in the sale of *d*  
the land in dispute. To hold otherwise would mean that  
although a judgment debtor may have valuable land which  
he owns jointly with another person, the judgment creditor  
had no remedy for securing payment of the debt but must sit *e*  
back and watch the judgment debtor enjoy the proceeds of  
his share in such land. This, to my mind, will be clearly  
unjust.

*Claim dismissed.*

*f*



a

## Agbonmagbe Bank Limited v. CFAO

b

SUPREME COURT OF NIGERIA

ADEMOLA CJN, BAIRAMIAN, COKER JJSC

Date of Judgment: 25 MAY 1966

S.C.: 576/1964

c

*Banking – Delay in returning dishonoured cheque – Negligence – Duty of care – Damage in consequence of defendant's negligence*

d

*Tort – Negligence – Action therefor – What plaintiff must establish*

### Facts

e

A trader and customer gave the CFAO (the respondent company) some cheques drawn on the Agbonmagbe Bank Limited between 7th August, 1957 and 5th October, 1957. The company handed over the cheques to the Bank of West Africa for collection and the latter sent them to the Agbonmagbe Bank Limited Headquarters which returned the

f

cheques dishonoured on the 10th October, 1957 in a bunch. However, before the return of the cheques, the CFAO had assumed that the cheques had been honoured and their account credited and had delivered goods purchased by the customer. CFAO contended at the trial that they lost the value of the cheques as a result of the delay by the defendant

g

banks in returning the dishonoured cheques. The CFAO sued the customer but failed to receive the whole value of the goods it supplied to the customer, hence this action. The bank contended that the judgment against the customer was a bar to a suit against the bank and that the bank owed no duty of care to the CFAO. The High Court gave judgment for the CFAO. Dissatisfied the bank appealed to the Supreme Court.

h

i

### Held –

j

1. There were two separate causes of action, against two distinct persons, and the judgment against one person

- did not extinguish the right of the CFAO to sue the bank, what was important was that it should not recover the money on the cheque twice. a
2. The law is that a plaintiff suing for negligence must show that the defendant owed him a duty of care, and that he suffered damage in consequence of the defendant's failure to take care. In the instant case, the banks' delay had nothing to do with the giving of credit between the 7th and the 14th August, 1957, but was responsible for the credit given on the 2nd, 4th and the 5th October, 1957. b
3. A person must take reasonable care to avoid acts or omissions which he can reasonably foresee would be likely to injure persons who are closely and directly effected by his acts or omissions that he ought reasonably to have them in contemplation. A banker may be held liable to persons who are not their customers for tort of negligence, which causes them pecuniary damage. In the instant case the defendant bank ought to have followed the practice among banks with regard to returning cheques. c
- d
- e
- f

*Appeal dismissed.*

### **Cases referred to in the judgment**

g

#### ***Foreign***

*Donoghue v. Stevenson* (1932) A.C. 562

*Gafai v. U.A.C. Ltd* (1961) All N.L.R. 785

*Hadley Byrne and Co Ltd v. Heller and Partners Ltd* (1964) A.C. 465 h

*Scarf v. Jardine* (1882) 7 App. Cos. 354

*Schroeder v. Central Bank of London* (1876) 34 L.T.R. (N.S) 735 i

#### ***Appeal***

This was an appeal against the decision of the Lagos High-Court in favour of CFAO for £9,865.4s.4d. The Supreme Court in a unanimous decision, dismissed the appeal. j

*a*

**Counsel**

For the appellant: *Makanju* (with him *Lardner* and *Williams*)

*b*

For the respondent: *Lampejo*

**Judgment**

*c*

**BAIRAMIAN JSC:** (*Delivering the judgment of the court*) In this appeal the Agbonmagbe Bank Limited complains of the judgment given by Adedipe J in the Lagos High Court Suit No. L.D. 344/1963 on 6th July, 1964 in favour of the CFAO for £9,865.4s.4d.

*d*

The CFAO had a customer by the name of Esther Abiola Amushan, who gave the company a number of cheques on the Agbonmagbe Bank's branch at Shagamu between the 7th August, 1957 and the 5th October, 1957 amounting to

*e*

£10,197.8s.4d. The company handed the cheques to the Bank of West Africa Limited, for collection, and this bank sent them to the headquarters of the Agbonmagbe Bank at Ebute Metta, which returned the cheques dishonoured on the

*f*

10th October, 1957 in a bunch. The CFAO wrote to the Agbonmagbe Bank headquarters to complain that the delay of their Shagamu Branch in returning the cheques caused them loss for which the company held the bank responsible, but received no reply. The CFAO sued Mrs Amushan and

*g*

obtained judgment against her for what she owed the company £13,829.0s.10d, which included the amount of the cheques. The company managed to collect £250 from her and could collect no more; so they sued the Agbonmagbe

*h*

Bank for the amount of the cheques in question. The company's manager testified as follows:

*i*

"When the cheques were not returned within reasonable time, my company assumed that they must have been paid. If the cheques had been returned within a week or so we would have stopped delivering further goods to Mrs Amushan and our loss would have been minimised. We lost the value of the cheques as a result of the delay, occasioned by the defendant."

*j*

The CFAO manager agreed in cross-examination that the Agbonmagbe Bank were not his company's bankers; but

there was no cross-examination on the company's assumption that as the cheques were not returned within a reasonable time they must have been paid. That there was undue delay on the part of the Agbonmagbe Bank was proved by a Manager of the Bank of West Africa who testified on bank practice; he was not cross-examined. The Agbonmagbe Bank offered no evidence in defence.

The learned trial Judge was of opinion that cheques sent from Lagos to Shagamu should, if not paid, have been returned within a week, and in his opinion the Agbonmagbe Bank had failed to fulfil its duty of returning them in the ordinary course of business to the Bank of West Africa within a reasonable time with an intimation that they would not be paid. The learned judge recognised that there was no privity of contract between the CFAO and the Agbonmagbe Bank; he relied on *Donoghue v. Stevenson* (1932) A.C. 562, for his view that the bank was liable for negligence.

In that case Lord Atkin gave his view of negligence in tort (at page 580) as follows:

“At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances . . . You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.”

Adedipe J states in his judgment that it was clear on the cheques that the Bank of West Africa was the agent of the CFAO for the purpose of collection, and that the Agbonmagbe Bank had a duty of care in dealing with the cheques which were sent to it for collection, but it was negligent and the CFAO suffered damages owing to its negligence. Hence the judgment in favour of the CFAO, from which the Agbonmagbe bank has appealed.

*a* The objections to the judgment made on the bank's behalf are two:—

- b* 1. that the judgment against Mrs Amushan was a bar to a suit against the bank;
- 2. that the bank had no duty of care to the CFAO.

*c* The court approaches an appeal on the principle that the appellant must show that the decision was wrong.

*d* The court is not persuaded that the judgment was wrong in the first respect, having regard to the fact that the claim against Mrs Amushan was based on contract but that on the bank was based on tort. There were two separate causes of action against two distinct persons, and the judgment against Mrs Amushan did not extinguish the right of the CFAO to sue the bank, even though it was in respect of the same cheques. What was important was that the CFAO should not recover the money on those cheques twice. They tried to recover it from Mrs Amushan and only sued the bank when *e* they could not recover it. *f*

Mr *Makanju* sought to support his argument by referring to *Gafai v. U.A.C. Ltd* (1961) All N.L.R. 785, and to *Scarf v. Jardine* (1882) 7 App. Cos. 354. *Gafai* sued the U.A.C. Limited twice for breach of one and the same contract, which is not possible: he ought to have made all his claims arising out of the breach in the first action. In *Scarf v. Jardine* the facts were these. Jardine had dealings with a firm known as W H Rogers and Co, earlier it consisted of Scarf and one Rogers; they dissolved the partnership and Scarf retired; Rogers took one Beech as partner, and they continued trading as WH Rogers and Co. Jardine sold goods to the firm not knowing of the change. After he had notice of it, he sued Rogers and Beech, who later went into liquidation; Jardine proved in the liquidation, and then sued Scarf. The decision was that Jardine could have sued either Rogers and Scarf as the old firm, and that Scarf would have been liable *j*

by estoppel under the doctrine of agency between partners, <sup>a</sup>  
as he had had no notice of the dissolution when he sold the  
goods, or could have sued Rogers and Beech as the new firm  
to whom he actually supplied the goods; but he could not <sup>b</sup>  
have sued Rogers and Beech and Scarf together; and having  
elected to sue Rogers and Beech he could not sue Scarf any  
more. It is to be noted that there was only one cause of ac-  
tion, and the basis of it was contract. Neither *Gafai's* case <sup>c</sup>  
nor *Scarf's* is similar to the case in hand, and the first objec-  
tion must fail.

The Court is also not persuaded that the trial judge erred in  
deciding that the bank had a duty of care towards the CFAO <sup>d</sup>  
Mr *Makanju* relied on *Schroeder v. Central Bank of London*  
*Ltd* (1876) 34 L.T.R. (ICS.) (735). It is true that a banker is  
ordinarily not liable to the payee of a cheque for non-  
payment of the cheque: a cheque is not an assignment of <sup>e</sup>  
debt in English law. But that case is on there being no priv-  
ity of contract between the payee and the banker on whom a  
cheque is drawn. Here the CFAO is suing the bank on the  
basis of negligence in tort. <sup>f</sup>

Mr *Makanju* has pointed out that the principle of the deci-  
sion in *Donoghue v. Stevenson (supra)* is summed in these  
words of Lord Atkin (at page 599):

“... a manufacturer of products, which he sells in such a form as <sup>g</sup>  
to show that he intends them to reach the ultimate consumer in the  
form in which they left him with no reasonable possibility of in-  
termediate examination, and with the knowledge that the absence  
of reasonable care in the preparation or putting up of the products <sup>h</sup>  
will result in an injury to the consumers life or property, owes a  
duty to the consumer to take that reasonable care.”

That certainly was the decision on the facts of the case.  
Donoghue drank some ginger beer at a cafe out of an opaque <sup>i</sup>  
bottle that was sealed with a cap; her case was that there was  
a decomposed slug in it, and that she suffered ill-health.  
There was no privity of contract between the plaintiff and  
the manufacturer, but he had a duty to take care towards  
potential consumers. Why? Because, as stated earlier by <sup>j</sup>

- a* Lord Atkin at page 580 in the passage first quoted in our judgment, the consumers are persons whom the manufacturer ought reasonably to have in contemplation as closely and  
*b* directly affected by his acts or omissions. The decision is an application of the principle stated at page 580 to the facts of the case.

- The learned Counsel's reference to the passage at page 599  
*c* was doubtless designed to show that it was only in that type of case that there was a duty to take care in the law of tort. Lord Macmillan in *Donoghue's* case made it clear that the duty was not so restricted; he said as follows (at page 619):

- d* "What, then, are the circumstances which give rise to (his duty to take care)? In the daily contacts of social and business life human beings are thrown into, or place themselves in, an infinite variety of relations with their fellows; and the law can refer only to the  
*e* standards of the reasonable man in order to determine whether any particular relation gives rise to a duty to take care as between those who stand in that relation to each other . . . The categories of negligence are never closed . . ."

- f* Mr *Lampejo*, for the, CFAO, referred to *Hadley Byrne and Co Ltd v. Heller and Partners Ltd* (1964) A.C. 465, as showing that bankers may be liable to persons who are not their customers for the tort of negligence which causes them pecuniary damage. In that case the defendants, who were  
*g* merchant bankers, were asked by a bank on behalf of the plaintiffs, a firm of advertising agents whose name was not stated to the defendants, about the creditworthiness of a company who were customers of the defendants; and the  
*h* decision was that the defendants were careless in what they said but escaped liability because they expressly disclaimed it in their answer. The case shows that bankers normally owe a duty of care to persons whose bank is making such an  
*i* enquiry on their behalf.

- There is a business practice among bankers in regard to cheques, and we think that the defendant bank ought to have followed it, to avoid it being thought, as it would reasonably  
*j* have been thought by the CFAO, that Mrs Amushan's cheques

were being paid. On the limited evidence in the case we do not think the learned judge erred in deciding that the bank had a duty of care towards the CFAO and was liable for damages caused by its negligence, and the second objection to the judgment must also fail. It seemed to us, however, when preparing this judgment, that the trial judge when assessing the damages erred in two respects – (1) in deducting the cheques of the 4th and of the 5th October, 1957, and (2) in allowing for the cheques taken by the CFAO between the 7th and the 14th August, 1957. We therefore had a further hearing on the 22nd April, 1966 on those points, in a desire to put things right for guidance on the application of the law of tort negligence, which is that the plaintiff must show that the defendant owed him a duty of care, and that he suffered damage *in consequence* of the defendant's failure to take care.

In this case, the CFAO could not say with propriety that the delay in the return of cheques had anything to do with giving goods on credit to Mrs Amushan between the 7th and the 14th August, 1957: for the cheques of the 7th would not be expected back until the 14th. The cheques received from Mrs Amushan between those dates come to £1,236.13s.5d, which ought to have been deducted.

On the other hand, the CFAO could say with propriety that if earlier cheques had been returned dishonoured, the firm would not have given Mrs Amushan goods on credit on the 4th and the 5th October. The fact that the four cheques issued on those two days were returned on the 10th October was no reason for deducting their value, which is £1,332.4s.0d and which was deducted by the trial Judge.

He gave judgment for £9,86.4s.d: he ought to have given judgment for £9,960.15s.0d. (to the nearest shilling). We do not however intend to vary the judgment in regard to the amount. The CFAO neither cross-appealed nor gave any notice that they would ask for the judgment to be varied, not



*a* even before the second hearing, after the mistake had been drawn attention to by this Court.

*b* The appeal is dismissed with costs to the plaintiff/respondent assessed at 35 guineas.

*Appeal dismissed.*

*a*

## Balogun v. Bank of West Africa Limited

HIGH COURT OF LAGOS STATE

OMOLOLU J

Date of Judgment: 25 JULY 1966

Suit No.: L.D. 130/65

*b*

*Banking – Banker/customer relationship – Negligence by bank – Liability thereof*

*c*

*Banking – Banker/customer relationship – Special arrangement with a customer may override bank's procedure*

### Facts

*d*

The plaintiff claims against the defendants (bank) delivery of goods cleared on his behalf and damages for unlawful detention of the goods.

The plaintiff kept his account with the bank and on some previous occasions he had instructed the bank to clear his goods from the port and keep it for him, and normally will release the goods to him on payment. On this occasion he wrote the instruction to the bank and the bank refused contending that in ordinary circumstances they would not act on the instructions of a customer to collect and store goods which was not in accordance with the General Instruction books issued to bank staff.

*g*

### Held –

1. That the court would give effect to some special arrangement between a customer and his bankers even though the arrangement would be contrary to the procedure laid down in the banks instruction book.

*h*

*Judgment for the plaintiff.*

### Case referred to in the judgment

*i*

#### *Foreign*

*Smith v. Hughes* 6 Q.B. 597

*Appearances not stated.*

*j*

*a* **Judgment**

*b* **OMOLOLU J:** The plaintiff is a trader and shoes manufacturer trading under the name and style of Alhaji Lawal Balogun Trading Company and carrying on his business in Lagos. The defendants are bankers carrying on their business in Lagos.

*c* Evidence was given by the plaintiff that he has been customer of the defendants for many years and that by some agreement between two parties the defendants had, on occasions before the present case for valuable consideration, helped the plaintiff to clear his goods from customs on arrival in Nigeria, and stored them at the request of the plaintiff.

*d* All the plaintiff had to do was to write to the defendants to inform them of the anticipated arrival of goods from overseas and the defendants would do the necessary. Usually

*e* within a short time afterwards the plaintiff would approach the defendants and pay all the necessary charges, interests and commissions and would collect his goods.

*f* In accordance with this practice the plaintiff said he wrote a letter to the defendants on the 20th December, 1963 requesting them to clear and store two different sets of goods which were arriving on the SS “Shomron” on the

*g* 1st January, 1964 and on the SS “Tidra” on the 15th of January, 1964. I quote the letter as follows:

Exhibit B

*h* “Re. Bills Nos. 71/22, 71/23, 71/24, 71/25 and 71/26. Each Bill amounting to £993.2s.9d respectively. Consignments shipped per s/s Shomron . . .

Re. Bill No. 71/424 for £305.12s.0d.

*i* Re. Bill No. 71/425 for £305.12s.0d.

Re. Bill No. 71/426 for £303.16s.1d.

Consignments shipped per s/s Tidra.

*j* Owing to the present dullness of the market manipulation, we find it very difficult for us to clear the above mentioned goods.

Under this circumstances, we shall be very grateful therefore if you would arrange to clear and store the relative goods as above in your Bank Store, the settlement of which will soon be effected. *a*

Thanking you in advance for your kind and immediate action. *b*

Yours faithfully,

ALHAJI LAWAL BALOGUN TRADING CO

(Sgd.)

Managing Director.” *c*

The goods ultimately arrived, the defendants cleared and stored the goods which arrived on the SS “Tidra” but failed to clear and store the goods which arrived on the SS “Shomron.” *d*

On the 17th February the plaintiff sent his clerk to the defendants company’s office with the sum of £1,300 to collect part of the goods which arrived on the SS “Shomron” and this clerk was told by the manager of the defendants company that the goods were still in customs and had not been cleared. When the plaintiff got this message he himself went to the manager and expressed surprise at the defendants’ negligence in not clearing the goods in view of his letter *e*  
dated 20th December which had given the defendants ample notice of the arrival of the goods. According to the plaintiff’s evidence the defendants’ manager expressed regret at his oversight and promised to make an immediate collection *f*  
of the goods. *g*

The goods were ultimately collected on the 2nd March by which time they had incurred Nigeria Ports Authority’s rent of £2,451.10s.10d. *h*

When the plaintiff called on the defendants again to collect the goods the defendants refused to deliver the same unless the plaintiff would also pay the Ports Authority’s rent. The plaintiff refused to pay this rent as he said it was incurred as *i*  
a result of the negligence of the defendants. He wrote letters to the defendants’ Head Office in Lagos and in London but all to no avail. The market value of the said goods is *j*  
£9,399.15s.0d.

- a* Plaintiff further testified that as a result of the defendants' refusal to release the goods he had to suspend work in his shoe factory and continued to pay salary of his workers for a whole year as a result of which he suffered damages amounting to £4,325.6s.8d.

The goods were rubber sponge sheets which the plaintiff ordered for the purpose of manufacturing shoes.

- c* Whereupon:

- d* 1. The plaintiff's claim against the defendants is for the delivery of the plaintiff's cartons of Rubber Sponge Sheets Nos. 71/22; 71/23; 71/24; 71/25 and 71/26 in the custody of the defendants which the defendants have refused to deliver;
- e* 2. OR in the alternative the plaintiff claims the sum of £13,725.1s.8d being general and special damages for the unlawful detention of the said goods since the 25th February, 1964.

- f* The plaintiff was quite clear in his evidence that at no time was it necessary for him to have to make a deposit with the defendants before they carried out his instructions. He had mortgaged the property to the defendants and he also kept his current account with them. He tendered documents to show that this had been the practice between him and the defendants in the past. When the two sets of goods arrived by the two ships in January his business, he said, was dull and he could not afford to pay to collect the documents. The manager of the defendant company whom he saw on the 17th February, 1964 was one Mr Enerburg. There was also a shipping clerk known as Joseph present at the interview. After his visit he wrote a letter (exhibit C) confirming the interview. I quote the letter in full:—

*i*

Exhibit C

“Re. Bills Nos. 71/22, 71/23, 71/24, 71/25 and 71/26. Each Bill amounting to £993 2s 9d respectively. 560 Cartons Rubber Sponge Sheets shipped per S.S. Shomron.

*j*

Drawer – Messrs Khusal (London) Limited . . .

We beg to refer to the above mentioned Bills/Goods drawn on us which we requested you on the 20th December, 1963 to clear and store for us due to the dullness of the market. (Our letter ref: ALBTC/SG/63 dated 20th December, 1963 refers). a

Upon our calling to your office on Monday the 17th January, 1964 to pay part of these goods, we are made known by you that these goods are not yet stored despite the fact that you are in a position to store goods of which payment are delayed, and despite the fact that we have instructed you on the 20th December last to store these goods for us. b

As all these goods have been in the Customs, (if not Government Warehouse now), for the past 50 days – (Carrying vessel arrived on the 1st January, 1964), the N.P.A. rent on these goods must be around £200 or less we predict. (Goods due rent from the 8th January, 1964). c

As we are not prepared to pay any proportion of the rent on these goods in view of the fact that we have given you the instruction to store these goods even before the arrival of the carrying vessel, we are of the fullest opinion that you will make provisions in settling the incurred rents on these goods without delay so as to give us the opportunity of paying for these goods, otherwise we are not prepared to start paying for these Bills until the N.P.A. rent incurred on these goods is settled by you. d

Your prompt and earliest reply to this matter will be highly appreciated. e

Yours faithfully,

ALHAJI LAWAL BALOGUN TRADING CO f

Managing Director g

c.c. Messrs Khushal (London) (Limited)	}	Your kind attentions to the-	h
c.c. Messrs Khushal (Nigeria) (Limited)	}	above is highly solicited."	

This letter was received by the defendant company on the 21st February, 1964. i

The plaintiff said the consignment of goods were in five bales and each bale cost £993.2s.9d and the total amount of the five bales were approximately £6,000 including insurance

*a* and other charges. The market value, however, would be £9,399.15s.0d because he expected to make a profit of about £3,500 on the consignment. He said if the defendants had  
*b* carried out his instructions as usual by clearing and storing the goods on arrival he would have had to pay no rent to the Ports Authority and so would have been in a position to collect the goods and make the expected profits for his business.  
*c*

Since the defendants' negligence had caused the goods to attract such an exorbitant rent he could not afford to clear them and so he not only lost the goods but also he had to  
*d* keep his Shoe Factory open for a whole year on which he made a loss of £4,325.6s.8d in wages. He could not dismiss the workers because they were trained men and hard to get and in any case he was hoping all along that the defendants  
*e* would agree to let him have the goods until it was too late. He said the defendants knew very well what he used the goods for as, on one occasion, the Manager had asked him and he had presented Mr Enerburg with some pairs of shoes  
*f* made from the rubber sheets.

Under cross-examination by learned Counsel, Mr *Bentley* for the defendants, he said he could only trade in 1964 because of some special financial accommodation granted to  
*g* him by one L Nicot, a London Finance Company which came to his aid.

The plaintiff's evidence was supported by that of his clerk.

*h* Mr Jeffrey Ozigbe who is an associate of the Institute of Bankers and is now employed in the African Continental Bank gave evidence for the plaintiff. He said until his present appointment he worked in defendants' Broad Street  
*i* Branch for about seven years from 1957 to September, 1963. He knew the plaintiff as a customer of the bank and he confirmed that the bank always cleared and stored all his goods for him on receipt of a letter instructing the bank to do so. I  
*j* quote from his evidence:

“He (the plaintiff) usually wrote the bank a letter asking for clearance of his goods. On receipt of his letter we used to send documents to our Ports Section, Apapa who would arrange the clearance. The plaintiff had been doing this for three or four years. Throughout the period the bank had never refused his request. The bank would charge fees for storage and clearance. As far as I can remember plaintiff never failed to collect his goods although at times he might be a little late.”

Under cross-examination by learned Counsel for the defendant, Mr *Bentley*, this witness tendered a page from the General Instruction Book issued to the staff (exhibit N). The contents of this document makes it clear that clearance of goods:

“in connection with bills received is not permitted unless the bank received specific instruction from the Remitting Office or Correspondent Bank or unless the drawee deposits the full amount necessary to cover the custom duties, clearance expenses and any other expenses which may be incurred.”

Mr Ozigbe said that he knew that the custom and practice between the plaintiff and the defendants was contrary to the instructions in the book but as far as he could remember plaintiff’s letter was always sufficient authority for his goods to be cleared and stored for him.

Plaintiff’s evidence as to this custom and practice of clearing his goods on the strength of a letter from him was also supported by another trader who he called as a witness Mr Awotoye who is a regular importer of goods from Japan. He said that whenever he was expecting goods which he could not afford to clear he would merely go to the defendants, tell them about the goods and the shipping particulars of their arrival and the bank would help him to clear and store until he was able to collect the goods. In consideration of this, he kept a credit account with the defendants and all his daily sales were paid into the account at the end of each day. In addition the bank imposed charges, commission and other interests. He had been in the trade for over eight years and throughout this period the bank had never refused to honour his instructions. In his own case his instructions to the bank were only verbal.



*a* Under cross-examination by learned Counsel Mr *Bentley*, the witness said he could not believe that the defendants were acting in accordance with the instructions of his ship-  
*b* pers and not his own instructions. He believed that the action usually taken by the bank was in accordance with his own instructions.

*c* The first witness for the defence was Mr Anthony Ray-  
mon, Branch Training Officer of the defendant's Broad  
Street office which is the branch connected with this case.  
He has been in the bank service for 12 years. He explained  
*d* different kinds of bills in use in the bank and the procedure for processing them. The effect of his evidence is that the defendants would not act on, the instructions of a customer to collect and store his goods unless:

- e* 1. the drawers or their London office had instructed them to do so; or
2. the customer himself made the payment or a sub deposit.

*f* He testified that it was not the practice of the bank to accept instructions in the manner which the plaintiff had alleged. I quote from his evidence:

*g* "B.W.A. may accept his instructions if he is very well known to them and if at, the time of the request he offered substantial consideration towards the payment of all Custom Duties and other Port Charges and in many cases he contributed towards bills himself."

*h* Under cross-examination by learned Counsel for the plaintiff Mr *Shodipo*, this witness said he was not working in the Bills Section himself. He believed that the plaintiff had been a customer of the bank for many years. He was not aware  
*i* that the plaintiff ever made a default towards the collection of his goods from the bank. When Mr *Shodipo* suggested to the witness that at all material times the defendants had been clearing the plaintiff's goods without plaintiff having to  
*j* deposit, witness said "I cannot tell."

The second witness for the defendants was Mr Allen, the Manager of the United Bank for Africa and a Fellow of the Institute of Bankers. He had formerly worked for the defendants in Nigeria but for the past 11 years he had been with the United Bank for Africa. He gave evidence about the procedure and normal banking practice about clearing of goods. The principle is that the bank acts on the instructions of the drawers of the bill. When he was shown the plaintiff's letter dated 20th December, 1963 (exhibit B) by which the plaintiff instructed the defendants to clear the goods on the SS "Shomron," Mr Allen said he also usually received such letters from his customers. I quote from his evidence:

"I get such letters from my customers. It depends on the customer. If you act on such a letter it would amount to granting customer an overdraft unless the instructions are from the shippers."

When told of the arrangement and practice which the plaintiff alleged existed between him and the defendants about the clearance of his goods, Mr Allen said he had no such arrangements with any of his own customers. He said the extract from the General Instructions Book to the Bank Staff (exhibit N) was similar to the instructions in use among his own staff.

Under cross-examination by learned Counsel for the plaintiff Mr *Shodipo*, he agreed that facilities accorded in a bank to customers depended on the customers' credit worthiness. If he had been the recipient of exhibit B he would rather give the plaintiff overdraft to pay the bill.

Mr Olfus Joseph shipping clerk in the defendants' employment who has been in their service for five years gave evidence to corroborate the procedure and internal arrangement of the bank about Bills of Exchange. He said it was not the practice to clear customer's goods on the instructions of the drawees. He said he did not know of any special arrangement with Alhaji Balogun, the plaintiff. This witness admitted that plaintiff's letter of instruction (exhibit B) had reached his desk before the arrival of the SS "Shomron." He could not remember that the plaintiff and his clerk called at

- a* the defendants' office to enquire about his goods. He denied that it was in his presence that the bank manager Mr Enerburg apologised to the plaintiff for the bank's failure to collect the goods and that the manager promised to collect them immediately.

*b* Asked why the bank cleared the goods on the "Tidra" and not those on the "Shomron" in view of the fact that the plaintiff's instructions to the defendants were contained in the same letter, this witness said that in respect of the "Tidra" the shippers had instructed them to collect but they had no such instructions in respect of goods arriving on the "Shomron" *c* (see exhibit T.15 and exhibit R1). This witness said the goods on the "Shomron" were ultimately cleared on the written instructions of their London office which he said he saw. *d*

*e* The last witness for the defendants was Mr Azukwo Enerburg who was the branch manager of the defendant company at the time of this transaction. He corroborated the defence story in that the defendants had no special arrangement with the plaintiff for clearing his goods. He knew the plaintiff very well as a customer of the bank but he said plaintiff always paid for documents. He said the goods on the "Shomron" were ultimately collected by the defendants on the 2nd March, 1964. He did not think it was an oversight on the part of the defendants that the goods were not collected from Customs; it was because they had no instructions from the shippers. He later received oral instruction from his headquarters by telephone to clear the goods. By that time the goods had attracted heavy duties and other charges. He said he did not know the time that the bank eventually sold the goods because he had by then proceeded on leave. *f* *g* *h*

*i* This closed the case of the defendants. Learned Counsel for both parties addressed me.

*j* I have carefully examined the evidence and I must say at once that formidable as the witnesses for the defence are, none of them was categorical in telling me that there was no

room for the practice alleged by the plaintiff. Mr Allen, Fellow of the Institute of Bankers who I understand is one of only three of such Fellows in the whole of the country, impressed me by his evidence which in effect indicated that such a practice could not be ruled out. His own way of dealing with a customer like the plaintiff was to give him an overdraft and pay the bill.

I believe the evidence of the plaintiff and his witnesses that there was a custom and practice in the way the plaintiff had alleged. He had mortgaged a property to the bank, maintained a current account with the bank and all the witnesses for the defendants who knew the plaintiff admitted that he was a good customer. I do not see anything wrong or unusual in banker varying their practice and, as Mr Allen said facilities given by bank would depend on the credit worthiness of the customer.

I have examined exhibit Q, the Bank's statement of account of the plaintiff and I have not been impressed with the argument of learned Counsel Mr *Bentley* when he relied so much on the fact that the plaintiff was 'heavily overdrawn' with the defendants in January, 1964. The fact was that for the first four days of January he was in funds but from the 4th of January he was overdrawn; but the overdraft was not more than £600. This was nothing in an account of which shows some heavy payments upwards of £1,500 sometimes and in any case within two months of January the plaintiff again was in funds.

I find sufficient evidence to substantiate the special arrangement alleged by the plaintiff. He produced evidence exhibits A and Al to show that other goods had been supplied to him in May and August, 1962 on the strength of letters similar to exhibit B. I find as a fact that exhibit B was written on the 20th December, and received by the defendants on the 24th of December, that is a clear week before the ship "Shomron" arrived in Nigeria. I find as a fact that the plaintiff was under the impression that the defendants had acted

*a* on his instructions and had cleared and stored the goods for him. I believe that the plaintiff in company of his clerk saw Mr Enerburg, the Manager and Joseph the shipping clerk on  
*b* the 17th February when for the first time they learnt that the goods had not been cleared. On that day they had come with the sum of £1,300 to pay for and to clear a portion of the goods. I believe that the manager apologised to the plaintiff  
*c* for what he called an oversight and I believe that the manager left the plaintiff with the impression that the goods would be cleared as soon as possible.

I do not believe the evidence of Mr Enerburg the manager  
*d* of the defendants branch which was involved in this case nor do I think the shipping clerk, Joseph was telling the truth. They are both employees of the defendants and I think their evidence was made up to suit the defendants' case. They did  
*e* not impress me as witnesses of truth. For instance when I asked on whose instructions the goods were ultimately cleared, Mr Enerburg said he received oral instructions from the Headquarters office in Lagos while Joseph said the in-  
*f* structions were written and that he saw the letter.

The custom and practice alleged by the plaintiff does not appear to me to be an unusual facility to be accorded by a bank to its customer. As Mr Allen said it all depends on the  
*g* customer's credit worthiness. In fact it seems to me that it would be good business for the bank to do so with a good and tested customer such as the plaintiff. The bank at all times had absolute possession of the goods which could only  
*h* be released to the customer against payment. The bank did not lose a penny and on the other hand they would recoup themselves for all the expenses incurred and would also charge bank interests and their commission. I should have  
*i* thought that this was a normal incident of banking business. There was sufficient mutuality and also sufficient consideration.

In any case if the bank did not intend to honour the plain-  
*j* tiff's instructions contained in exhibit B why did the bank

not say so when they received his letter? Why did they keep his letter from 24th December, 1963 without taking any action on it until he called personally at the bank's office on the 17th of February, 1964 when, according to the bank they informed him that the goods had not been collected? I could not have believed that a reputable bank like the defendants could come to court to plead a situation of this sort.

I consider that the action of the defendants was the result of some bungling in their branch office because this action was contrary to their previous practice with the plaintiff. Whatever their Instruction Book said about clearance of goods I believe that there was a special arrangement between the defendants and the plaintiff and that the defendants did not usually, insist on the instructions of shippers before clearing customer's goods. Plaintiff was indeed surprised to hear that when the defendants cleared his goods in the past they were acting in accordance with the shipper's instruction and not his own. At no time did the defendants inform the plaintiff of this position.

In this connection the rule of law is that stated in *Freeman v. Cook* 2 Epstica at page 663 and referred to with approval in the speech of Blackburn J, in the case of *Smith and Hughes* reported in Volume 6 Queens Bench Division 597 at page 607 and I quote:

"If, whatever a man's real intention may be he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party and that other party upon that belief enters into contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."

I find that, relying on this custom and practice with the defendants, plaintiff was entitled to refuse to pay the extra costs incurred by the negligence of the defendants and consequently he lost the goods of which the market price was £9,399.15s.0d. The defendants are liable for this loss.

- a* I have examined the evidence relating to the plaintiff's claim for damages in the amount of £4,325.6s.8d but I cannot find sufficient evidence to justify this claim. On the
- b* contrary the defendants tendered documents which show that; throughout the year 1964, when the plaintiff alleged he closed down his factory for a year, had received lots of supplies which must have kept his factory busy. Plaintiff explained that this was because of some financial accommodation given to him by one L Nicot from London. If this
- c* was so he had no right to claim for any loss. In the alternative, I do not believe that he closed down his factory for a whole year and kept paying his workmen throughout this
- d* period. His claim for damages under this head fails.

- The order of this Court is that judgment be entered in favour of the plaintiff in the amount of £9,399.15s.0d. Plaintiff
- e* is also entitled to the costs of this action which I will now proceed to assess.

## Ajayi v. Commissioner of Police

COURT OF APPEAL, ZARIA

HURLEY CJ, HAGUE AG J

Date of Judgment: 16 AUGUST 1966

Appeal No.: Z/15CA/66

*Banking – Fraudulently delivering a counterfeit note or coin  
– Accused must have known the same to be counterfeit at the  
time of taking possession – Section 438 of Penal Code*

### Facts

The appellant was convicted of fraudulently delivering a forged note contrary to section 438 of the Penal Code. He paid a £5 note to the complainant for some goods. It was not proved that the appellant knew at the time he took possession of the note that it was a forgery. But he knew it to be forged at the time it was delivered to the complainant.

### Held –

1. A charge under section 438 of Penal Code cannot stand on the facts because the trial magistrate did not direct himself on the question whether at the time the appellant took delivery of the note he knew it to be a forgery.

*Appeal dismissed.*

### Counsel

For respondent: *Shittu, State Counsel*

### Judgment

**HURLEY CJ:** (*Delivering the judgment of the court*) The appellant was convicted by the Chief Magistrate at Ilorin of an offence against section 438 of the Penal Code, which, so far as material, provides:—

“Whoever, having in his possession any counterfeit coin or note . . and having known at the time when he became possessed of such coin or note that such coin or note was counterfeit . . fraudulently or with intent that fraud may be committed delivers such coin or note to any to other person . . shall be punished.”



*a* It is an element of this offence that the accused must have known at the time when he became possessed of the coin or note, that it was counterfeit. That was alleged in the charge in this case, which concerned a £5 note, and the finding of guilty on the charge would in the ordinary way imply a finding that the appellant had that knowledge. However, the Chief Magistrate's finding as expressed in his judgment was different. He said:—

*c* “Taking all the evidence and circumstances of the case as a whole, I am satisfied beyond reasonable doubt that the accused, who was possessed of the £5 note (exhibit ‘B’), knowing that it was counterfeit, fraudulently delivered it to P.W. 1.”

*d* This is not a finding that when the appellant became possessed of the note he knew it was counterfeit. In fact, that point is not mentioned anywhere in the judgment, and the judgment starts with a misstatement of the charge which indicates that the Chief Magistrate did not make the finding or consider the point because he failed to realise that it was material. For the judgment begins:—

*f* “The accused stands charged with an offence punishable under section 438 of the Penal Code in that he fraudulently delivered a £5 counterfeit note to one Yahaya Adoke with the knowledge that it was counterfeit.”

*g* The Chief Magistrate having failed to direct his mind to an essential element of the offence or make any finding that that element had been proved, there is no course open to us but to set aside the conviction. We cannot ourselves find the missing fact from the record. It is true to say that the note, exhibit B, to our eyes, declares itself immediately and unmistakably to be a forgery. But it is not an altogether crude forgery. When the first prosecution witness, an itinerant trader, saw the note, he suspected it, but he did not reject it. We cannot say that the appellant must have recognised it as counterfeit at the time when it came into his possession.

*j* The only person who was in a position to say whether or not the appellant had that knowledge was the Chief Magistrate, who saw and heard the appellant, the first prosecution witness and the other witnesses at the trial and had thus the

means of deciding whether or not the appellant was a person *a*  
who could have readily recognised and did recognise a  
counterfeit which the first prosecution witness did not. The  
Chief Magistrate left the question unanswered, and indeed *b*  
never asked it; and it cannot be answered here.

The conviction must be set aside, but we think that the ac-  
cused could have been charged with fraudulently using as  
genuine a document (as defined in section 22 of the Penal *c*  
Code), namely a £5 note, which he knew to be a forged  
document, contrary to section 366 of the Penal Code that his  
defence (which was a denial that he possessed or delivered  
the note) would not have been less effective if he had been *d*  
so charged, or less appropriate to the charge than it was to  
the original charge, and that the evidence, if it supported the  
conviction on the charge under section 438, would have  
supported a conviction under section 366 and in that case we *e*  
ought to substitute such a conviction. This leads us to the  
consideration of the merits of the appeal in light of the  
grounds and arguments put forward by the appellant.

The appellant's defence is that the counterfeit £5 note was *f*  
never in his possession and that the first, second and third  
prosecution witnesses, being brothers and Northerners,  
wished to implicate the appellant (a Westerner) and procure  
his dismissal from his post as mechanic with the firm of *g*  
Impreglio.

In support of his contention that the case against him was a  
fabrication, appellant has made detailed submissions to us  
concerning matters in the evidence which he alleges are *h*  
contradictory and entitle him to an acquittal.

He points out that the first prosecution witness (Yahaya)  
and the second prosecution witness (Raji) went according to  
the former Moses Ajayi to appellant's house at about *i*  
9:00 am on 26th July, 1965. Raji on the other hand stated  
this happened at about 2:00 pm.

Furthermore, Raji testified that at their house, Yahaya-  
showed the suspect note to their senior brother Ibrahim, a *j*

- a* police sergeant (third prosecution witness). Yahaya gave similar evidence, but Ibrahim said Raji was not present when Yahaya showed him the note, the time being about 2:30 pm  
*b* on 26th July, 1965.

The appellant criticises the learned Chief Magistrate for stating before recording evidence that Raji was “A very intelligent and smart boy. Clearly understands the duty of speaking the truth.” The appellant suggests that the Chief Magistrate had made up his mind about this witness, if not the whole case, before coming into court. This attitude is unjustified as the learned Chief Magistrate’s comments clearly related to the acceptance of this witness’s evidence on oath as opposed to unsworn. It should he remembered that the witness Raji was only 12 years of age and that further he was testifying to events which had happened almost seven months earlier. This lapse of time also increases the chance of discrepancies occurring in the evidence of his senior brothers.

The learned Chief Magistrate held that the presence or otherwise of the boy Raji on the occasion previously mentioned, did not affect his view of the credibility of the witnesses Yahaya and Raji. We are of opinion that the Chief Magistrate’s evaluation of the evidence was correct. There was persuasive evidence that the appellant tendered the forged note to the first prosecution witness in payment for a piece of cloth priced at £1.5s.0d. The first prosecution witness commented on the note’s dirty condition, which appellant explained was caused by rain. At this point we may observe that the appellant, had he not done so earlier, must then have realised the note was a forgery and a palpable forgery at that.

*i* There is corroborative evidence concerning the £3.15s.0d handed to appellant as change. The appellant’s story that he handed over the exact amount of £1.5s.0d, was rejected. The learned Chief Magistrate, rightly in our view, commented  
*j* that appellant in his statement to the police said no one was

nearby when he paid the £1.5s.0d, and in consequence the witness Adegboyega was not telling the truth when he said he saw the appellant with a note between his lips, a note in his hand and some coins which he was counting.

It is true nothing incriminating was found when the appellant's house was searched, but this does not diminish the value of the other evidence. At the trial, and again in this appeal, the point was taken that it had not been sufficiently proved that the note exhibited in the case was the same note as the note certified as a forgery by the Central Bank. As we have already said, the note exhibit "B" declares itself a counterfeit, so we have not examined this contention.

Appeal dismissed, but conviction under section 438 set aside and conviction under section 366 substituted for fraudulently using as genuine a document, namely a £5 currency note, which he knew to be a forged document, at Kainji on 25th July, 1965.

Sentence affirmed.

*Appeal dismissed.*

*a*

## Ashubiojo v. African Continental Bank Limited

*b*

HIGH COURT OF LAGOS STATE

TAYLOR CJ

Date of Judgment: 22 AUGUST 1966

L.D.: /300/66

*c*

*Banking – Banker’s liability for wrongful dishonour of cheques – Assessment of damages by the court – Customer who is a trader whether he need plead and prove actual damages – Principles governing*

*d*

*Banking – Banker/customer relationship – Current account – Money paid into account and cheques presented for payment by customer the same day – Cheque dishonoured by banker – Banker to prove that cheques were dishonoured before payments in by customer*

*e*

### Facts

*f*

The plaintiff who was a trader, regularly obtained goods on credit from Messrs AG Leventis and Co Limited, and had a bank account with the defendant. On 19th January, 1966, the plaintiff presented for payment a cheque for the sum of £24.5s.0d but the defendant dishonoured the cheque. The plaintiff also claimed that another cheque for the sum of £6.5s.0d which was presented for payment on 18th February, 1966 was dishonoured by the defendant. Both cheques were dishonoured with the words “Return to Drawer.” The plaintiff tendered a statement of account which showed that he had to his credit the sum of £25.8s.0d on 19th January, 1966 and the sum of £19s.0d on 18th February, 1966, the date the first cheque was dishonoured and on 18th February, 1966, the plaintiff made two separate payments of £6 and £5 into his account. However, the defendant did not give any evidence as to whether the above sums were paid in before or after the cheques were dishonoured.

*g*

*h*

*i*

*j*

Upon the complaint of the plaintiff to the defendant that their wrongful dishonour of the two cheques made AG Leventis Limited to stop credit facilities granted to him, the defendant wrote two letters of apology to him. The major issue for determination was whether the money paid into account by plaintiff on both days which put the plaintiff's account in credit preceded the presentation of the two dishonoured cheques. The court awarded judgment for the plaintiff.

**Held –**

1. Once a bank places money to its customer's credit, the customer is entitled to draw upon it, unless something occurs to deprive him of that right. In the instant case, since sufficient money had been placed to the plaintiff's credit, he was entitled to draw upon it. The defendant bank was therefore liable to the plaintiff in damages for wrongfully dishonouring the cheques.
2. A trader is entitled to recover substantial damages for the wrongful dishonour of his cheque without pleading and proving actual damage. However, that exception to the general rule as to the measure of damages for breach of contract does not extend to anyone who is not a trader. In the instant case where the plaintiff was a proven trader, he was entitled to substantial damages without even pleading and proving actual damages. Since the plaintiff had proved that he lost the credit facilities he formerly enjoyed from Messrs AG Leventis and Co Limited and the commission he received in his business transactions, the plaintiff was entitled to substantial damages of £250.

*Judgment for plaintiff.*

**Cases referred to in the judgment**

***Foreign***

*Bank of New South Wales v. Laing* (1954) 1 A.E.R. 213

*Capital and Counties Bank v. Gordon* (1903) A.C. 240

- a Gibbons v. Westminster Bank Ltd* (1939) 2 K.B. 882  
*Marzetti v. Williams* 109 E.R. 842

**Counsel**

- b* For the plaintiff: *Munis and Balogun*  
 For the defendant: *Opele*

***c* Judgment**

- TAYLOR CJ:** The plaintiff was a trader with credit facilities with Messrs AG Leventis and Co Limited at the material time. He also has an account with the defendant company.  
*d* He complains of the defendant company's action in dishonouring two cheques for small sums issued by him in favour of Messrs AG Leventis and Co Limited, as a result of which the credit facilities granted to him were stopped. He urges  
*e* that at the material time of presentation of the said cheques he had sufficient money with the defendant company to cover the sums the subject matter of the cheques. The defendant company on the other hand contend in their defence  
*f* *inter alia* that the plaintiff had insufficient funds with them to cover the two cheques.

- The first cheque is exhibit "A" and is dated the 15th January, 1966. The sum involved is £24.5s.0d. It was received by  
*g* the defendant company on the 19th January, 1966 by Cashier No. 5 and it was marked "Return to Drawer." The second cheque exhibit "B" is for an even smaller sum, ie, £6.5s.0d issued by the plaintiff on the 16th February, 1966 and  
*h* marked in similar fashion to exhibit "A" by Cashier No. 5 on the 18th February, 1966. It should be mentioned also that both of these cheques are crossed. The points that arise therefore are whether (1) on the 19th January, 1966 the  
*i* plaintiff had £24.5s.0d standing to his credit at the defendant bank and (2) on the 18th February, 1966 he had £6.5s.0d to his credit in the said bank?

- j* Now in addition to the oral evidence of the parties, exhibit "E" the Statement of Account of the plaintiff with the

defendant bank was tendered in evidence. It is undated but it must have been prepared some time after the 29th March, 1966, the last entry contained therein. According to this exhibit the plaintiff had to his credit the sum of £25.8s.0d on the 19th January, 1966 and the sum of £19s.0d on the 18th February, 1966. It therefore seems that at first glance the plaintiff was in credit on the two material dates aforementioned.

The defendant company's contention goes a little deeper than that. They say that the 7th entry in exhibit "E," ie the entry of the payment of £250s.0d on the 17th January, 1966 is a wrong entry in point of time and that as per exhibit "F" the sum of £25 was paid in on the 19th January, 1966. The cashier, ie, No. 2 who recorded this sum was not called to give evidence nor was any explanation offered as to his inability to give evidence with the result that there is no evidence as to the hour of the day when this sum was paid in. I accept the defendant's story that this sum was paid in on the 19th January, 1966 for had there been another sum of £25.0s.0d paid in on the 17th January, 1966 as per exhibit "E," the duty of rebutting the defendants' story fell on the plaintiff and this he failed to do. The net result, therefore, is that the seventh entry, as far as the date is concerned, in exhibit "E" is erroneous and should read 19.1.66. That being the case, was the sum of £25 paid in before the cheque exhibit "A" was received by cashier No. 5 for crediting the account of Messrs AG Leventis and Co Limited? Let us look at the evidence led by the defence to refute the plaintiff's evidence that he was in credit at the material time. The first defendants' witness, Godwin Dike is a reference clerk and a ledger keeper in the defendant bank, and he gave evidence that he always checks the ledgers at the end of each day. He says that exhibit "A" was presented to him in the morning of the 19th January, 1966 and on going through the plaintiff's account found that the plaintiff had no funds in the bank to meet this payment. He further said he went to the cashiers to



- a* check whether any payment in had been made by the plaintiff and found that none had been made.

- b* The sole point for determination as regards both exhibits is whether the payments in on both days which put the plaintiff's account in credit preceded the receipt of the cheques exhibits "A" and "B" by the defendant bank in point of time. It should be mentioned that the payments in on the relevant
- c* dates were cash payments as per exhibit "E" and not payments by cheque. In the case of *Capital and Counties Bank v. Gordon* (1903) A.C. 240 at 249, Lord Lindley said:

- d* "It must never be forgotten that the moment a bank places money to its customer's credit the customer is entitled to draw upon it, unless something occurs to deprive him of that right."

- In the case of *Bank of New South Wales v. Laing* (1954) 1 A.E.R. 213 at 221, to which my attention was drawn by Mr
- e* *Munis* for the plaintiff, Lord Asquith said that:

- f* "But a further 'peculiar incident' is that the Bank is only indebted to the customer for the amount (which may be called 'a balance' when it is arrived at by deducting authorised withdrawals from sums paid in) standing to his credit as at the time of demand. Of course, if the customer can prove that at that time the 'balance' sufficient to pay his demand, he succeeds. If the 'balance' falls short of doing so, even by a penny, he fails altogether, another distinction which rails off the creditor-debtor relationship in the
- g* case of a customer and banker from that relationship in other cases; on this footing did the plaintiff discharge the onus on him? Their Lordships consider that he did not. If he had gone into the box and sworn that the eight disputed cheques were forged, and had been believed, he would unquestionably have discharged it.
- h* He would equally have shifted that onus to the bank if he had gone into the box and testified that only cheques A, B and C drawn on account were genuine and that, after deducting these, there were still sufficient funds to meet the demand. He did neither."

- i* In the case before me as I had said the plaintiff did give evidence that:

"My account was in credit when the cheques were returned."

- j* The fact as to whether exhibits "A" and "B" were received from the clearing house by the defendant bank before the cash

payments in by the plaintiff which puts his account in credit is a matter wholly within the knowledge of the defendant bank. The plaintiff would and could only be expected to know the time he paid in the various sums under consideration. The defendant bank on the other hand must be aware not only of the time payments were made by the plaintiff but also of the time exhibits “A” and “B” were received by their bank from the clearing house. I am of the view that the plaintiff has by the evidence given by him shifted the onus on the bank to show that in fact the cheques were received from the clearing house before plaintiff made the payments in to which reference has already been made. What have the defendants done to displace this onus? Apart from the evidence of the ledger keeper, Godwin Dike to which I have already referred, one Bernard Peters gave evidence and he said this *inter alia*:—

“Plaintiff called on me and reported that we had wrongly returned one of his cheques and that because of this his customers AG Lev-entis had threatened to stop accepting his cheques, and that this was affecting his business. I called for the Ledger card, and as a result of what I saw I apologised to the plaintiff, and in view of what he told me about his business I promised to write a letter to him.”

A little later on in answer to a question from the court, the witness, who, be it noted, was at the relevant period the accountant in the defendant bank, said this:

“Before I wrote exhibits ‘C’ and ‘D’ I called Defence Witness 1 (Godwin Dike) and told him ‘you must be careful in checking.’ He said he checked before he returned the cheques and saw that the plaintiff had not paid in anything.”

It was after this that Mr Peters wrote the two letters exhibits “C” and “D.” He wrote the first one on the 24th February, 1966 in respect of the cheque exhibit “B” for £6.5s.0d and the second on the 1st March, 1966 in respect of the cheque exhibit “A” for £24.5s.0d. The wording of the letters is identical and it is as follows:

“Dear Sir,

We wish to apologise for returning the abovementioned cheque unpaid when in actual fact there was sufficient funds to cover it.

- a* We deeply regret whatever embarrassment this might have caused you, and we assure you that such errors will not occur in the future.”
- b* The facts as regards the cheque exhibit “B” for £6.5s.0d differ a little from those in respect of the cheque exhibit “A” to the extent that on the 18th February, 1966 the day on which the cheque exhibit “B” was presented, the plaintiff made two
- c* separate payments into his account. The first payment was for £6 which put his account in credit to the tune of £619s.0d and later on in the same day he made a further payment of £5.
- d* Both these payments were cash payments holding that the plaintiff’s evidence together with the weight attached to exhibits “C” and “D,” not to mention portions of the evidence of Bernard Peters to which I have already alluded tip the scales heavily in the plaintiffs favour. I therefore find as a fact that at the time the two cheques exhibits “A” and “B” were presented the plaintiff, to use the wording of exhibits “C” and
- e* “D,” had “sufficient funds to cover” them. I will put it in another way. I find as a fact that the payment in of the £25.0s.0d by the plaintiff on the 19th January, 1966 took
- f* place in point of time before the receipt of exhibit “A.” Similarly the payments in of £6 and £5 on the 18th February, 1966 took place before the receipt of exhibit “B” by the defendant bank. These sums being cash payments and having been
- g* placed to the plaintiff’s credit he was entitled to draw upon them. The defendant bank having dishonoured the cheques are liable to the plaintiff in damages which I shall now proceed to assess.
- h* What is the principle governing assessment of damages in such cases? In the case of *Gibbons v. Westminster Bank Ltd* (1939) 2 K.B. 882, Lawrence J said this at page 888:
- i* “. . . and it remains only to consider whether the plaintiff, who, it is admitted, is not a trader, is entitled to recover more than nominal damages for the dishonour of her cheque without having pleaded or proved special damage. The authorities which have been
- j* cited in argument all lay down that a trader is entitled to recover substantial damages for the wrongful dishonour of his cheque

without pleading and proving actual damage, but it has never been held that that exception to the general rule as to the measure of damages for breach of contract extends to anyone who is not a trader.”

In the case before me, that the plaintiff is a trader is well proven, and it would seem on this authority that he is entitled to substantial damages without even pleading and proving actual damage. That he has proved actual damage is beyond any dispute for the evidence of his witness, Victor Shoyinka which I accept, clearly shows that the plaintiff has lost the credit facilities he formerly enjoyed with Messrs AG Leventis and Co Limited as a result of the dishonour of these two cheques. He has also lost the commission he normally receives in his transactions with the said firm, ie, one quarter percent on the sales made. On the highest sales made in one month as per exhibit “J,” the commission comes to no more than about, £14.17s.0d approximately on £5,925.4s.3d. On his oral evidence he says he makes a daily gain of £25 to £40 and in his Statement of claim he says it is between £35 and £40. A profit of £35 per day for 6 days in the week amounts to £840 per month and £10,080 per year. I do not believe for one moment that the man who appeared before me has seen as profit in his best days as much as a tenth of that sum per year. It is very hard for me to believe that a man who takes as much as £5.900 worth of goods in one month will only have in his bank account as per exhibit “E” a credit of £57.8s.0d at the most. It is true he said that he also pays in cash and the witness called by him stated that the plaintiff pays by cheques on other banks. As to the former I want further evidence by way of receipts to support it before I accept it, and as for the latter the plaintiff himself never supported such evidence.

Be that as it may, he is on the authorities, entitled to substantial damages even in the absence of proof of special damages.

It is true that the amounts involved in the cheques, ie, £24.5s.0d and £6.5s.0d are comparatively small sums but in

- 
- a* the case of *Marzetti v. William* 109 E.R. 842, Lord Tenterden, CJ said at page 845 that:–
- b* “At the same time I cannot forbear to observe, that it is a discredit to a person, and therefore injurious in fact, to have a draft refused payment for so small a sum, for it shows that the banker had very little confidence in the customer. It is an act particularly calculated to be injurious to a person in trade.”
- c* Bearing all these authorities in mind and applying them to the facts of the case before me I award the plaintiff substantial damages assessed at £250 and costs which I assess at 100 guineas inclusive.

*Judgment for plaintiff.*

*a*

## Buko v. Nigerian Pools Company Limited

SUPREME COURT OF NIGERIA

*b*

ADEMOLA CJN, COKER, LEWIS JJSC

Date of Judgment: 18 NOVEMBER 1966

S.C.: 525/1964

*Banking – Cheques – Stale cheque – Right of holder to sue on – Principles applicable*

### Facts

The plaintiff won a certain amount on a football coupon, and was presented with a cheque, which the bank refused to honour as it was a stale cheque.

The respondents refused to issue him another cheque claiming that they were not liable to pay the money, whereupon the appellant sued them on the dishonoured cheque.

Part of the agreement between him and the betting company as stated on the coupon was that the agreement could not give rise to any legal relationship or be legally enforceable.

### Held –

1. The fact that the bank had endorsed the cheque as a stale cheque in no way altered the right of the plaintiff to sue on the cheque as it has long been held that as between the drawer and the holder of a cheque the former is not discharged by any delay in its presentation short of six years unless some loss or injury is occasioned to him by such delay.
2. As the cheque however had not been passed on to another person but remained with the plaintiff in whose name it was drawn, it was necessary for him to establish that consideration had been given for it.

**a Cases referred to in the judgment**

***Foreign***

- b** *Appleson v. H. Littlewood Ltd* (1939) 1 A.E.R. 464  
*Burrell and Son v. Leven* (1926) T.L.R. 407  
*Jones v. Vernon's Pools Ltd* (1938) 2 A.E.R. 626  
*Laws and another v. Rend* (1857) 3 C.B.H.S. 442  
**c** *Rose and Frank Co v. J.R. Crompton and Bros Ltd* (1925) A.C. 445

**Counsel**

- For appellant: *Moore*  
**d** For respondents: *Ogunsanya*

**Judgment**

- e LEWIS JSC:** (*Delivering the judgment of the court*) This is an appeal by the plaintiff from the decision of Lambo J in the Lagos High Court given on the 14th October, 1963 in which he dismissed with 70 guineas costs the plaintiff's claim for the sum of £12,585.10 in respect of a cheque drawn on the African Continental Bank Limited, Lagos, in the plaintiff's name by the defendants, the Nigerian Pools Company Limited, on which the bank refused to pay when it was presented.
- f**
- g** The facts of this case, as found by the learned trial Judge, are that on the 3rd March, 1962, the plaintiff paid to an agent of the defendant company in Benin the sum of ten shillings and six pence in respect of a football coupon which
- h** the plaintiff entered for the matches due to be played on that date. The plaintiff submitted to the agent only the one coupon, which was numbered No. A902783, though he had completed both the original and duplicate of the coupon and
- i** he received a receipt from the defendant agent in acknowledgement of his payment. The original coupon was retained by the agent of the defendant company in Benin for dispatch with any other coupons received from matches on that date. These were duly dispatched but when they were received
- j** from Benin by the defendant company in Lagos it was found

that only the copy of the original coupon of the plaintiff was *a*  
included and that this bore the same number as the original,  
namely A902783, though the number was written in ink and  
not printed. Later on the same day the defendant company *b*  
received in Lagos a bunch of coupons from Port-Harcourt  
which included the original submitted by the plaintiff with  
the number duly printed. This batch of coupons from Port-  
Harcourt was, due to the delay of the plane, received by the *c*  
defendant company after the results of the matches had been  
declared and it was found upon investigation when the cou-  
pons were checked the following day that the plaintiff's  
coupon from Port-Harcourt was a winning coupon though *d*  
the copy received from Benin was not. The defendant com-  
pany being naturally suspicious of two coupons with the  
same number having been received. First of all sent senior  
officers to investigate and then called in the Nigerian Police,  
who, on the advice of a representative of the Director of *e*  
Public Prosecutions, told the defendant company to give a  
cheque to the plaintiff for the amount he had won on his  
coupon received from Port-Harcourt. This was duly done on *f*  
the 6th March, and the plaintiff was then arrested and  
charged but in the subsequent criminal trial was acquitted.  
After he was acquitted he obtained back the cheque which  
had been an exhibit at his trial and presented it to the bank on  
the 10th of November, 1962, but the cheque was endorsed by *g*  
the African Continental Bank., on whom it was drawn as  
"stale cheque" and when the money was not paid the plaintiff  
through his solicitor wrote to the defendant company inform-  
ing them of what had happened and requesting them to issue *h*  
the plaintiff with another cheque. This, the defendant com-  
pany refused to do maintaining that they were not liable to  
pay the money.

The plaintiff in the High Court sued on the dishonoured *i*  
cheque and whilst the defendant company had not given the  
bank instructions to stop this particular cheque the bank in  
accordance with normal banking practice in respect of out-  
of-date cheques refused payment as this cheque was over six *j*



*a* months old. The fact that the bank had endorsed the cheque  
 as a stale cheque in no way altered the right of the plaintiff  
*b* to sue on the cheque as it has long been held since *Laws and*  
*another v. Rend* (1857) 3 C.B.H.S. 442 that as between the  
 drawer and the holder of a cheque the former is not dis-  
 charged by any delay in its presentation short of six years  
*c* unless some loss or injury is occasioned to him by such  
 delay. As the cheque, however, had not been passed on to  
 another person but remained with the plaintiff in whose  
 name it was drawn it was necessary for him to establish that  
 consideration had been given for it. Chief Moore on behalf  
*d* of the appellant submitted that the necessary consideration  
 was, in fact, the ten shillings and six pence state money that  
 the plaintiff had paid to the defendants agent in Benin in  
 respect of the football coupon he entered. He further submit-  
*e* ted, quite rightly in our view, that if the consideration was  
 established then its adequacy was not a matter for the court  
 to determine. Mr *Ogunsanya* for the defendant company on  
 this point submitted that one could not look back to the first  
 payment for the consideration as fresh consideration must be  
*f* shown as was required in the case of *Burrell and Son v.*  
*Leven* (1926) T.L.R. 407.

*g* Part, however, of the football coupons used by the defen-  
 dant company and entered by the plaintiff in this appeal  
 stated – “I have read and agreed to the current rules and  
 conditions of the Nigerian Pools Company Limited, and  
 remit in full the amount staked on this coupon. I am over  
 21,” under which the person submitting the coupon puts his  
*h* name and address and this was duly done by the plaintiff.  
 One of the rules was rule 2 which stated:–

*i* “It is a basic condition of the sending in and the acceptance of  
 every coupon, that it is intended and agreed that the conduct of the  
 pools and everything done in connection therewith and all ar-  
 rangements relating thereto (whether mentioned in these Rules or  
 to be implied) and that any coupon and any agreement or transac-  
 tion entered into, or payment made by, or under it shall not be at-  
*j* tended by, or give rise to any legal relationship, rights, duties or  
 consequences, however, or be legally enforceable, or the subject of

litigation, but all such arrangements, agreements and transactions are binding in honour only.” *a*

Another rule was rule 14 which read (in part)

“DISQUALIFICATIONS:– A coupon (or the particular forecast concerned) is disqualified and no claim will be entertained in respect of it, or of the stake money relating to it, if in fact or in the opinion of the accountants:– *b*

(a) . . . *c*

(b) there is any reason to doubt the genuineness of any forecast.”

These Rules accordingly bound the plaintiff in respect of his coupon upon which he paid the ten shillings and six pence entry fee. *d*

Now, so far as rule 2 is concerned the intention was to ensure that the relationship between the parties was to be that of honour, in other words, a gentleman’s agreement rather than to create a legal relationship. The court have long accepted that the law does not impute an intention to enter into legal relationship where the circumstances and the conduct of the parties negative any intention of the kind and in *Rose and Frank Co v. J.R. Crompton and Bros Ltd* (1925) A.C. 445 it was held that where there was such a term (as in rule 2) here which has been set out) in an agreement between the parties that this arrangement did not become a legally binding contract. Nonetheless, in that case, after this arrangement had been entered into the parties had conducted business and Lord Phillimore had stated at page 555:– *e*  
*f*  
*g*

“According to the course of business between the parties which is narrated in the unenforceable agreement, goods were ordered from time to time, shipped, received, and paid for, under an established system; but the agreement being unenforceable, there was no obligation on the American company to order goods or upon the English companies to accept an order. Any actual transaction between the parties, however, gave rise to the ordinary legal rights; for the fact that it was not of obligation to do the transaction did not divest the transaction when done of its ordinary legal significance. This, my lords will, I think, be plain if we begin at the latter end of each transaction. Goods were ordered, shipped and received. Was here *h*  
*i*  
*j*

- a* no legal liability to pay for them? One stage further back. Goods were ordered, shipped goods were ordered, shipped, and invoiced. Was there no legal liability to take delivery? I apprehend that in each of these cases the American company would be bound. If the goods were short-shipped or inferior in quality, or if the nature of them was such as to be deleterious to other cargo on board or illegal for the American company to bring into their country, the American company would have its usual legal remedies against the English companies or one of them. Business usually begins in some mutual understanding without a previous bargain.”

- Chief *Moore* submitted that this was in his favour and that we must look, as was said by Lord Phillimore, at the actual transaction between the parties and just as in that case goods passed so that there was a duty to pay for them, so here money passed and there was a duty to give value which it had earned in returned. He further submitted that the cases of *Jones v. Vernon's Pools Ltd* (3) and *Appleson v. H. Littlewood Ltd* (1) which *prima facie* were against him, were distinguishable. In each of those two cases, a person had sued a pools company in respect of a sum alleged to have been won on a coupon but in the former case in High Court and in the latter case in the Court of Appeal in England, it was held that this could not be done because one of the rules made by each of the pools companies was that the arrangements, agreements and transactions were binding in honour only. Counsel, however, pointed out that in accordance with the law then in force in England in both cases no money had been sent with the coupon but the person submitting the coupon was in honour bound to send the following week.

- h* Counsel submitted that it was different in the appeal before us because, in fact, the ten shillings and six pence was paid by the plaintiff at the time he submitted the coupon so that in effect the contract was executed rather than being executory.
- i* We do not need to decide this interesting point in this appeal because in our view the matter is clearly determined by rule 14(b) of the rules of the defendant company for the running of its pools in that as the learned trial Judge had
- j* found that the winning coupon of the plaintiff was, in fact,

received from Port-Harcourt and the plaintiff submitted his coupon in Benin and as the coupon sent from Benin was not only not a winning coupon, but had its number written instead of printed as it should have been, there was more than justification for the defendant company disqualifying both coupons. Chief *Moore* conceded that if we found it was proved that his client had sent two coupons the defendant company would be entitled to disqualify the coupons under rule 14(b) without reference to rule 2 dealing with the “gentleman’s agreement.” He submitted that there had been no evidence at the hearing of the action from anyone in the employment of the defendant company to show that the plaintiff had submitted a coupon through Port-Harcourt, but the learned trial Judge accepted the evidence of the defendants manager in Lagos, that in fact, it was received with the Port-Harcourt coupons and we consider that this was sufficient to warrant the rejection of the coupon when another coupon of the same number was received from Benin, whether or not it was established that it was the plaintiff who submitted it through Port-Harcourt because it may well be that there were one or more persons other than the plaintiff involved in the attempted fraud upon the defendant company. It is, moreover, to be kept in mind that the receipt that the plaintiff produced was in respect of the Port-Harcourt coupon although he maintained that the actual coupon he submitted was through Benin. Whilst it might well have been better if the defendant company had adduced further evidence in respect of how the coupon was received from Port-Harcourt, nonetheless the plaintiff’s contention throughout was that he was only winning on a coupon submitted through Benin. We do not consider the plaintiff/appellant has established that the learned trial Judge was wrong on the evidence before him to make the finding of fact he did in regard to it. It follows from this, therefore, that we consider that the learned trial Judge was right in his judgment to dismiss this action and the appeal is accordingly dismissed.

*Appeal dismissed.*

*a*

## Williams v. Bankole and others

HIGH COURT OF LAGOS STATE

*b*

GEORGE AG J

Date of Judgment: 25 NOVEMBER 1966

*c*

*Banking – Banker’s books – Application to take copies of –  
When court will grant – When court will refuse*

*Banking – Trust fund – Application by beneficiary to take  
copies of bank entries relating to trust fund – When court  
will grant*

*d*

*Banking – Trust fund – Statements of account filed by trustee  
in the bank – Right of beneficiary to verify – Duty of  
trustee thereby*

*e*

### Facts

*f*

The plaintiff in this case is a beneficiary under the will of JO Williams, deceased, and in his will the testator directed his trustees to create a trust fund from the rents and profits accruing from the properties and pay the same to the Bank of West Africa for a period of 10 years. He further directed that at least one quarter of the funds so created should not be touched. Finally, in the penultimate paragraph of the will, he

*g*

said:

“I give bequeath and devise all my real and personal properties of what matter or mind so ever not herein before otherwise disposed of in equal shares to my children legitimate and illegitimate.”

*h*

The plaintiff filed an action for a true and accurate account of the Administration of the Estate of the late JO Williams including an account of the trusts created under the will. By motion, the plaintiff sought to take copies of all entries in the Books of the Bank of West Africa, now Standard Bank Limited relating to the account of the first and second defendants.

*i*

*j*

The learned Counsel for the defendants resisted the application on three grounds: (*a*) that the applicant has no interest

in the trust fund; (b) that there is no residuary bequest and so there can be no residuary legatee; (c) that the motion was in the nature of a discovery and the plaintiff/ applicant could not enforce discovery of private books kept by him.

**Held –**

1. As a residuary legatee, the plaintiff has sufficient interest in the trust fund created.

The instant case, is a residuary bequest which makes the plaintiff a residuary legatee since he is one of the children of the deceased. The plaintiff is of course interested in the trust fund, because at least one quarter of the trust fund consists of rent accumulated according to the will for a period of 10 years. This amount was not specifically bequeathed to anybody and therefore part of the residue.

2. A trustee is bound to disclose at the request of the beneficiary all their dealings with the trust fund. In the instant case having regards to the subject matter of the action it is clear that the entries in the bank Books were material and relevant to the cause of action. The plaintiff is therefore entitled to an Order empowering him to take copies of the bank Books relating to the matter.
3. The court will not grant an application to take copies of entries in bank Books where it is irrelevant to the cause of action and the defendant deposes as such in an affidavit.
4. The beneficiary is entitled as of right to verify from the bank whether statements of account filed by the trustees tally with the entries in bank Books.
5. A trustee must give information to his *cestui que* trust as to investment of the trust estate. Where a portion of the trust estate is invested, it is not sufficient for the trustee to merely say that it is so invested; his *cestui que* trust is entitled to an authority of the trustee to enable him to make proper application to the bank in order that he may verify the trustee's statement.

*a Granting the application.*

### **Cases referred to in the judgment**

*b Foreign*

*Arnolt v. Hayes* (1887) 36 Ch.D. 731; 57 L.T. 299

*In re: Marshfield* (1886) 32 Ch.D. 54; L.T. 564

*c Parnell v. Wood* (1892) P. 137; 66 L.T. 670

*South Staffs Tranways Co v. Ebbsmith* (1895) 2 Q.B. 669; (1895) 73 L.T. 454

*In re: Tillot* (1892) 1 Ch.D. 86; (1891); 65 L.T. 781

*d Waterhouse v. Barker* (1924) 2 K.B. 759

### **Nigerian rules of court referred to in the judgment**

*e Supreme Court (Civil Procedure) Rules (Laws of Nigeria), 1948, Cap 211, Order XIII, rule 17*

### **Counsel**

For the plaintiff: *Williams*

*f For the defendants: Coker and Impey*

### **Judgment**

*g GEORGE AG J:* This is the application by motion by the plaintiff under Order XIII, rule 17 of the Old Supreme Court (Civil Procedure) Rules (Cap 211) for an order that the plaintiff's solicitor or any other person duly authorised by him or by the plaintiff himself be at liberty to take copies of all entries in the books of the Bank of West Africa, now *h Standard Bank Limited*, relating to the account of the first and second defendants, including all dealings with funds held in the bank to the credit of Jacob Olumide Williams, deceased. The application is supported by an affidavit.

*i The main action is for a true and accurate account of the administration of the estate of the late JO Williams, deceased, including an account of the Trusts created under the will of the said JO Williams. The plaintiff is himself a child of the deceased and a beneficiary under his will. The defendants opposed the application and filed a counter-affidavit.*

Order XIII, rule 17 of the Old Supreme Court (Civil Procedure) Rules was taken from section 7 of the English Bankers' Books Evidence Act, 1879, which has been held to be a statute of general application in the United Kingdom on the interpretation and meaning of section 7 of the Bankers' Books Evidence Act are therefore relevant to the matter in issue.

The learned Counsel for the defendants resisted the application on three grounds: (a) that the applicant has no interest in the trust fund; (b) that there is no residuary bequest and so there can be no residuary legatee; (c) that the motion was in the nature of a discovery and the plaintiff/applicant could not enforce discovery of private books kept by him.

The plaintiff in this case is a beneficiary under the will of JO Williams, deceased, and in his will the testator directed his trustees to create a trust fund from the rents and profits accruing from the properties and pay same to the Bank of West Africa for a period of 10 years. He further ruled that at least one quarter of the funds created should not be touched. Finally, in the penultimate paragraph of the will, he said: "*I give bequeath and devise all my real and personal properties of what matter or mind so ever not herein before otherwise disposed of in equal shares to my children legitimate and illegitimate.*" (emphasis supplied)

This, in my view, is a residuary bequest which makes the plaintiff a residuary legatee since he is one of the children of the deceased. I do not agree with the learned Counsel for the defendants that the plaintiff is not interested in the trust fund. The plaintiff is of course interested in the trust fund, because at least one quarter of the trust fund consists of rent accumulated according to the will for a period of 10 years. The amount was not specifically bequeathed to anybody. It is therefore part of the residue.

With regard to the third point raised by Counsel for the respondents it is settled law that an application under section 7 of the Bankers' Book Evidence Act, 1879, is regulated by



- a* the general rules as to inspection of documents and the person whose account is sought to be inspected may oppose the application on any ground on which inspection of ordinary documents could be resisted.
- b*

- The leading authority on this subject is the case of *Waterhouse v. Barker* (1924) 2 K.B. 759. In that case, the court refused an application for inspection under section 7 of the Bankers' Books Evidence Act on the ground that the respondent had sworn that part of the documents, if inspected, would tend to incriminate him. The Court of Appeal held that the oath of the respondents was conclusive as he took the risk of being prosecuted for perjury if he lied. *Waterhouse* (*supra*) actually follows two earlier decisions namely *Parnell v. Wood* (1892) P. 137; 66 L.T. 670 and *South Staffs Tramways Co v. Ebbsmith* (1895) 2 Q.B. 669; (1895) 73 L.T. 454.
- c*
- d*
- e*

- The ground on which the application was successfully resisted in the *South Staffs Tramways* case (*supra*) was that the entries in the bank books were irrelevant to the issue. It is clear from the authorities that the course open to the defendants was to swear to an affidavit that the entries in the bank books were irrelevant to the issue, in which case I would be obliged to defer my decision and take evidence on oath.
- f*
- g* There is no such an affidavit in this case and in my view, there could not have been such an affidavit, because the accounts concerned are in respect of the estate of the deceased, of which the defendants are trustees. The defendants cannot plead any privilege in this case, because as trustees, they are bound to disclose at the request of the beneficiary all their dealings with the trust fund.
- h*

- In the *Waterhouse* case (*supra*), Scrutton LJ in his judgment, quoted Cotton LJ in *Arnolt v. Hayes* (1887) 36 Ch.D. at 731; 57 L.T. at 302) as saying (1924) 2 K.B. at 770; [1924] All E.R. Rep. at 782):
- i*

- j* "This is not giving the plaintiff discovery from the defendant to assist the plaintiff's case, but giving him a power of examination

for the purpose of ascertaining what copies he will require for the purposes of being put in evidence.” *a*

The plaintiff in this case cannot tell which entries are material until he sees them. *b*

Counsel for the plaintiff, on the other hand, has drawn my attention to two cases which are directly in point. They are *In re: Tillot* ((1892) 1 Ch.D. 86; (1891); 65 L.T. 781) and *In re: Marshfield* ((1886) 32 Ch.D. 54; L.T. 564). In the former case, Chitty J in his judgment said (1892) 1 Ch.D. 86 at 88; 65 L.T. at 782: *c*

“The general rule, then, is what I have stated, that the trustee must give information to his *cestui que* trust as to the investment of the trust estate. Where a portion of the trust estate is invested in Consols, it is not sufficient for the trustee merely to say that it is so invested, but his *cestui que* trust is entitled to an authority of the trustee to enable him to make proper application to the bank, as has been done in this case, in order that he may verify the trustees own statement.” *d* *e*

It is not disputed that an account has been filed with the Probate Registrar, but the beneficiary is entitled as of right to verify from the bank whether the statements of account filed by the trustees tally with the entries in the bank books. *f*

The authorities show that the plaintiff is entitled to the order sought. There will therefore be an order in the terms of the plaintiff’s motion. *g*

*Order accordingly.*