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Judgment
44, 1954

In the Privy Council.

No. 30 of 1952.

ON APPEAL FROM THE WEST AFRICAN
COURT OF APPEAL
(NIGERIAN SESSION.)

38001

UNIVERSITY OF LONDON
W.C.1.
23 MAR 1955
INSTITUTE OF ADVANCED
LEGAL STUDIES

BETWEEN
THE UNITED AFRICA COMPANY LIMITED
(Plaintiffs) *Appellants*
AND
SAKA OWOADE (Defendant) *Respondent.*

RECORD OF PROCEEDINGS

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In the Privy Council.

No. 30. of 1952.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL (NIGERIAN SESSION.)

BETWEEN

THE UNITED AFRICA COMPANY LIMITED

(Plaintiffs) Appellants

AND

SAKA OWOADE

... .. *(Defendant) Respondent.*

RECORD OF PROCEEDINGS

No. 1.

Civil Summons.

In the
Supreme
Court.

Suit No. 51/49.

Between

THE UNITED AFRICA CO. LTD. *Plaintiff*

and

SAKA OWOADE *Defendant.*

No. 1.
Civil
Summons.
2nd March
1949.

To SAKA OWOADE of Alade Street, Isale Ijebu, Ibadan, or c/o John Holt & Co. Ltd., Ibadan (Produce Department).

10 You are hereby commanded in His Majesty's name to attend this Court at Tinubu Square, Lagos, on Monday the 28 day of March 1949, at 9 o'clock in the forenoon to answer a suit by The United African Co. Ltd., of c/o Messrs. Irving & Bonnar, Barclays Bank Chambers, Lagos, against you.

The Plaintiff's claim against the Defendant is in the sum of £4,777 9s. 4d., whereof £4,732 13s. 4d. is value of 40 cases of Guinea Gold Cigarettes and £44 16s. is cost of 4 cases of Jules Charrent Brandy delivered and accepted by the Defendant's clerk and Lorry Driver on behalf of the Defendant on or about 15th March, 1948 and 13th April, 1948, as common carriers for transporting to the Plaintiffs' Station at

20 Ilorin which he has failed to deliver.

In the
Supreme
Court.
—
Civil
Summons.
2nd March
1949—
continued.

Issued at Lagos the 2nd day of March, 1949.

Summons	...	...	£25	0	0
Service	...	...		5	6
			<hr/>		
			£25	5	6
			<hr/>		

(Sgd.) FRANCIS H. BAKER,
Senior Puisne Judge.

TAKE NOTICE: That if you fail to attend at the hearing of the suit or at any continuation or adjournment thereof, the Court may allow the Plaintiff to proceed to judgment and execution.

No. 2.
Statement
of Claim.
11th April
1949.

No. 2.
Statement of Claim.

10

STATEMENT OF CLAIM.

1.—The Plaintiffs are a limited liability Company carrying on the business *inter alia* of wholesale suppliers of goods in Lagos and elsewhere. The Defendant is a Produce Assistant to Messrs. John Holt & Co. Ltd. in Ibadan, and also owns lorries and carries on a road transport business as a common carrier.

2.—In February, 1948, the Defendant introduced his clerk and a lorry driver to the clerk to the Plaintiffs who deals with despatch of goods up-country and also introduced the said clerk and lorry-driver to the Plaintiffs' storekeeper. The Defendant requested at the same time that the Plaintiffs should entrust him with freight of their goods to stations up-country. 20

3.—In March, 1948, the Plaintiffs entrusted goods to the value of £4,777 9s. 4d. to the clerk to the Defendant for carriage and delivery to places up-country.

4.—The said goods were never delivered to their destinations and the said clerk and lorry-driver to the Defendant were later convicted of the theft of the said goods.

5.—The Defendant is liable as a common carrier to make good to the Plaintiffs the value of the said goods but has failed to do so. 30

Whereof the Plaintiffs claim as per writ of Summons.

Dated at Lagos this 11th day of April, 1949.

(Sgd.) IRVING & BONNAR,
Plaintiffs' Solicitors.

No. 3.
Defence

In the
Supreme
Court.

STATEMENT OF DEFENCE.

No. 3.
Defence.
22nd April
1949.

1.—The Defendant denies paragraphs 2, 3, 4 and 5 of the Plaintiffs' Statement of Claim and puts the said Plaintiffs to their very strict proof.

2.—The Defendant admits paragraph 1 of the Plaintiffs' Statement of Claim save and except the averment that he is a common carrier which he denies and puts the said Plaintiffs to their strict proof.

3.—The Defendant says that the person alleged to be his Clerk in 10 paragraph 3 was not and has never been his Clerk is one who touts for passengers and loads to be carried to certain places and is no way an Agent of the Defendant.

4.—The Defendant became aware of paragraph 4 after the prosecution of his driver and the said tout Simeon Dejo.

5.—The Defendant avers that he is not a common carrier.

6.—The Defendant says that his driver did not have the said Defendant's consent before the said goods of the Plaintiffs were entrusted to him, nor was it done with his knowledge.

Dated at Lagos this 22nd day of April, 1949.

20

(Sgd.) JOHN TAYLOR,
Defendant's Solicitor.

No. 4.
Plaintiffs' Opening.

No. 4.
Plaintiffs'
Opening.
27th
February
1950.

TEESDALE for Plaintiff.

J. I. C. TAYLOR with AGBAJE for Defendant.

TEESDALE : Claim for £4,000 odd in respect of 40 cases of Guinea Gold Cigarettes and 4 cases brandy which were delivered by Plaintiffs to be carried in a lorry belonging to Defendant. The goods were to be delivered to outlying depots of the Plaintiffs at Ilorin and Oshogbo. Defendant through his clerk and driver accepted these goods for carriage. Defendant 30 had previously visited the premises of the Plaintiffs in Lagos and introduced one Clerk and one driver who he said operated this lorry on his behalf and requested that when the Plaintiffs had any goods for carriage up country a load might be given to him to be carried in his lorry. On 2 dates in March and April, 1948, the Plaintiffs handed over cigarettes and brandy which were signed for by the clerk employed by the Defendant. After a lapse of time it was discovered that these goods had never been delivered. A criminal prosecution was later instituted and the clerk and driver were found guilty of theft of these goods and are now in prison. Action brought against Defendant as owner of the lorry and employer of the two persons operating 40 the lorry and because Defendant introduced these persons to the Plaintiffs, as his agents. There is a double ground of liability. We aver that Defendant as a lorry owner should be regarded as a common carrier which has with it the absolute liability to make good any loss of goods entrusted to the carrier. Defence admits that the Defendant carries on a road

In the
Supreme
Court.

No. 4.
Plaintiffs'
Opening.
27th
February
1950—
continued.

transport business but deny that he is a common carrier. Second ground of liability arises from the relationship between the Defendant as owner of the lorry and employer of the driver, because if that relationship is established then, independently of his obligations as a carrier, he is liable on the principle *Respondet superior* for the acts of his servants. The defence sets up that the person we allege to be a clerk was not in fact an agent of the Defendant but merely a person who touts for passengers. Defence avers that the driver did not have the Defendant's consent to accept the goods nor was it done with the Defendant's knowledge.

Plaintiffs'
Evidence.

No. 5.
Plaintiffs' Evidence.

10

No. 5.
Claudius
Macfor.
27th
February
1950.
Examina-
tion.

CLAUDIUS MACFOR, Sworn, states : I live at 25 Daddy Alaja Street, Lagos. I am a clerk in the employ of the United Africa Co., Ltd., Plaintiffs in this action. I work in the General Goods Department and have been there for 6 years. I know the Defendant. I met him sometime in February, 1948. He was brought to the office and introduced by the Storekeeper as a lorry owner. The Storekeeper told me that whenever goods are to be transported up country by lorries that he should be considered. On that day when Defendant was introduced to me he was accompanied by his driver Adegbola Amao and a clerk named Simeon Dejoj. They left some 20 time in March the clerk Simeon Dejoj came up to me in the office and enquired whether there are any goods to be transported up country. I said yes and took him round to the European Manager and introduced him as the Clerk of a lorry and that he wanted to transport goods to the out station. The Manager instructed me to give him goods for the U.A.C. Ilorin. I prepared the packing slips. The documents shown to me are the packing slips I prepared for 20 cases Guinea Gold Cigarettes which I gave to Simeon Dejoj to be taken to the Chief Storekeeper. Tendered, no objection, admitted and marked Exhibit "1." Two days later I had instructions to transport 4 cases brandy to the same station. As the cigarettes were not 30 ready on the 15th March I made another packing slip for the 4 cases brandy to be carried with the 20 cases of cigarettes. I gave the slip to Simeon Dejoj and he took it to the storekeeper. Tendered, no objection admitted and marked Exhibit "2." On the 13/4/48 Simeon Dejoj came along and enquired whether there were goods to be transported. I told him yes and prepared a packing slip for 75 cases Guinea Gold to be transported to U. A. C. Oshogbo. I handed it to him and he took it to the storekeeper. Tendered, no objection admitted and marked Exhibit "3." Later on I received a Way Bill from the storekeeper to prove that the goods had been signed for by Simeon Dejoj and taken away. The Way Bills are prepared 40 by Mr. Akalla. The goods were not delivered to Oshogbo and Ilorin and they have not been recovered. Later there were criminal proceedings against the clerk and driver and they were convicted.

Cross-exam-
ination. To TAYLOR : The first and only time I met Defendant was in February, 1948. The bill was signed for as received by Simeon Dejoj.

No. 6.
Emanuel Akanni Wey.

In the
Supreme
Court.

Plaintiffs'
Evidence.

EMANUEL AKANNI WEY, Sworn, states : I live at 37 Aje Street, Yaba, and am Storekeeper to the U.A.C., Ltd. I have been a storekeeper for about 14 years in the General Goods Department. I know the Defendant. I met him in February, 1948. He came to my store with 2 persons named Simeon Dejoh and Adegbola Amao. He introduced himself to me as a transport owner and asked me if I had any goods going to outstations to give them to the clerk and driver whom he brought with him. I told him I would not
10 give out goods unless I got instructions from the office. I took the 3 of them to the office and introduced them to the chief Clerk and the transport Clerk. In March, 1948, Simeon Dejoh and the driver brought an order for 20 cases Guinea Gold Cigarettes to be transported to Ilorin. I called my clerk to prepare Way Bill for them. My clerk prepared the Way Bill for 20 cases Guinea Gold Cigarettes and Simeon Dejoh signed the Way Bill. I saw him sign. I produce the book containing the Way Bills for 20 cases Guinea Gold Cigarettes and 4 cases brandy. The date is 15/3/48. Tendered, no objection, admitted and marked Exhibit "4." In April I received an order from
20 Simeon Dejoh to transport 20 cases Guinea Gold to Oshogbo. I prepared a Way Bill for the 20 cases on the 13/4/48 and Simeon Dejoh signed it. Tendered, no objection, admitted marked Exhibit "5." I saw him sign. The documents shown to me are the invoices for stocks from which the cigarettes and brandy delivered to Simeon Dejoh were taken. Tendered, no objection, admitted and marked Exhibit "6." The price of the brandy was £11 3s. 9d. a case. The cigarettes are £118 6s. 8d. a case. The goods never reached their destinations.

No. 6.
Emanuel
Akanni
Wey.
27th
February
1950.

Examina-
tion.

To Mr. TAYLOR : I gave evidence during the criminal trial. I admit that I never mentioned Mr. Owoade in the criminal trial. I did not know Simeon Dejoh before February, 1948. I never knew Owoade before
30 February, 1948. Simeon Dejoh did not introduce Owoade to me. Owoade introduced himself to me. I do not know if there was document signed by Owoade relating to the transport of goods and given as a guarantee to the U.A.C. Simeon Adejoh signed for the goods in his own name, not in a representative capacity. I did not know Simeon Adejoh before February. Goods have never been given to him before February.

Cross-exam-
ination.

RE-EXAMINED : I took Owoade to our chief Clerk—Mr. Adeyemi. After introducing Defendant to Adeyemi I left them to make arrangements.

Re-exam-
ination.

Adjourned till 6th March for mention.

(Sgd.) C. W. REECE,
Puisne Judge.

In the
Supreme
Court.

No. 7.

Defendant's Opening.

No. 7.
Defendant's
Opening.
14th March
1950.

TEESDALE for Plaintiff.

J. I. C. TAYLOR and AGBAJE for Defendant.

TAYLOR does not propose to call evidence but desires to make a submission to the Court that there is no case for the Defendant to answer.

TAYLOR : Case for Plaintiff based on para. 1 of the Statement of Claim and para. 5 of the Statement of Claim. Para. 1 of Statement of Claim read, also para. 5. If Plaintiff fail to Establish Defendant as a common carrier then they must fail. 10

A second point on the question of agency was raised in the opening by Teesdale but this cannot be pursued because it is not raised in the Writ and is not pleaded.

Question of who is a common carrier has been subject of many decisions. Onus of proof on Plaintiff who alleges.

Halsbury's Laws of England 1st Edition Vol. 4 page 2 para. 1.

Gisbourn v. Hurst Vol. 1 Salkeld Report page 249.

Bennett v. The Peninsular Steamboat Co. 6 C.B. 775—Wilde C.J. at 787.

Two witnesses, clerks of U.A.C. called by Plaintiff. Neither of them could give evidence on this point of common carrier. Both of these witnesses said that Defendant asked to be allowed to carry goods for U.A.C. 20

Belfast Rope Work v. Bushell (1918) 1 K.B. at page 210 in Law of England Transport by Freund page 11.

It has to be established in the first place that Defendant carries goods for everybody. Defendant may disprove that he is a common carrier by showing that he reserved the right to reject or accept passengers or goods. If this right of refusal or acceptance is based not upon whether the lorry is full, but upon the attractiveness of the offer, he is not a common carrier. In this case Plaintiff has failed to show the first point which would necessitate the Defendant's going into box and showing second and third points. 30

So far as a common carrier is concerned he is liable for goods lost in transit irrespective of whether he is negligent or not. In case of master and servant master is only liable for his own or his servant's negligence. Plaintiff would have to plead negligence.

No. 8.

Reply by Plaintiffs' Counsel to submission by Defence.

No. 8.
Reply by
Plaintiffs'
Counsel to
submission
by Defence.
14th March
1950.

TEESDALE : Does not propose to address on what Taylor has said on a common carrier. Taylor has given a very clear outline of the law and of what Plaintiff would have to show by evidence to establish Status of 40

Defendant as a common carrier. But Court will remember, as Taylor said, that I pointed out that the pleadings disclosed a dual liability— (1) that of the strict liability of a common carrier and (2) by the facts averred both in the Writ of Summons and Statement of Claim that the relationship of master and servant existed between Plaintiff and the driver of the lorry. In both cases liability would attach to the Defendant. If the goods were carried in his lorry and it was shown by Evidence that he carried indifferently for all persons and did not have the right to refuse to carry for anyone, then I don't agree with Taylor that liability would arise irrespective of any averment of negligence. If I were relying solely on the Defendant being liable as a common carrier it would only have been necessary to prove 3 things by Evidence—(1) that Defendant had accepted the goods for carriage (2) that the goods never reached their destination and (3) that the Defendant was a common carrier. Mr. Taylor says that in opening I took an 11th hour argument on the pleadings. It is not the case that Mr. Taylor failed to realise that the plea of master and servant would be taken. Ref. : to wording of writ of summons shows that the goods were delivered to the clerk and lorry driver on behalf of the Defendant. Ref. : to Statement of Claim.

20 Taylor says that Plaintiff rests his case on paras. 1 and 5 of Statement of Claim. Paras. 2 and 3 go far beyond what I said was necessary to plead had we been relying on Defendant's liability of a common carrier. Paras. 2 and 3 are dealt with specifically in the defence in paras. 2 and 5 thereof. In para. 3 Defendant goes on to indicate what the relationship of the Clerk and driver to himself was. Defendant sets up a specific defence to show that he is not liable on the principle of master and servant.

30 Para. 6 of defence deals with the position of the driver. This is a defence to the plea I am taking now. There is more of the defence dealing with the defence of master and servant than with that of a common carrier. By his pleading he must have been fully aware that this was a plea to be taken. We are relying on the evidence that the relationship of master and servant has been shown to exist between Clerk, driver and Defendant. We have led no evidence to show that Defendant can be regarded as a common carrier and are resting case on having established relationship of master and servant which Defendant has not seen fit to come and deny.

I do not agree with Mr. Taylor on the necessity for the Plaintiff to show negligence on the part of Defendant before he can be held liable as master :

40 Smith's Law of Master and Servant, at pages 208/209.

It is common ground that the goods were stolen.

Dyer v. Munday (1895) 1 Q.B.D., 742 at 747.

In the
Supreme
Court.

No. 8.
Reply by
Plaintiffs'
Counsel to
submission
by Defence,
14th March
1950—
continued.

In the
Supreme
Court.

No. 9.

Rejoinder by Defendant's Counsel.

No. 9.
Rejoinder
by
Defendant's
Counsel.
14th March
1950.

TAYLOR : Teesdale has conceded that there is no case on the ground of common carrier and relies on the relationship of master and servant. Would like to reiterate my argument on the pleadings. Plaintiff may have made certain averments about Defendant's clerk and lorry driver, but we are not concerned with surplusage in pleading. The question is on what does Plaintiff base the liability of Defendant.

If my construction is correct the writ is based on the Defendant being a common carrier.

Teesdale says that I have pleaded agency. Para. 5 of the Statement of Claim shows how the Plaintiff seeks to make the Defendant responsible I may have pleaded to surplusage but that does not entitle Plaintiff to rely on a plea that he did not set up as a cause of liability. 10

I had not referred to the question of agency but I did not think it necessary, but it is necessary for Plaintiff to aver negligence if he intends to rely on it.

Halsbury's Laws of England, 1st Edition, Vol. 4, page 4, paras. 3 & 5. The act done by the servant must be in the conduct of his employment and interest of his master.

Law of Inland Transport (Freund) page 56.

Bullen and Leake, 9th Edition 140. Negligence must be proved. 20
It must be specifically and particularly pleaded.

I submit that the Plaintiff must fail.

(Sgd.) C. W. REECE,
Puisne Judge.

No. 10.
Judgment.
30th March
1950.

No. 10.

Judgment.

IN THE SUPREME COURT OF NIGERIA.

LAGOS JUDICIAL DIVISION.

HOLDEN AT LAGOS.

Before His Honour Mr. Justice COURTENAY WALTON REECE, Puisne Judge.

This 30th day of March, 1950.

Case No. S. 51/49.

UNITED AFRICA CO. LTD. v. SAKA OWOADE.

This action was brought by the Plaintiff against the Defendant claiming 30
£4,777 9s. 4d. whereof £4,732 was the value of 40 cases of Guinea Gold Cigarettes and £44 16s. 0d. the cost of 4 cases of Jules Charrent Brandy delivered and accepted by the Defendant's clerk and lorry driver on behalf of the Defendant on or about the 15th March, 1948, and 13th April, 1948, as common carriers to be transported to the Plaintiff's premises at Ilorin, but which said goods were never delivered.

In para. 5 of the Statement of Defence the Defendant averred that he was not a common carrier and in para. 6 the Defendant stated that his driver did not have the Defendant's consent before the said goods were

entrusted to him nor were they entrusted to the driver with the consent of the Defendant.

The Evidence led by the Plaintiff was that in February, 1948, the Defendant accompanied by one Simeon Dejob and one Adegbola Amao went to the Plaintiff's Store where he met Emanuel Akanni Wey, a storekeeper, to whom he introduced himself and the two persons just named. The Defendant told the witness Wey that he was a transport owner and that the two persons with him were his driver and clerk. The Defendant asked Wey if he had goods to be taken to the out-stations to give them to the clerk and driver. Wey said that he took the three of them to the office and introduced them to the transport clerk and the chief clerk. Claudius Macfor, a clerk in the Plaintiff Co.'s employ, said that the storekeeper Wey brought the Defendant accompanied by Simeon Dejob and Adegbola Amao and introduced the Defendant as a lorry owner and requested that when goods were to be sent up country by lorries Defendant should be considered.

Sometime in March, the witness Macfor stated, the Clerk Simeon Dejob came to him and asked whether there were any goods to be transported up-country and that he took Dejob to the European Manager and said that Dejob offered to transport goods to outstations and asked whether he could give him any. On the Manager instructing him to give goods to Dejob Macfor said he prepared packing slips for 20 cases of Guinea Gold Cigarettes and gave them to Dejob. The packing slips were put in evidence as Ex. 1. On the 15th March Macfor stated he gave the said Simeon Dejob a packing slip for 4 cases of brandy, to be carried with the 20 cases of cigarettes, which Dejob took to the storekeeper. This packing slip was put in evidence as Ex. 2. Again on the 13th April, 1948, Macfor stated that Dejob came along and enquired whether any more goods were to be transported and that he prepared and gave Dejob a packing slip for 75 cases of Guinea Gold Cigarettes to be transported to the U. A. C. Ltd. at Oshogbo. Exhibit 3 was the packing slip. Later Macfor said he received from Emanuel Akanni Wey a way-bill which showed that the goods had been signed for and taken away by Simeon Dejob. Macfor said the goods were never delivered and that criminal proceedings were instituted against Dejob and the driver Amao, both of whom were convicted. Emanuel Akanni Wey testified further that in March, 1948, Simeon Dejob brought an order for 20 cases of Guinea Gold Cigarettes to be transported to Ilorin and that way bills were prepared for these 20 cases of cigarettes and 4 cases of brandy and signed by Dejob. Exhibit 4 was produced showing the way-bills signed by Dejob on the 15th March, 1948. In April Wey said he received an order from Simeon Dejob for another 20 cases of Guinea Gold Cigarettes and that he prepared a way-bill for these on the 13th April which Simeon Dejob signed. The way-bill was put in evidence as Ex. 5. Exhibit 6 was the invoices for stocks from which the cigarettes and brandy were taken and show that the brandy was £11 3s. 9d. a case and the cigarettes £118 6s. 8d. a case.

At the close of the case for the Plaintiff Mr. Taylor for the Defendant

In the
Supreme
Court.

No. 10.
Judgment.
30th March
1950—
continued.

In the
Supreme
Court.
—
No. 10.
Judgment.
30th March
1950—
continued.

submitted that it had not been established that the Defendant was a common carrier and cited several authorities in support of his submission. He further submitted that having failed to establish that the Defendant was a common carrier the Plaintiff must fail in the action, since he had not pleaded negligence, which he must do if it was sought to hold the Defendant liable on the relationship of master and servant between the Defendant and Amao and Dejob.

Counsel for the Defendant submitted that Counsel for the Plaintiff raised a last minute argument on the pleadings when he opened his case and said that the relationship of master and servant existed between the Defendant and the lorry driver and that the Defendant was therefore liable for the tort of his servant committed in the course of his employment. This, Counsel continued, had not been pleaded by the Plaintiff and it was not open to him to rely on it as part of his case. 10

Mr. Teesdale for the Plaintiff did not seek to support his plea that the Defendant was a common carrier but submitted that his statement of claim disclosed a dual liability on the part of the Defendant (1) as a common carrier and (2) arising out of the relationship of master and servant that existed between the Defendant and the driver of the lorry. In reply to Mr. Taylor's submission that the Plaintiff could not rely on the liability of a master for the tort of his servant, Mr. Teesdale for the Plaintiff said that paras. 2 and 3 of the Statement of Claim went beyond what was necessary to plead had the Plaintiff been relying solely on the Defendant's liability as a common carrier. Counsel for the Plaintiff submitted that paras. 2 and 3 of the Statement of Claim were specifically pleaded to in paras 2 and 5 of the Defence and that in para. 3 of the Defence the Defendant set out the relationship that existed between himself and Simeon Dejob the Clerk, while para. 6 of the Defence dealt with the position of the Defendant. Counsel for the Plaintiff submitted that more of the defence dealt with the liability arising from the relationship of master and servant than from that of a common carrier and that from the defence the Defendant must have been fully aware that the Plaintiff would rely on the liability of a master for the wrongs of his servant. Counsel for Plaintiff concluded his address by saying that evidence had been led to show that the relationship of master and servant existed between the Defendant, the driver and the clerk and that the Plaintiff was relying on the liability of the master for the tort of his servant committed in the scope of his employment and disagreed with the submission of Counsel for the Defence that the Plaintiff had to show negligence on the part of the Defendant before he could be held liable for the tort of his servant as master. In support of this contention he cited a passage from Smith's Law of Master and Servant which read as follows :— 30 40

“ Though it has been thought that the doctrine of respondeat superior has been extended too far, it is now indisputable that, with a few limitations which will be hereafter pointed out, a master is responsible civiliter to third persons for any act done by his servant provided it be done in the course of his employment, whether act be one of omission or commission, whether

“negligent, fraudulent, or deceitful, even if it be done in violation
 “of his master’s orders, and even if it be an act of positive mal-
 “feasance or misconduct, and though it should amount to a
 “criminal offence.”

In the
 Supreme
 Court.

No. 10.
 Judgment.
 30th March
 1950—
continued.

Counsel for the Plaintiff stated that it was common ground that the goods were stolen and in submitting that the Defendant was liable as master for the criminal act of his servant cited the case of *Dyer v. Munday* (1895) 1 Q.B.D. 742 at p. 47. But in my view this case seems to be authority for saying that a master is liable for the criminal act of his servant if such act
 10 is done in the course of his employment and in the interest of his master, and to this extent appears not to go so far as the principle enunciated from Smith’s Law of Master and Servant. Counsel for the defence in reply reiterated that in his pleadings the Plaintiff based his claim on the Defendant being a common carrier and submitted that if the Defendant did plead to surplusage it would not entitle the Plaintiff to rely on a plea that he did not set up as a cause of liability.

It seems to me beyond dispute that both in the writ of summons and the statement of claim the Plaintiff sought to rest his case solely on the liability of the Defendant as a common carrier. This ground of liability
 20 has been abandoned and indeed otherwise could not be done, for the evidence led on behalf of the Plaintiff wholly failed to establish that the Defendant was a common carrier. The question for me to decide in the first place now is whether, as submitted by Counsel for the Defendant, the Plaintiff having failed to establish the cause of liability on which he relied in paragraph 5 of his pleading, the Plaintiff must fail and judgment should be entered for the Defendant or whether, having established by evidence that the relationship of master and servant existed between the Defendant, the driver and the clerk, the Plaintiff can rely on the liability of a master for the wrong of his servant and, as in this case, is the master liable for the criminal act of
 30 his servant.

It is a first principle of pleading that facts only are to be stated and that matters of law or mere inferences of law should not be stated as facts. It has been decided in *Gautret v. Egerton*, L.R. 2 C.P. 371 that a Plaintiff must state only the facts which in his opinion give him a right, or impose on the Defendant a duty; and the Judge will decide, when these facts are proved, what are the legal rights and duties of the parties respectively.

Counsel for the Defendant submitted that the Plaintiff in para. 5 of the statement of claim relied on the Defendant’s liability as a common carrier. Para. 5 of the statement of claim reads as follows:—

40 “The Defendant is liable as a common carrier to make good
 “to the Plaintiffs the value of the said goods but has failed to
 “do so.”

In my opinion this paragraph violates the principle enunciated above from the case of *Gautret v. Egerton* in that it is an inference of law and not a fact being pleaded and, as it were, encroaches upon the functions of the Judge to decide what are the legal rights of the parties. But para. 2 of the

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Supreme
Court.
—
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continued.

Statement of Claim sets out certain facts which have been proved and, as it is for the Judge to decide, from the facts proved, what are the legal rights and duties of the parties, I am of the opinion that it is within my province to examine such facts and ascertain whether they give rise to any rights and duties between the parties. Accordingly, I am unable to accept the submission of Counsel for the Defendant that, [the Plaintiff having abandoned his claim that the Defendant was a common carrier, judgment should be entered for the Defendant. From the evidence which has been led by the Plaintiff I am satisfied that the relationship of master and servant has been established between the Defendant, the Clerk, Simeon Dejob and the driver Adegbola Amao. It has been proved that 40 cases of Guinea Gold Cigarettes and 4 cases of brandy were delivered to Simeon Dejob to be transported to Ilorin and Oshogbo on the Defendant's lorry and it is common ground between the parties that the goods were never delivered to their destinations but were stolen and that both Simeon Dejob and Adebola Amao were prosecuted to a conviction for stealing the aforesaid goods. 10

It now remains to determine whether the Defendant as master is liable for the theft by these two men, his servants, of the goods bailed to them. The question was open to doubt and it used to be thought that a bailee was not responsible for the loss of property by theft, even though the thief is the bailee's servant, unless the bailee had given occasion to the theft by his negligence. I will pause here to observe that Counsel for the Defendant has contended that to succeed by establishing the relationship of master and servant between the Defendant, the Clerk and the driver the Plaintiff must plead negligence and prove it. 20

Since the decision in the case of *Lloyd v. Grace Smith & Co.* (1912) A.C. 716 it has been settled that a principal is liable for the fraud of his agent acting within the scope of his authority, whether the fraud is committed for the benefit of the principal or for the benefit of the agent. In my opinion the decision in this case disposes of the submission by Counsel for the Defendant that the act done by the servant must be in the conduct of his employment and interest of his master. 30

In *Lloyd v. Grace Smith & Co.* Earl Loreburn said :—

“ The Appellant, Mrs. Lloyd, had bought some property, and
“ thus had come to know of the Defendant, a Solicitor. She had
“ doubts about having got her money's worth, and went to the
“ Defendant's Office to inquire. When there she saw one Sanoles,
“ the Defendant's Managing Clerk, and was induced by him to
“ give him instructions to sell or realize this property, and for
“ that purpose to give him the deeds and to sign two documents 40
“ which she neither read nor knew the tenor of, but which put
“ into Sanoles' possession her interest therein. She gave him the
“ deeds as the Defendant's representative. Having got them and
“ the signed documents, he dishonestly disposed of this lady's
“ property and pocketed the proceeds.”

“ It is clear to my mind,” continued Earl Loreburn, “ upon
“ these simple facts, that the Jury ought to have been directed,

10 “ if they believed them, to find for the Plaintiff. The Managing
 “ Clerk was authorised to receive deeds and carry through sales
 “ and conveyances, and to give notices on the Defendant’s behalf.
 “ He was instructed by the Plaintiff, the representative of the
 “ Defendant’s firm,—and she so treated him throughout—to
 “ realize her property. He took advantage of the opportunity so
 “ afforded him as the Defendant’s representative to get her to
 “ sign away all that she possessed and put the proceeds into his
 “ own pocket. In my opinion there is an end of the case. It was
 “ a breach by the Defendant’s agent of a contract made by him
 “ as Defendant’s agent to apply diligence and honesty in carrying
 “ through a business within his delegated powers and entrusted
 “ to him in that capacity. It was also a tortious act committed
 “ by the Clerk in conducting business which he had a right to
 “ conduct honestly, and was instructed to conduct, on behalf
 “ of his principal.”

In the
 Supreme
 Court.

No. 10.
 Judgment.
 30th March
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continued.

20 In the case before the Court the Clerk and driver were authorised by
 the Defendant to accept goods for carriage to the Provinces for they were
 introduced by the Defendant to the Storekeeper. The goods were delivered
 to Simeon Dejob as the Defendant’s representative and he took the goods
 purporting to transport them to Ilorin and Oshogbo, but stole them.
 On the evidence I am satisfied that Simeon Dejob and the driver were
 acting within the scope of their authority when Dejob signed the Way-Bills
 for the goods and had them delivered to the lorry. Guided by the decision
 in *Lloyd v. Grace Smith & Co.* I enter judgment for the Plaintiff for the
 amount claimed in the writ, viz. : £4,732 13s. 4d. and costs.

(Sgd.) C. W. REECE,
Puisne Judge.

30 L. V. DAVIS, holding TEESDALE’S brief, says that the out of pocket
 expenses amounted to £25 10s. 6d. and I ask for 40 guineas.

Mr. TAYLOR says that the case was adjourned on Teesdale’s application
 to bring a witness, who was never brought, and that as Plaintiff failed in
 one part of the case Defendant is entitled to Costs on that part of the case.

Costs assessed at 30 guineas.

Costs assessed at 5 guineas awarded to the Defendant in respect of
 the claim on which the Plaintiff failed.

(Sgd.) C. W. REECE,
Puisne Judge.

In the West African Court of Appeal.

No. 11.
Grounds of Appeal.

No. 11.
 Grounds of Appeal.
 10th June 1950.

IN THE WEST AFRICAN COURT OF APPEAL.
 HOLDEN AT LAGOS.

Suit No. 51/49.

Between
 THE UNITED AFRICA CO. LTD. *Plaintiff/Respondent*
 and
 SAKA OWOADE *Defendant/Appellant.*

The Appellant being dissatisfied with the Judgment of the Supreme Court delivered on the 30th day of March 1950 and having obtained final leave to appeal therefrom dated the 5th day of June, 1950, hereby applies to the West African Court of Appeal on the grounds hereinafter set forth :—

GROUND OF APPEAL.

1.—The Learned Trial Judge erred in Law in finding for the Plaintiff when :—

- (i) Liability on the basis of Master and Servant was never relied upon or averred in the Statement of Claim but merely liability of Common Carriers.
- (ii) The relationship of master and servant was never established. 20
- (iii) Negligence, or loss during course of employment were never proved.

2.—The Learned Trial Judge misdirected himself in the following passage in his Judgment.

“ It is common ground between the parties that the goods were never delivered to their destination but were Stolen and that both Simeon Dejob and Adegbola Amao were Prosecuted to a conviction for stealing the aforesaid goods.”

When paragraph 1 of the Statement of Defence denies such allegations. 30

3.—The Judgment is against the Weight of Evidence.

Dated at Lagos this 10th day of June, 1950.

(Sgd.) A. A. TAYLOR

For J. I. C. TAYLOR,
Appellant's Solicitor.

No. 12.
Notice of Preliminary Objection.

In the West
African
Court of
Appeal.

	Between		
UNITED AFRICA CO., LTD.	...	... ..	<i>Respondent.</i>
	and		
SAKA OWOADE	...	... ..	<i>Appellant.</i>

No. 12.
Notice of
Prelim-
inary
Objection.
19th April
1951.

TAKE NOTICE that the Respondent herein intends at the hearing of this appeal, to rely upon the following preliminary objection notice whereof is hereby given to you, viz. :—

10 AND TAKE NOTICE that the grounds of the said objection are as follows :—

1. That the Grounds of Appeal 1 (ii), and 2 contain pleas not raised in the Court below and consequently should not be raised or argued in this Appeal.

Dated at Lagos this 19th day of April, 1951.

(Sgd.) IRVING & BONNAR,
Solicitors for the Plaintiffs/Respondents.

To the above-named Defendant/Appellant,

20 c/o His Solicitor,
J. I. C. Taylor, Esq.,
9, Victoria Street,
Lagos.

No. 13.
Court Notes on hearing of Appeal.

No. 13.
Court Notes
on hearing
of Appeal.
25th April
1951.

IN THE WEST AFRICAN COURT OF APPEAL.
HOLDEN AT LAGOS, NIGERIA.

Wednesday, the 25th day of April, 1951,

Before their Honours, SIR JOHN VERITY, Chief Justice, Nigeria—Presiding Judge. ARTHUR WERNER LEWEY, K.C.—Justice of Appeal, Gold Coast.

30 JOSEPH HENRI MAXIME DE COMARMOND, Senior Puisne Judge, Nigeria.

W.A.C.A. 3397.

U.A.C., LTD. *v.* OWOADE.

TAYLOR for Appellant.

TEESDALE for Respondent.

TEESDALE: Preliminary objection—filed.

G.A. 1 (ii) and 2—Plea not raised in Court below.

In the West African Court of Appeal. No. 13. Court Notes on hearing of Appeal. 25th April 1951—*continued.*

[COURT : Para 3 of Statement of Defence ?] Not only must be pleaded but argued, if material.
 Pp. 3-5—Appellant's argument.
 P. 6—Respondents' argument.
 Pp. 6-7—Appellant's reply—no denial of relationship.
 As to Ground 2—XXn. of Plaintiffs' witness does not go to this question.
N. Staff Rly. Co. v. Edge. 1920 A.C. 254.
 Birkenhead L. C. at 263.
 Plaintiffs' claim as to Master and Servant made clear—evidence called 10
 —no cross examination—no evidence by Defendant.
 Therefore Appellant cannot now raise question.
 TAYLOR : As to Ground 1 (ii)—para. 3 of Defence, Page 3.
 Defendant denied relationship and put Plaintiff to proof.
 Appellant may say it is not proved.
 As to Ground 2—Defendant denied matter—Judge said was common ground.
 TEESDALE does not reply.
 Objection overruled.
 TAYLOR : Ground 1 (i) : Claim on liability of common carrier. 20
 Judgment in relationship of Master and servant.
 Summons p. 1 : Statement of Claim page 2, para. 1, and 5.
 Liability as common carrier only.
 Judgment page 10, *et seq.*
 As Judge held that sole basis of claim was on liability on common carrier and that not proved he should have entered judgment for Defendant.
Bullen & Leake, 6th Edn., p. 146.
Bullen & Leake, 10th Edn. p. 122—Claim against common carrier.
 Nature of Claim cannot be changed half-way.
 " Rights and duties " as claimed by Plaintiff—then of common carrier. 30
 Judgment is based on mere bailment.
 Ground 1 (iii)—as to negligence.
 Judgment p. 12 *et seq.*
 If relationship is that of bailor and bailee Plaintiff must prove negligence.
 No consideration alleged—same as common carrier. Statement of Claim and evidence, p. 2—nothing about consideration of a bailor—thus particularised and negligence must be averred and proved.
Bullen & Leake, 6th Edn., p. 334.
 Taylor stopped and Teesdale invited to argue question as to whether 40
 on abandonment of claim as against Defendant as common carrier judgment should not have been entered for Defendant.
 TEESDALE : Two points.
 1. Pleadings related not only to liability on common carrier—p. 11 argument rejected by Judge but submits it is sound.
 Writ—Claim " accepted as Defendant's clerk and lorry driver."
 [Court : as common carriers].

But reference is made to "clerk and driver."
 Para. 6 Defence—goes beyond what is necessary to plead.
 Judgment p. 12 however, although rejecting above argument as to
 duality, nevertheless found for Defendant.

Powers of Judge and nature of pleadings.

Hammer v. Flight, 35 L.T., p. 127 (1876).

Agrees that Judge's power to determine rights and duties must be in
 relation to the claim.

N. Staff Rly. Co. v. Edge.

10 Defendant not taken by surprise—opening by Counsel for Plaintiff,
 pp. 3 and 4—no objection—or application, to amend writ might have been
 made.

TAYLOR in reply—question whether Defendant need make objection
 at that stage—liability as common carrier would depend on his relationship
 with clerk and driver—therefore relevant.

No amendment asked for Plaintiff at any stage.

(Sgd.) JOHN VERITY,
Chief Justice, Nigeria.
 C. A. V.

In the West
 African
 Court of
 Appeal.

—
 No. 13.
 Court Notes
 on hearing
 of Appeal.
 25th April
 1951—
continued.

20

No. 14.
 Judgment.

No. 14.
 Judgment.
 15th May
 1951.

WEST AFRICAN COURT OF APPEAL.

GENERAL SITTING HELD AT LAGOS.

Tuesday the 15th day of May, 1951,

Before their Honours, SIR JOHN VERITY, Chief Justice Nigeria—Presiding
 Judge. ARTHUR WERNER LEWEY, K.C., Justice of Appeal, Gold Coast.
 JOSEPH HENRI MAXIME DE COMARMOND, Senior Puisne Judge.

W.A.C.A. 3397.

U.A.C., Ltd. v. SAKA OWOADE.

30 DE COMARMOND, S.P.J.

This is an appeal from a decision of Reece, J. given in favour of the
 Plaintiff Company (now the Respondent).

The Defendant-Appellant's main ground of appeal is that the Plaintiff
 having failed to establish that the Defendant was a common carrier (which
 was the very basis of the claim) the action should have been dismissed.

The writ of summons set out a claim for a certain sum of money

In the West African Court of Appeal.

No. 14.
Judgment.
15th May
1951—
continued.

alleged to be the value of certain goods delivered to and accepted by the Defendant's clerk and the Defendant's lorry driver on behalf of the Defendant, as common carrier, for transport to the Plaintiff's station at Ilorin, which goods the Defendant failed to deliver.

The writ clearly means that the Defendant was sued in his alleged capacity as a common carrier and in no other capacity. The clerk and the lorry driver are mentioned because they receive the goods on behalf of their employer (the common carrier).

The Statement of Claim contained averments to the effect that the Defendant carried on a road transport business as a common carrier, 10 that he had introduced his clerk and his driver to the Plaintiff Company and requested that goods for stations up-country be entrusted to him by the Plaintiff Company for transport. It was further averred that goods had been so entrusted and had been stolen by the said clerk and lorry driver.

The Statement of Claim concluded thus: "The Defendant is liable " as a common carrier to make good to the Plaintiff the value of the said " goods but has failed to do so. Whereof (sic) the Plaintiffs claim as per " writ of summons."

The Defendant denied in his statement of Defence that he was 20 a common carrier. He also denied all the other averments affecting him and went on to aver that the so-called clerk had never been in his employ and that the driver had no authority to accept the goods for transport.

The learned Counsel for the Plaintiff Company stated, when opening the case, that the Defendant was liable on two grounds (presumably in the alternative?). The first ground was that he was liable as a common carrier, and the second was that he was liable by virtue of the principle respondeat superior.

The Plaintiff did not lead evidence to show that the Defendant was 30 a common carrier, but sought to rest the claim solely on the alleged responsibility of the Defendant for the acts of his alleged servants. This was objected to by Defendant's Counsel who had not called evidence, and who submitted that neither the writ nor the pleadings revealed that Plaintiff had an alternative basis for his claim, and that the claim could not succeed because the Defendant had failed to establish the ground of responsibility invoked by him, namely, the Defendant's responsibility as a common carrier.

The learned trial Judge rejected the submission made by Counsel 40 for the Defendant. The gist of the reasons given by the learned Judge was that facts only are to be stated in pleadings and that paragraph 5 of the Statement of Claim violated the principle enunciated in *Gautret v. Egerton* (L. R. 2 C.P. 371) in that it set out that the Defendant was liable as a common carrier to make good to the Plaintiffs the value of the goods.

It is to be noted that the learned Judge made no reference to the Writ of Summons. I would also point out that, even if paragraph 5 of the

Statement of Claim had not contained the words "as a common carrier," there still remained paragraph 1 which clearly shows that the Defendant was sued in his capacity as a common carrier and in no other. Had the Plaintiff intended to sue the Defendant, in the alternative, as a private carrier, he should have complied with Order XXII Rule 8 of the Supreme Court (Civil Procedure) Rules which reads in part as follows: "Where
 10 " the Plaintiff seeks relief in respect of several distinct claims or causes of
 " complaint founded upon separate and distinct facts, they shall be stated
 " as far as may be, separately and distinctly." I might also draw attention
 to Order II Rule 2 of the Supreme Court (Civil Procedure) Rules which
 lays down, *inter alia*, that a Writ of Summons shall state briefly and clearly
 the subject matter of the claim and the relief sought for. Rule 6 of the
 same Order makes it permissible to join several causes of action in the
 same suit.

I cannot subscribe to the view that the writ and the Statement of Claim in this case set out alternative causes of action.

I find it difficult to understand how the case of *Gautret v. Egerton* could be invoked against the Defendant-Appellant's contention in the present case. That case makes it clear that "the Plaintiff must, in his
 20 " declaration, give the Defendant notice of what his complaint is
 " It (the declaration) ought to state the facts upon which the supposed
 " duty is founded, and the duty to the Plaintiff with the breach of which
 " the Defendant is charged" I might also mention the case of
West Rand Central Gold Mining Company v. Rex (1905) 2 K.B. 391, 399
 where Lord Alverstone, C.J. quoted from *Gautret v. Egerton* after saying
 " Upon all sound principles of pleading it is necessary to allege what must,
 " and not what may, be a cause of action"

I am of opinion that the Plaintiff could not succeed in the Court below because he failed to establish the only cause of action that was before the
 30 Court, namely, that the Defendant was responsible as a common carrier.

I would therefore allow this appeal with costs.

The Judgment of the Court below is set aside and a Judgment dismissing the action with costs is substituted therefor.

(Sgd.) M. DE COMARMOND,
Senior Puisne Judge.

I concur.

(Sgd.) JOHN VERITY,
Ag. President.

I also concur.

40

(Sgd.) ARTHUR LEWEY,
Justice of Appeal.

In the West
 African
 Court of
 Appeal.

No. 14.
 Judgment.
 15th May
 1951—
continued.

No. 16.

Order granting Conditional Leave to Appeal to the Privy Council.

In the West African Court of Appeal.

IN THE WEST AFRICAN COURT OF APPEAL.
HOLDEN AT LAGOS, NIGERIA.

Suit No. 51/1949.
W. A. C. A. 3397.

No. 16.
Order granting Conditional Leave to Appeal to the Privy Council.
2nd July 1951.

Between

U. A. C. LTD. *Plaintiffs/Appellants*

and

10 SAKA OWOADE *Defendant/Respondent.*

L.S.

(Sgd. N. R. BAIRAMIAN,
Presiding Judge.

Monday, the 2nd day of July, 1951.

UPON READING the motion and affidavit filed on behalf of the United African Company Ltd., the Plaintiffs/Appellants, on the 4th day of June 1951, in the above matter and after hearing Mr. David of Counsel for Plaintiffs/Appellants and Mr. J. I. C. Taylor of Counsel for the Defendant/Respondent :

20 IT IS ORDERED that Conditional Leave to appeal in the above matter to His Majesty's Privy Council be granted to the United Africa Company Ltd. the Plaintiffs/Appellants upon fulfilment within 3 months from the date hereof of the following conditions :—

(a) That the Plaintiffs/Appellants, the United Africa Company Ltd. do deposit in Court the sum of £50 for the preparation of the Record of Appeal and for the despatch thereof to His Majesty's Privy Council :

30 (b) That the Plaintiffs/Appellants, the United African Company Ltd. do enter into good and sufficient security, to the satisfaction of the Court, in the sum of £500 for the due prosecution of the Appeal and the payment of all such costs as may become payable to Saka Owoade, the Defendant/Respondent in the event of the Plaintiffs/Appellants, the United Africa Company Ltd. not obtaining an Order granting them Final Leave to appeal, or of the appeal being dismissed for non-prosecution, or of His Majesty-in-Council ordering the Plaintiffs/Appellants, the United Africa

In the West
African
Court of
Appeal.

No. 16.
Order
granting
Conditional
Leave to
Appeal to
the Privy
Council.
2nd July
1951—
continued.

Company Ltd. to pay the Defendant/Respondent, Saka Owoade, costs of the appeal :

- (c) That the Plaintiffs/Appellants, the United Africa Company Ltd. do give Notice of the Appeal to the Defendant/Respondent, Saka Owoade.

(Sgd.) W. H. HURLEY,
Deputy Registrar.

No. 17.
Notice of
Appeal.
30th
August
1951.

No. 17.
Notice of Appeal.

NOTICE OF APPEAL.

10

TAKE NOTICE that the Plaintiffs/Respondents/Appellants herein did on the 2nd day of July, 1950, obtain conditional leave to appeal to His Majesty's Privy Council against the Judgment of this Honourable Court delivered on the 15th day of May, 1951, in the above-named matter and that they have since complied with the conditions imposed.

Dated at Lagos this 30th day of August, 1951.

(Sgd.) D. T. VEALL,
Plaintiffs/Respondents/Appellants' Solicitor.

On Notice to :

Deputy Registrar,
W. A. C. A.,
The Defendant/Appellant/Respondent.

20

No. 18.
Court Notes
on hearing
of Motion
for Final
Leave to
Appeal.
29th
October
1951.

No. 18.
Court Notes on hearing of Motion for Final Leave to Appeal.

DAVID to move.
TAYLOR on notice.
David—Order on 2/7/51 for conditional leave.
On condition (b) entered into security in £500.
£500 deposited in Court as security on 30/8/51.
All conditions fulfilled and notice given.
Affidavit 8/9/51, para. 2.

30

Judgment of W.A.C.A. in *U.A.C. vs. Kretchi*—may be distinguished.

Wording of receipt for deposit and affidavit different.

Here reasons for deposit given.

Affidavit sufficiently binds Appellants.

If bond had been conditioned in terms of para. 2 of affidavit it would have been good.

Notice of affidavit given to Respondent and Appellant—therefore bound thereby.

10 TAYLOR : Substance of judgment in Kretchi's case was that conditions not complied with.

Could Appellant deposit document of title and a chattel ?

A.P. 1948, p. 1524 in accordance with order.

Deposit of cash is not " entry into security."

DAVID : Question is whether the form of security given is " to the satisfaction of the Court."

If Court is satisfied with deposit in bond given in that case the Order of 2/7/51 have been complied with.

C.A.V.

In the West African Court of Appeal.

No. 18.
Court Notes on hearing of Motion for Final Leave to Appeal.
29th October 1951—
continued.

No. 19.

20 Judgment refusing Final Leave to Appeal.

IN THE WEST AFRICAN COURT OF APPEAL.

HOLDEN AT LAGOS, NIGERIA.

Monday, the 19th day of November, 1951,

Before their Lordships, SIR JOHN VERITY, Chief Justice, Nigeria, Acting President ; ARTHUR LEWEY, Justice of Appeal ; OLUMUYIWA JIBOWU, Acting Senior Puisne Judge, Nigeria.

W.A.C.A. 3397.

Between :

30 THE UNITED AFRICA Co., LTD. ... *Plaintiffs/Respondents/Appellants*
and
SAKA OWOADE *Defendant/Appellant/Respondent.*

JUDGMENT.

(Delivered by JIBOWU, Ag. S.P.J.).

This is an application by the Appellants, the United Africa Co., Ltd., for final leave to appeal to His Majesty-in-Council. Mr. J. I. C. Taylor, Counsel for Respondent, opposed the application on the ground that the security for costs given by the Appellants was not in accordance with the order of Court, and Mr. James David, Counsel for the Appellants, argued that security for costs may be by bond or by cash deposit and that, as the

No. 19.
Judgment.
19th
November
1951.

In the West
African
Court of
Appeal.

No. 19.
Judgment.
19th
November
1951—
continued.

order did not specifically mention a bond, the Appellants were in order in making a cash deposit of the sum of £500.

The Order of Court with regard to the security for costs reads :—“ that
“ the Plaintiffs/Appellants, the United Africa Company, Ltd., do enter into
“ good and sufficient security, to the satisfaction of the Court, in the sum
“ of £500 for the due prosecution of the Appeal and the payment of all
“ such costs as may become payable to Saka Owoade, the Defendant/
“ Respondent in the event of the Plaintiffs/Appellants, the United Africa
“ Company, Ltd., not obtaining an Order granting them final leave to
“ appeal, or of the appeal being dismissed for non-prosecution, or of His
“ Majesty-in-Council ordering the Plaintiffs/Appellants, the United Africa
“ Company, Ltd., to pay the Defendant/Respondent, Saka Owoade, costs
“ of the appeal.”

It is correct, as stated by Mr. James David, that the Order did not specifically mention a bond, but it is clear that it does not ask for a cash deposit. It therefore becomes necessary that the words used in the Order be construed to determine what kind of security was required.

The relevant words are “ that the Plaintiffs/Appellants, the United Africa Company, Ltd., do enter into good and sufficient security, to the satisfaction of the Court in the sum of £500.”

The security required was one into which the Plaintiffs/Appellants could enter. One enters into a bond, but not into a cash deposit. One makes or gives a cash deposit.

If the words of the Order had been that the Plaintiffs/Appellants shall “ enter into or give good and sufficient security,” it would have been open to the Plaintiffs/Appellants to enter into a bond or give or make a cash deposit, but as the Order required them to “ enter into good and sufficient security,” a bond, and not a cash deposit, was indicated. It was, therefore, not open to the Plaintiffs/Appellants to make a cash deposit when the Court ordered them to enter into a bond.

The Order of Court in respect of the security for costs is a reproduction of the provisions of section 6 (a) of the West African (Appeal to Privy Council) Order-in-Council of 1949, which leaves the Court no discretion to order a cash deposit instead of a bond. The objection raised by Mr. J. I. C. Taylor that the Plaintiffs/Appellants had not given security for costs in accordance with the Order of Court is therefore upheld.

As the Plaintiffs/Appellants have not fulfilled all the conditions of appeal imposed, their application for final leave is therefore refused.

(Sgd.) JOHN VERITY,
Acting President. 40

(Sgd.) ARTHUR LEWEY,
Justice of Appeal.

(Sgd.) OLUMUYIWA JIBOWU,
Acting Senior Puisne Judge.

In the Privy
Council.

No. 21.

Order of Her Majesty in Council granting Special Leave to Appeal.

No. 21.
Order of
Her
Majesty in
Council
granting
Special
Leave to
Appeal.
9th April
1952.

AT THE COURT AT CLARENCE HOUSE.

The 9th day of April 1952.

Present

THE QUEEN'S MOST EXCELLENT MAJESTY

LORD PRESIDENT.
MR. MACMILLAN.

MR. ECCLES.
SIR THOMAS DUGDALE.

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 3rd day of April 1952 10
in the words following, viz. :—

“ WHEREAS by virtue of His Late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of the United Africa Company Limited in the matter of an Appeal from the West African Court of Appeal between the Petitioners Appellants and Saka Owode Respondent setting forth (amongst other matters) : that the Petitioners (Plaintiffs in the action) desire special leave to appeal from a Judgment of the West African Court of Appeal dated 15th May, 1951, reversing a Judgment of the Supreme Court of Nigeria dated 20
30th March, 1950, whereby it had been adjudged that the Appellants were entitled to recover from the Respondent £4,732 13s. 4d. damages and from an Order of the Court of Appeal dated the 19th November 1951 whereby it was held that the conditions upon which the Appellants had by an Order of the Court of Appeal dated 2nd July 1951 been given leave to appeal had not been fulfilled : that Appeals to Your Majesty in Council from the West African Court of Appeal are governed by the West African (Appeal to Privy Council) Order in Council 1949 : that where as here the amount in dispute amounts to £500 or more there is by Section 3 of the Order an Appeal as of right 30
' subject to the provisions of this Order ' : that the Order provides (inter alia) by Section 6 that leave shall only be granted by the Court in the first instance upon condition of the Appellant within a period to be fixed by the Court but not exceeding three months from the date of the hearing of the application for leave to appeal entering into good and sufficient security to the satisfaction of the Court in a sum not exceeding £500 for the due prosecution of the appeal : that on 2nd July 1951 the Court of Appeal granted conditional leave to appeal upon fulfilment by the Petitioners within three months of the following (among other) terms :—(1) That the Plaintiffs/Appellants do deposit 40

10 in Court the sum of £50 for the preparation of the record (2) That the Plaintiffs/Appellants do enter into good and sufficient security to the satisfaction of the Court in the sum of £500 for the due prosecution of the Appeal : that the Petitioners paid both sums into Court within three months but on 19th November 1951 the Court of Appeal (after hearing the parties) made an Order refusing final leave to appeal : that the Court held that the second condition of their Order of 2nd July 1951 required a bond and could not be satisfied by a payment into Court and that Section 6 (a) of the Order in Council gave it no power to accept a cash deposit instead of a bond : that it is submitted that both these conclusions were erroneous in law: And humbly praying Your Majesty in Council to grant the Petitioners special leave to appeal from the Judgment of the West African Court of Appeal dated 15th May 1951 and from the Order of the said Court dated 19th November 1951 and for such other Order as to Your Majesty in Council may seem fit :

In the Privy Council.

No. 21.
Order of
Her
Majesty in
Council
granting
Special
Leave to
Appeal.
9th April
1952—
continued.

20 “ THE LORDS OF THE COMMITTEE in obedience to His Late Majesty’s said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioners to enter and prosecute their Appeal against the Judgment of the West African Court of Appeal dated the 15th day of May 1951 and against the Order of the said Court of Appeal dated 19th day of November 1951 upon depositing in the Registry of the Privy Council the sum of £400 as security for costs :

30 “ AND THEIR LORDSHIPS do further report to Your Majesty that the proper officer of the said Court of Appeal ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioners of the usual fees for the same.”

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

WHEREOF the Governor or Officer administering the Government of Nigeria for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

In the Privy Council.

No. 30 of 1952.

ON APPEAL FROM THE WEST AFRICAN COURT
OF APPEAL
(NIGERIAN SESSION).

BETWEEN

THE UNITED AFRICA COMPANY
LIMITED ... (*Plaintiffs*) *Appellants.*

AND

SAKA OWOADE (*Defendant*) *Respondent.*

RECORD OF PROCEEDINGS

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