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Judgment
(31) 1964 ✓

IN THE PRIVY COUNCIL

No. 8 of 1963

ON APPEAL FROM

THE FEDERAL SUPREME COURT OF NIGERIA

BETWEEN:

THE NATIONAL BANK OF NIGERIA LIMITED
(Plaintiffs)

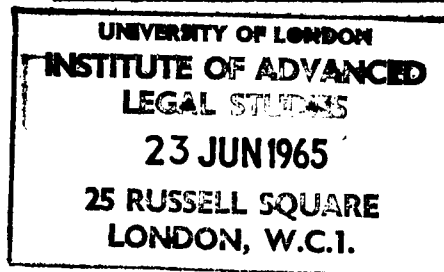
Appellants

- and -

OBA M. S. AWOLESI
(Defendant)

Respondent

RECORD OF PROCEEDINGS



- 78621

A. L. BRYDEN & WILLIAMS,
~~59 Victoria Street,~~ 20 Old Queen Street,
London, S.W.1.
Solicitors & Agents for Appellants

IN THE PRIVY COUNCIL

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BETWEEN:

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RECORD OF PROCEEDINGS

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<u>Plaintiff's Exhibits</u>			
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"H"	Bank Schedules	1955	Not reproduced
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	<u>Referee's Exhibit</u>		
"K"	Referee's Summaries of Credits and debits, Taiwo's Bank Accounts	30th December 1955 to 14th July 1957	55
	*This Statement is not reproduced as an Exhibit as it is the same as the Particulars of Claim on pages 5 to 8 inclusive		

LIST OF DOCUMENTS TRANSMITTED BUT NOT REPRODUCED

<u>Description</u>	<u>Date</u>
Settlement of Record in High Court	27th January 1960
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Formal Order of Court	17th May 1962
Bond for costs on Appeal	24th August 1962
Affidavit of Means	24th August 1962

<u>Description</u>	<u>Date</u>
Motion with affidavit in support for final leave to appeal to H.M. in Council	29th October 1962
Settlement of Record of Proceedings	26th January 1963

EXHIBITS TRANSMITTED BUT NOT REPRODUCED

<u>Mark</u>	<u>Description</u>	<u>Date</u>
"A"	Statement of Account	5th December 1955 to 1st August 1957
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IN THE PRIVY COUNCIL

No. 8 of 1963

ON APPEAL FROM

THE FEDERAL SUPREME COURT OF NIGERIA

BETWEEN:

THE NATIONAL BANK OF NIGERIA LIMITED
(Plaintiffs)

Appellants

- and -

10

OBA M. S. AWOLESI
(Defendant)

Respondent

RECORD OF PROCEEDINGS

No. 1

In the Supreme
Court

CIVIL SUMMONS

No. 1

IN THE SUPREME COURT OF NIGERIA

Civil Summons
21st August 1957

CIVIL SUMMONS

Suit No. A B/111 of 1957

20

BETWEEN: NATIONAL BANK OF NIGERIA LTD.
Plaintiff
and

E.O.ADEYEMI TAIWO & HIS HIGHNESS
OBA M. S. AWOLESI Defendant

TO E.O. Adeyemi Taiwo & His Highness Oba M.S.Awolesi
of 140, Akarigbo St. Shagamu & Afin Akarigbo, Offin,
Shagamu respectively.

30

You are hereby commanded in His Majesty's name
to attend this court at Ijebu-Ode on Monday the 14th
day of October, 1957, at 9 o'clock in the forenoon
to answer a suit by National Bank of Nigeria Ltd.
of 37, Marina, Lagos against you.

In the Supreme Court

No. 1

Civil Summons
21st August
1957
(continued)

The Plaintiff's claim is for the sum of Ten Thousand and Twenty three pounds fourteen shillings and three pence (£10,023.14.3d.) against the Defendants jointly and severally being money payable by the 1st Defendant to the Plaintiffs for money lent by the Plaintiffs to the 1st Defendant and money paid by the Plaintiffs for the 1st Defendant as Bankers for the 1st Defendant at his request and for interest upon money due from the 1st Defendant, to the Plaintiffs and forborne at interest by the Plaintiffs, to the 1st Defendant at His request and for Bank charges.

10

PARTICULARS

24th July, 1957 To balance of Banking Account
£10,023.14. 3d.

AND the Plaintiffs claim interest at the rate of 5 per cent per annum until payment or judgment.

The 2nd Defendant is sued as the Guarantor.

Issued at Abeokuta the 21st day of August, 1957.

(Sgd.) C.R. Stuart

20

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.

In the High Court

No. 2

Court's Note
14th October
1957

No. 2

COURT'S NOTE

IN THE HIGH COURT OF JUSTICE WESTERN REGION OF NIGERIA
ABEOKUTA JUDICIAL DIVISION HOLDEN AT ABEOKUTA

30

BEFORE THE HONOURABLE MR. JUSTICE IRWIN, JUDGE

MONDAY THE 14TH DAY OF OCTOBER, 1957

AB/111/57

National Bank of Nigeria Ltd. Vs. E.O.Adeyemi & Anor.

Jibril Martins for Plaintiff bank.
Thompson for 2nd defendant and 1st defendant.

In the High
Court

1st defendant when claim is read states: I owe
the Bank about £9,000.

No.2

Court: Statement of Claim to be filed and served
in 15 days defence in 30 days thereafter.

Court's Note
14th October
1957
(continued)

(Sgd.) W.H.Irwin, J.
14.10.57.

No. 3

No. 3

10

STATEMENT OF CLAIM

Statement of
Claim
17th October
1957

IN THE HIGH COURT OF JUSTICE
IN THE WESTERN REGION OF NIGERIA
IN THE ABTEOKUTA JUDICIAL DIVISION

SUIT NO. AB/111 of 1957

BETWEEN:

NATIONAL BANK OF NIGERIA LIMITED Plaintiffs

and

1. E.O. ADEYEMI TAIWO
2. HIS HIGHNESS OBA M.S.AWOLESI }
ERINWOLE II, The Akarigbo of } Defendants
Ijebu Remo }

20

STATEMENT OF CLAIM

The Plaintiffs are company incorporated in
Nigeria and are carrying on banking business in
Lagos the Federal Capital of Nigeria, and other
places in Nigeria and also in the City of London.

30

2. The 1st Defendant was a customer of the
Plaintiffs at the Shagamu Branch of the Plaintiffs
and has overdrawn his account current with the
Bank up to the sum of £10,023.14.3d. including
interest etc. vide Statement of Account hereto annexed
and marked Exhibit "A".

3. Under a guarantee in writing dated the 30th
day of December, 1955, the 2nd Defendant guaranteed

In the High
Court

—
No.3

Statement of
Claim
17th October
1957
(continued)

the due payment of all advances made by the Plaintiffs to the 1st Defendant together with interest, commission and banking charges provided the total amount recoverable from the 1st Defendant should not exceed £10,500.

4. In spite of repeated demands, the Defendants have failed to settle the account.

WHEREUPON the Plaintiffs claim as per Writ of Summons filed in this action.

(Sgd.) Jibril Martins

Plaintiff's Solicitor
5th August 1957.

DELIVERED for filing this 17th day of October, 1957.

PARTICULARS OF CLAIM

MR. EMANUAL OLASENI ADEYEMI TAIWO
IN ACCOUNT WITH

THE NATIONAL BANK OF NIGERIA LIMITED

		1955		CR.	
DR.					
1955					
Dec. 5	To C.F.A.O. I'Ode 65243	394.00.00	Dec. 1	By Bal. b/d	£ 210.11. 1.
			1	By Cash	56. 7. 9.
			5	" "	49. 6. 5.
			6	" "	5.11. 9.
				" "	80. --. --.
				" "	189.17. 6.
				" "	79.10. --.
				" "	57.10. --.
				" "	500. --. --.
8	To C.F.A.O. 48,947	1000.00.00		" "	140. --. --.
12	To Cash 64147	400.00.00		" "	74. --. --.
	To 1/4% Com. on £400	1.00.00		" "	76. 7. --.
	To C.F.A.O. I'Ode 64138	12.5.00		" "	400. --. --.
	To C.F.A.O. I'Ode 64139	17.00.00	12	By Cheque	126.10. --.
13	To C.F.A.O. I'Ode 64132	218.00.00		" Cash	30. 7.10.
14	To 1/4% Com. on £200	0.50.00	13	" "	235. 5. --.
			14	" Cheque	55.10. --.
			15	" Cash	45.12. 3.
			17	" "	75. --. --.
			19	" "	214.10. --.
			20	" "	184. --. --.
			21	" "	124.10. --.
21	To C.F.A.O. I'Ode 949	500.00.00		" "	76. --. --.
				" "	204.18. 2.
				" "	65.12. 7.
				" "	113. 9. --.
				" "	109.12. 9.
				" "	£3,579.19. 1.
	Carried forward	£2,542.10.00			

1955	Dec 22	Brought forward	£2,542.10.	--	Dec. 22	Brought forward	£3,579.19.	1.
	23	To C.F.A.O. I'Ode 244	827.	3.	23	By Cash	163.	--
	29	To Chq. Book 63876-900		4.	24	" "	189.	--
	30	" C.F.A.O. I'Ode 64129	1,120.	--	28	" "	410.	--
		" " " 145	750.	--	29	" "	100.	--
		" " " 144	352.	--	30	" "	109.10.	--
	31	" " " 143	629.	--	31	By Bal.	141.11.	4.
		" " " 142	1,000.	--			203.	--
		" " " 141	1,000.	--				
		" " " 146	450.	--				
		" " " 148	750.	--				
		" " " 149	500.	--				
		" " " 150	712.	--				
		" " " 12010	510.	--				
		The National Bank Ltd.						
		64877						
		To C.F.A.O. I'Ode 130	520.	--				
		" " " 133	500.	--				
		" " " 135	578.	--				
		" " " 136	1,193.	--				
		" " " 140	700.	--				
		To C.O.T. 30.12.55	350.	--				
			9.	--				
			<u>£14,992.17.</u>	2.			<u>£14,992.17.</u>	2.
		To Balance b/d	£10,096.16.9d.					

6th August 1957

1956	1956				
Jan. 1 To Balance b/d	Jan. 31 By Cash	£10,096.16.	9.	100.	-. -.
31 To Int. for the month		<u>42. 9. 4.</u>		154.	4. -. .
Feb. 29 To Int. for the month	Feb. 29 By Cash	10,139. 6. 1.		254.	4. -. .
Mar. 31 To Int. for the month		<u>39.14. 6.</u>			
Apr. 30 To Int. for the month	April 30 By Chq.	10,179. -. 7.		254.	4. -. .
May 30 To Int. for the month		<u>41. 1.11.</u>		100.	-. -. .
Jun. 30 To Int. for the month		10,220. 2. 6.		354.	4. -. .
		<u>31.10. 1.</u>			
Jul. 1 To Balance b/d	Jun. 30 By Chq.	10,251.12. 7.		354.	4. -. .
31 To Int. for the month	By Balance c/d	<u>40.13. 5.</u>		200.	-. -. .
		10,292. 6. -. .		9,778.	15. 5. .
Aug. 31 To Int. for the month		<u>40.13. 5.</u>		£10,332.	19. 5. .
		9,820. 6. -. .			
		<u>41.10. 7.</u>			
Sept. 1 Brought forward	Aug. 31 By Cash	9,861.16. 7.		64.	6. 4. .
29 To Int. for the month		<u>9,820. 6. -. .</u>		64.	6. 4. .
		9,861.16. 7.		5.	-. -. .
		<u>41.10. 7.</u>		£69.	6. 4. .
		9,820. 6. -. .			
		<u>41.10. 7.</u>			
		9,861.16. 7.			
		<u>9,861.16. 7.</u>			
1956	1956				
Sept. 1 Brought forward	Sept. 1 Brought forward	9,861.16. 7.		69.	6. 4. .
29 To Int. for the month	By Cash	<u>40. -. -. .</u>		2.	-. -. .
				8.	-. -. .
				10.	-. -. .
				3.	-. -. .
				2.	-. 6. .
				2.16.	6. .

Oct. 31 To Int. for the month	<u>£9,901.16. 7.</u>	Sept. 29 By Cash	<u>100. --. --.</u>
	41. 3. 7.	Oct. 1 By Cash	197. 3. 4.
Nov. 29 To Int. for the month	<u>9,943. --. 2.</u>	15 " "	2.10. --.
	39.15. 9.	16 " "	20. --. --.
Dec. 30 To Int. for the month	<u>9,982.15.11.</u>	Nov. 20 By Cash	<u>53.15. --.</u>
	41. 4. 1.	Dec. 3 By Cash	273. 8. 4.
1957	<u>£10,024. --. --.</u>	By Balance c/d	2. --. --.
Jan. 2 To Balance b/d	9,743.11. 8.		275. 8. 4.
28 Int. for the month	<u>41. 7. 9.</u>		5. --. --.
Feb. 1	9,784.19. 5.		<u>9,743.11. 8.</u>
28 To Int. for the month	<u>37.10. 1.</u>		<u>£10,024. --. --.</u>
Mar. 26 To Int. for the month	9,822. 9. 6.		
	<u>41.13. 9.</u>	Feb. 1 By Cash	4. --. --.
Apr. 26 To Int. for the month	9,864. 3. 3.	4 " "	<u>2.10. --.</u>
	<u>40.10. 4.</u>		6.10. --.
May 27 To Int. for the month	9,904.13. 7.		<u>6.10. --.</u>
	<u>42. 1. 1.</u>	June 30 By Balance c/d	6.10. --.
Jun. 25 To Int. for the month	9,946.14. 8.		<u>£ 9,981. 6. 7.</u>
	<u>41. 1.11.</u>	July 30 By Balance c/d	<u>£ 9,987.16. 7.</u>
July 1 To Balance b/d	9,981. 6. 7.		<u>£10,023.14. 3.</u>
23 To Int. for the month	<u>42. 7. 8.</u>		<u>£10,023.14. 3.</u>
Aug. 1 To Balance b/d	<u>£10,023.14. 3.</u>		

No. 4

DEFENCE OF AWOLESI

In the High
Court

No. 4

IN THE HIGH COURT OF JUSTICE

IN THE WESTERN REGION OF NIGERIA

IN THE ABEOKUTA JUDICIAL DIVISION

Defence of
Awolesi
1st December
1957

Suit No. AB/111/57

BETWEEN:

NATIONAL BANK OF NIGERIA LTD. Plaintiffs

and

10

1. E.O. ADEYEMI TAIWO
2. HIS HIGHNESS OBA M.S. AWOLESI
ERINWOLE II, THE AKARIGBO OF
IJEBU REMO Defendants

2nd Defendant's Statement of Defence

1. Save and except as hereinafter expressly admitted the 2nd defendant deny each and every allegation of fact contained in the plaintiffs' statement of claim as if the same were set out seriatim and specifically traversed.

20

2. The 2nd defendant admits paragraph 1 of the statement of claim.

3. The 2nd defendant is not in a position to admit or deny the arrangement between the plaintiffs and the 1st defendant but as regards the statement of account filed, the 2nd defendant disputes every item therein and puts the plaintiffs to strict proof of all the dates, facts and figures contained therein.

30

4. With reference to paragraph 3 of the statement of claim the 2nd defendant states that he did sign a guarantee aforesaid but only in respect of debts genuinely incurred by the 1st defendant after the 30th day of December 1955.

5. With reference to paragraph 4 of the statement of claim the 2nd defendant says that no demand was ever made to him for the repayment of the sum of £10,023.14.3d. or any other sum.

In the High Court

No. 4

Defence of Awolesi
1st December 1957
(continued)

6. (a) The 2nd defendant will contend at the trial that in the circumstances of this case he is not liable under the guarantee as stated in paragraph 4 supra.

(b) That there is no consideration for the said guarantee and in the alternative that such consideration if any is a past consideration and unable to support the contract.

Dated at Lagos this 1st day of November 1957.

(Sgd.) Thompson & Coker
Solicitors to the 2nd defendant.

10

No. 6

No. 6

Court's Notes
24th April 1958

IN THE HIGH COURT OF THE WESTERN REGION OF NIGERIA
ABEOKUTA JUDICIAL DIVISION HOLDEN AT IJEBU-ODE
BEFORE THE HONOURABLE MR. JUSTICE IRWIN, JUDGE
THURSDAY THE 24TH DAY OF APRIL 1958

AB/111/57

National Bank

V.

E. O. Adeyemi & Anor.

Jibril Martins for plaintiff.
1st defendant in person
Thompson for 2nd defendant.

1st Defendant: I admit I owe £9,000 nett.

Adjourned 24.7.58 at Abeokuta for hearing.

(Sgd.) W.H. Irwin, J.
24.4.58.

20

16th March 1959

MONDAY THE 16TH DAY OF MARCH, 1959

D.O.Coker for plaintiff.
Adewale Thompson for 2nd defendant
(Gabriel Adereti, Manager, National Bank, Shagamu, attends).

30

1st defendant now admits liability for £10,023.14.3d.

In the High Court

D.O.Coker: We will accept judgment for that amount without interest.

Court's Notes
16th March 1959
(continued)

(Thompson, Court, Adereti)

A. Thompson: We have no copy of the guarantee and ask for adjournment. D.O.Coker undertakes to supply copy.

10 Court: Judgment is entered against the first defendant, Adeyemi, for £10,023.14.3. and costs 50 guineas.

Suit as against 2nd defendant is adjourned until 29.4.59.

(Sgd.) W.H.Irwin, J.
16.3.59.

WEDNESDAY THE 29TH DAY OF APRIL 1959

Jibril Martins for plaintiff.
Thompson for 2nd defendant who is absent.

Jibril Martins calls:

Plaintiff's Evidence

20 1st: GABRIEL SAMUEL OLADIPO ADERETI: Sworn on Bible in English, Manager, National Bank of Nigeria Ltd., Shagamu. I know both defendants. 2nd defendant is the Akarigbo of Ijebu-Remo. 1st defendant has an account with the Bank of Shagamu. I produce the ledger showing his account to be overdrawn £10,023.14.3. on 24.7.57.

No.8

G.S.O.Adereti
29th April 1959
Examination

30 I produce the copy of this account which was signed by me and attached to writ in this case: Ex. A. Ex.A. is a true copy of ledger kept in the ordinary course of business. I wrote on 21.5.57 to 2nd defendant as well as 1st defendant; this is a copy of that letter. Ex.B.

"A"

"B"

Martins: We gave notice to produce original. 2nd defendant guaranteed the overdraft - I produce the guarantee: Ex. C. (Dated 30.12.55) The letter dated 6.6.57 is a reply to Ex.B., Ex.D. 2nd defendant has paid nothing on

"C"

"D"

In the High Court

Plaintiff's Evidence

No. 8

account. On 16th March, 1959 I was present in Court and I heard 1st defendant Adeyemi admit liability for £10,023.14.3. Judgment was then given against Adeyemi with costs. I have never seen 2nd defendant in Court in connection with this case. He was absent on 16th March 1959 as he also is today.

G.S.O.Adereti
29th April 1959
Examination
(continued)

Cross-examination

Cross-examined by Thompson: I have served notice to produce cheques drawn on the account.

Martins: I learnt today that those cheques are kept at Lagos and not at Shagamu. We are willing to produce them.

10

Adjourned at 9.45 a.m.

at 11.30 a.m.

Martins: The cheques are being sent from Lagos. I asked for an hour's adjournment.

Adjourned 22.5.59 at Ijebu-Ode.

(Sgd.) W.H.Irwin, J.
29.4.59.

22nd May 1959

FRIDAY THE 22ND DAY OF MAY 1959

20

Jibril Martins for the plaintiff.
Thompson for 2nd defendant.

Cross-examination by Thompson continued:

GABRIEL SAMUEL OLADIPO ADERETI: reminded of his oath.

I produce 17 cheques drawn by 1st defendant Adeyemi Taiwo in Shagamu branch -

Nos. $\frac{NB}{25}$ 64129, $\frac{NB}{25}$ 64130, $\frac{NB}{25}$ 64133, $\frac{NB}{25}$ 64135, $\frac{NB}{25}$ 64136, $\frac{NB}{25}$ 64140, $\frac{NB}{25}$ 64146, inclusive. $\frac{NB}{25}$ 64148-64150 inclusive, $\frac{NB}{25}$ 64877 and $\frac{NB/SP}{10}$ 12010:

30

"E"

Ex.E.

Cheque $\frac{NB}{25}$ 64129 is payable to C.F.A.O., Ijebu-Ode - it is marked "Refer to drawer" and initialled by Enilolobo, Manager, National Bank, Shagamu.

"Refer to drawer" means no money in the account. I take from Barclays Bank stamp on face of cheque that C.F.A.O. passed it through their account with Barclays Bank, Ijebu-Ode, who in turn passed it to National Bank for collection.

In the High Court

Plaintiff's Evidence

No. 8

G.S.O.Adereti
22nd May 1959
Cross-examination
(continued)

A week is about the time taken for cheques to come from Ijebu-Ode to Shagamu. The only date on cheque is 26.9.55 the date of issue. Barclays Bank stamp on it is 27.9.55. The cheque presumably got back to National Bank, Shagamu, within 7 days of 27.9.55. The Stamp (C/P 52 N.B.N.Ltd.) means collected for another branch. This cheque is also stamped "paid" by National Bank Cashier and initialled by him in red ink - he was Odunuga don't know date cheque was paid by Odunuga. Cheque $\frac{NB}{25}$ 64130 is similar to 64139 it is marked "refer to drawer" and is then paid but it bears date stamp unlike the former cheque of 31.12.55. The manager has signed "refer to drawer".

Cheque $\frac{NB}{25}$ 64135 is similar to the other two - $\frac{NB}{25}$ 64140, $\frac{NB}{25}$ 64141, $\frac{NB}{25}$ 64142, $\frac{NB}{25}$ 64143, $\frac{NB}{25}$ 64144, $\frac{NB}{25}$ 64145, $\frac{NB}{25}$ 64146, are all alike payable to C.F.A.O. and marked "refer to drawer"; Cheque No. 64148 and No.64149 are not marked "refer to drawer"; dated 20.12.55, and 22.12.55 respectively.

Cheque No. $\frac{NB/SP}{25}$ 12010 dated 24.12.55 and Cheque No. $\frac{NB}{25}$ 64150 dated 24.12.55 are each marked "refer to drawer". All were paid to C.F.A.O. $\frac{NB}{25}$ 64877 "payee National Bank" is not endorsed on back - issued 30.12.55. The ledger folio No. is written on the cheque - 105 and 36 - the account of Adeyemi Taiwo is on those pages I refer to the ledger folios. 105 and 36 and 171 and put them in evidence: Ex.F.

Adjourned 27.5.59.

(Sgd.) W.H.Irwin, J.
22.5.59.

Ledger Ex.F. handed to Mr. Jibril Martins for plaintiff on his personal undertaking to produce it on adjournment.

(Sgd.) W.H.Irwin, J.
22.5.59.

In the High
Court

WEDNESDAY THE 27th DAY OF MAY 1959

Plaintiff's
Evidence

Thompson for 2nd Defendant.
Jibril Martins for plaintiff.

No. 8

GABRIEL SAMUEL OLADIPO ADERETI: reminded of his
oath.

G.S.O.Adereti
27th May 1959
Cross-
examination
(continued)

At folio 117 also there is the account of Taiwo-
at 117, 171, and 178 also 180, 197, 213, 221, 371,
379 - I call this Taiwo's No.2 account opened in
January, 1956). Approximately £29,000 was paid
into this account in year 1956. From 1.1.57 to 10
31.3.57 approximately £4,000 was paid in. I
became Manager of Shagamu branch on 31.10.56. I
do not know who struck out in blue ink the words
"Refer to drawer" on the cheques in evidence. On
30.12.55 the account was overdrawn to £6,766.16.9.
on 31.12.55 it was overdrawn £10,096.16.9. On
21.5.57 I wrote this letter (Ex.B.) asking for
collateral security. Durosola, is General Manager
Lagos; yes, he knows about this case. It is duty
of the Manager of a Branch to ensure that over- 20
drafts are adequately secured - it is his
responsibility. Yes, the 2nd defendant stood
security for one Chief Banjo, I know. This letter
of 8.2.54 appears to be signed by the manager.

Jibril Martins: This is "res inter alias".

"G"

Court: Letter admitted Ex.G.

Re-examination

Re-examined by Jibril Martins: A cheque marked
"RD" could subsequently be presented and if there
were funds we would know the cheque. All cheques
marked "RD" were passed through Ijebu-Ode branch 30
of National Bank. Those 12 covering schedules
were sent to Shagamu with the cheques in question

"H"

Ex. H. Each schedule is endorsed in the corner
(left hand) "entry passed" and signed and dated by
the manager. Each cheque to which the schedule
refers was duly honoured and paid. On 29.12.55
Taiwo's account was £203.3.3. in credit. On 30.12.55
he paid cheque for £520 to us and transferred the
amount to his Lagos account with the Bank - This is
the letter: Ex.I. Taiwo also had with us in 40

"I"

Shagamu a No.2 account. This No.2 account was
closed on 18.6.58. The customer has the right to
say to what account monies are to be credited. In
1956, there were no withdrawals from the account in
dispute. The last payment in was made on February 4
1957.

To Court: On 30.12.55 Taiwo had three accounts with National Bank, two in Shagamu, and one at Lagos. No, I see in reference to ledger this account in question here was opened on 30.8.55 and had been transferred from a present ledger. Defendant opened No.2 account on 12.1.56 with deposit of £354.

In the High Court

Plaintiff's Evidence

No. 8

To court: On 21.8.57 No.2 account was £2.17.5. in credit. Up to 31.12.56 he paid £14,000 odd into No.2 account.

G.S.O.Adereti
27th May 1959
Re-examination
(continued)

10

Martins: That is case for plaintiffs.

No. 9

M. S. AWOLESI

2nd Defendant's Evidence

No. 9

Thompson calls:

MOSES SOWEMIMO AWOLESI: Sworn on Bible in English, Akarigbo of Ijebu-Remo, Afin, Shagamu. I am a first-class chief. E.O.Adeyemi Taiwo the 1st defendant is my nephew. On 30.12.55 Taiwo came to me with Durosola, General Manager, National Bank, Lagos, to the Afin about 5.30 p.m. Taiwo told me he had cowbones and ginger to be shipped to U.K. and he wanted money from Bank to carry on this business. Durosola asked me to sign this document Ex. "C" as guarantor. I glanced at Ex. "C" before I signed - I have signed such guarantees for other people before this one. I received Ex. G in respect of a guarantee to Chief Banio. I secured Chief Banjo's overdraft on similar form to Ex."C" I was told by Durosola and Taiwo that on date I signed that Taiwo's account was not overdrawn. Durosola and Taiwo are friends from their youths and went to the same school. Taiwo was educated at my expense. Letter Ex.B. was addressed to Taiwo and a copy was sent to me; paragraph 2 thereof asked for collateral security. I replied in Ex.D.dated 6.6.57. No letter in addition to Ex.D. was received by me. The next thing I got from the Bank was the writ of summons. I learned subsequently that the cheques paid were not paid on the dates on which they purport to have been paid. Taiwo told me about 6 months after I signed the guarantee that he had arranged to repay the overdraft by instalments.

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M.S.Awolesi
27th May 1959
Examination

In the High
Court

2nd Defendant's
Evidence

No. 9

M.S.Awolesi
27th May 1959
Cross-
examination

Cross-examined by Jibril Martins: I was formerly a Government Officer in Secretariat, Lagos, and became Assistant Chief Clerk in Inland Revenue Department, before I left it on pension in 1947. Then I was employed as clerk by C.F.A.O. - I was sales agent for C.F.A.O., Shagamu, and responsible for their shops in Shagamu. When I became Old I gave up my interest in C.F.A.O. - I had no longer time for that business. Taiwo, my nephew, 2nd defendant, took over from me as Sales Agent, C.F.A.O. Shagamu. Taiwo is no longer employed by C.F.A.O., the shops are closed but the petrol station (Texaco) is open. I have an interest in it - a boy is there who operates it. I recommended Taiwo to C.F.A.O. as my successor - I still have an interest in C.F.A.O. - I secured two overdrafts at National Bank, Banjo, and Taiwo. I signed Ex. "C" about 5.30 p.m. in the Afin - it was not on 29th I saw him about Ex. "C". I filled in Ex. "C" myself in writing including the amount "ten thousand, five hundred" at the request of Durosola and Taiwo. I did not ask how this amount came to be required, - I did not inquire for details. I did not ask to see Taiwo's account in the ledger before I signed. All Bank Accounts are private and confidential. The cheque marked R.D. are with one exception in favour of C.F.A.O. The shop in which Taiwo was sales agent might have been closed if cheques were not honoured I agree. I would not have minded. Taiwo has lost his job with C.F.A.O. I saw the cowbones in Taiwo's backyard - I believed him. I did not know how much it would be worth - whether as much as £10,500 or not. I am surprised that no cheque was drawn to finance the export of cowbones and ginger. I know 1st defendant has submitted to judgment in this case. I saw paragraph 7 of Ex.C. Ex."D" was a serious demand and warned that action would be taken. I said in my letter "we discussed his account with him" - against his overdraft with your Bank" I did not ask the manager to come and see me - I did not deny liability in the letter. I am not admitting any part of the debt now, 1st defendant, lives in my house - my private house.

Re-examination

Re-examined by Thompson: He, Taiwo, is not resident in the Afin.

No. 10

E.O.A.TAIWO

In the High Court

2nd Defendant's Evidence

No.10

E.O.A.Taiwo
27th May 1959
Examination

Thompson calls:

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EMMANUEL OLASENI ADEYEMI TAIWO: Sworn on Bible in English, Trader, Shagamu, I live at 140, Akarigbo Street, Shagamu. In December, 1955, I worked indirectly with C.F.A.O. I was also an exporter of cowbones, hooves, brass and scrap metal. I saw Ex.C. the guarantee when it was signed in the evening of December 30, 1955. Durosola, the 2nd defendant and myself were present and one Amusan. Durosola and I are old school friends. Durosola brought the form out of his handbag. I did not tell 2nd defendant I had any liabilities to the bank. It was Durosola who took me to the Afin. I had two accounts in National Bank, Shagamu, one for "Fowoke Stores" and the other in my own name.

20

I made no application to the Bank for an overdraft. On 30.12.55, I did not know account was overdrawn.

Adjourned 23.6.59 at Abeokuta.

(Sgd.) W.H.Irwin, J.
27.5.59.

TUESDAY THE 23rd DAY OF JUNE 1959

23rd June 1959

Obafemi for plaintiff in place of Mr.J.Martins deceased.

Thompson for 2nd defendant.

Thompson continues Examination-in-Chief.

30

EMMANUEL OLASENI ADEYEMI TAIWO: reminded of his oath.

I wanted money for export business - cowbones, hooves, and scrap iron. I did not know that those cheques (Ex.E.) had been marked RD.

Cross-examined by Obafemi: Yes, the cheques (Ex.E) were paid: the marks "RD" were cancelled on them. I have admitted the claim. Yes, the Akarigbo, the 2nd defendant, was my guarantor to C.F.A.O. He had guaranteed me to the company. Yes C.F.A.O. had had the right to make demand of the guarantor Cross-examination

In the High Court
2nd Defendant's Evidence

No.10

E.O.A.Taiwo
23rd June 1959
Cross-examination
(continued)

if I defaulted. Yes, I obtained value from C.F.A.O. for the amount of the cheques. Yes, it appeared the cheques Ex. E. were paid on 30.12.55. It was not because of those cheques marked RD that I asked the 2nd defendant to guarantee me. On 30.12.55 I thought the cheques marked RD had been paid. I asked 1st defendant to guarantee me in respect of money I intended to take from the Bank.

No.11

Counsel's Addresses

23rd June 1959
For Awolesi

No.11

COUNSEL'S ADDRESSES

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Thompson: The cheques (Ex.E.) were paid long after the dates of issue thereon. I submit there was no sufficient consideration, for the guarantee Ex.'C'. I refer to paragraph 4 and 6(a) of our defence and say the rule in Clayton's Case applies. 1878,10 Ch.D.139, the principle of appropriation applies here - the Bank was obliged to credit payments into clearance of the overdraft even if they purported to open a new account in name of Fowoke Stores which they called No.2 account. Both accounts were in fact trading accounts - the distinction between them is artificial - the Bank could not do this to the disadvantage of the 2nd defendant. Prior debts should be satisfied in order of date. I refer to S.48 Bills of Exchange Ord. "notice of dishonour must be given....." No evidence of notice being given by C.F.A.O. before the R.D. was cancelled. No evidence that cheques were again presented. There is a presumption S.148 (id) Evid.Ord. that such evidence of representation could have been called. Cheques dated 20 and 22. 12.55 were not marked R.D. yet a cheque dated 24.12.55 was so marked. The cheque dated 30.12.55 payable to National Bank Ltd. should be dedicated from any liability held to be that of 2nd defendant - it is for £520.

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The letter Ex.E. is not such a demand in writing as it contemplates by Ex.C.

Adjourned 3.7.59.

(Sgd.) W.H.Irwin, J.
29.6.59.

FRIDAY THE 3rd DAY OF JULY 1959

In the High
Court

Obafemi for plaintiff.
Thompson for 2nd defendant with Okuribido

No.11

Obafemi replies: Paragraph 3 of S of C., it is said by 2nd defendant, has not been proved. I submit that the cheques (Ex.E.) speak for themselves: they are valid and payable up to 6 months from date of issue. The cheques were in order. I refer to Rowlatt on Principal & Surety 3rd Ed.127. I say question of appropriation does not arise. A particular account was guaranteed here for a particular purpose. Kinnaird v. Webster (L.R.) 1878 Ch.D.139, does not apply - Taiwo had position to overdrawn up to £10,500 secured by 2nd defendant who is now called upon. Taiwo did not defend this suit. The Cheques were paid as soon as the account of Taiwo was in funds i.e. as soon as the guarantee was executed. Judgment should be given for the Bank.

Counsel's
Addresses

3rd July 1959
For Plaintiff

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Thompson: We have not connived to deprive the Bank of their money. The rule in Clayton's case is in our favour. For Awolesi

Adjourned 21.7.59 for judgment.

(Sgd.) W.H.Irwin, J.
3.9.59.

No.12

No.12

JUDGMENT

Judgment
21st July 1959

FRIDAY THE 21st DAY OF JULY 1959

Obafemi for Plaintiff.
Thompson with Okuribido for 2nd defendant.

30

JUDGMENT

This is a claim for the sum of £10,023.14.3. against the defendants jointly and severally.

On the 30th December 1955, the second defendant executed a guarantee for £10,500 to the National Bank of Nigeria Ltd., in consideration of their "continuing the existing account" with the first defendant, for the payment of "all advances, overdrafts, liabilities, bills and promissory

In the High
Court

No.12
Judgment
21st July 1959
(continued)

notes, whether made, incurred or discounted before or after the date hereof, to or for the Principal".

On his admitting liability judgment has been entered against the first defendant.

The second defendant was formerly the sales agent of the Compagnie Francaise de L'Afrique Occidentale, known as C.F.A.O., at Shagamu, and now appears to be licensee of a petrol station owned by that company at Shagamu.

When he became Akarigbo of Ijebu Remo, the second defendant recommended Taiwo, the first defendant, to the company as his successor. Taiwo was then appointed sales agent, C.F.A.O. Shagamu, on the execution by the Akarigbo of a guarantee to the company. Taiwo is a nephew of the Akarigbo and lives in his private house at Shagamu. 10

Over the period from 26th September 1955 to 24th December 1955 Taiwo issued fourteen cheques each payable to C.F.A.O., Ijebu-Ode, for a total of £9,844. Each of these cheques was endorsed "Refer to Drawer". 20

One cheque dated 26th September, for £1,120 was honoured on the 29th December, the remaining thirteen cheques for a total sum of £8,724 were honoured on the 30th and 31st December. After payment of those cheques the account was on the 31st December, 1955, overdrawn to the extent of £10,096.16.9.

On the 12th January 1956 a new account was opened by the Bank in the name of Taiwo which was called "No.2 account". No cheques were drawn on the guarantee account after the 31st December 1955 which remained overdrawn; the amounts paid in after that date did not represent a serious attempt to reduce the overdraft and interest thereon. 30

By letter of the 21st May, 1957 (Exh."B") the Bank demanded collateral security against the overdraft and the payment of a substantial amount on or before the 10th June, 1957; they added that the matter would otherwise be handed over to their solicitor "for legal recovery". 40

The ledger (Exh."F") shows that the No.2 account was at times in credit for sums exceeding

£2,500 but that in May 1957 the credit balance was £2.19.4.

In the High Court

No.12

Judgment
21st July 1959
(continued)

10 Taiwo, who was called as a witness by the second defendant, said that on the 30th December, 1955, he did not know that any of the cheques he had issued had been endorsed "Refer to Drawer"; the second defendant denied all knowledge, at the time of execution of the guarantee, of Taiwo's liabilities. Both were plainly evasive witnesses; I do not accept their evidence on this issue.

In my view, however, the principal contention advanced on behalf of the second defendant is one of substance, namely, 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 vs. Noble (1816) 1 Mer.572.

20 In Re sherry, London and County Banking Company vs. Terry (1884) 25 Ch.D.692, Cotton L.J.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 these 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".

30

40 And in Mutton vs. Peat (1900) 2 Ch.79, it was held that two accounts of a customer must be treated as one in order not to prejudice the rights of the surety.

The letter exhibit "B" was, in my opinion, a sufficient demand in writing, although not in express terms, in compliance with the guarantee.

Taiwo also had an account with the Bank at

In the High
Court

No.12

Judgment
21st July 1959
(continued)

Lagos. On the 30th December 1955 he issued a cheque for £520 payable to the Bank and that amount was transferred to his Lagos account. No evidence was called by the Plaintiffs nor was any inquiry made by the second defendant as to the state of the Lagos account. This being so, I do not consider that the second defendant can now claim to have the sum of £520 deducted from any amount found due by him.

10

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.

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.

20

Thompson: I suggest that the Manager, Bank of West Africa Ltd., Abeokuta, be appointed.

Obafemi: I agree. I will produce the Lagos ledger before 31st July 1959.

Adjourned 31st July 1959.

(Sgd.) W.H.Irwin, J.
Judge.

30

No.13

Court's Notes
31st July 1959

No.13

COURT'S NOTES

FRIDAY THE 31st DAY OF JULY 1959

Obafemi for plaintiffs.
Thompson for 2nd defendant.

Obafemi: I have brought the ledger containing Taiwo's account at Head Office, Lagos. It shows that his account has been dormant since 18.1.56. After the payment in of £520 in January, there

was left a credit of 5/2 and since 18.1.56, there were not withdrawers or payments in. I put in the Lagos ledger (p.81) (by consent of Ex.J. Thompson for 2nd defendant). Ex.J.

In the High Court

No.13

Court's Notes
31st July 1959
(continued)

10 Court: The ledgers Exs.' F and J to be handed to Manager, Bank of West Africa, Ltd. Abeokuta, for an account to be taken by him by counting all their accounts and taking the balance due as at 24th July, 1957, having treated the three as one account. Adjourned 21.8.59.

Plaintiffs to deposit the sum of £10.10. in Court for the cost of taking the account on or before that date.

(Sgd.) W.H.Irwin, J.
31.7.59.

FRIDAY THE 21st DAY OF AUGUST 1959

21st August
1959

Obafemi for plaintiff.
Ige for Thompson for defendant.

(REGISTRAR, COURT, IGE, MELHUIISH, COURT)

20 Registrar: A statement of account signed by J.A. Melhuish, E.W.A. has been received.

Court: Copy of account handed to counsel for examination.

Ige: I have no instructions and ask leave to withdraw.

2nd defendant absent.

No.14

Referee's
Evidence

J. A. MELHUIISH

No.14
J.A.Melhuish
21st August
1959

30 JOHN ANTHONY MELHUIISH: Sworn on Bible in English, Manager Bank of West Africa Ltd. Abeokuta. From Ex.F the ledger marked 66 I have extracted the total of the debit and treated amounts applied to a No.1 account in name of E.O.A.Taiwo from the start of business on 30.12.55 to close of business on 24.7.57. From the same ledger I have extracted the totals of the debits and credits applied to a No.2 account in name of

In the High Court

Referee's Evidence

No.14

J.A.Melhuish
21st August
1959
(continued)
Ex. "K"

E.O.A.Taiwo from 12.1.56 to 24.7.57. From the Ledger Ex. marked 235 I have entered in my reckoning the credit balance of 5/2 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 bank concerned would have been a debit £9,610.14.4. 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, Ex. K.

10

Obafemi: States he has no questions to ask the witness.

To Court: The intention on the overdraft was in accordance with the established Banking practice.

Court: Out of the amount of £10.10/- deposited in Court: £8.8/- is to be paid out to J.A.Melhuish.

No.15

Judgment on Reference

No.15

JUDGMENT ON REFERENCE

Court: There will be judgment for the plaintiff both against the second defendant for £9,610.14.4. and costs 80 guineas. The liability of the second defendant for £9,610.14.4. is joint and several with that of the first defendant against whom judgment for £10,023.14.3. was entered on the 16th March 1959.

20

(Sgd.) W.H.Irwin, J.
21.8.59.

In the Federal Supreme Court

No.16

Notice and Grounds of Appeal
25th September,
1959

No.16

NOTICE AND GROUNDS OF APPEAL

IN THE FEDERAL SUPREME COURT HOLDEN AT LAGOS

30

Suit No.AB/111/57:

BETWEEN:

National Bank of Nigeria Ltd.

Plaintiffs/
Respondent

and

1. E.O.Adeyemi Taiwo
2. His Highness Oba M.S.Awolesi
Erinwole II, The Akarigbo of
Ijebu Remo

Defendant/
Appellant.

In the Federal
Supreme Court

No.16

Notice and
Grounds of
Appeal
25th September,
1959
(continued)

10

TAKE NOTICE that the 2nd defendant/Appellant being dissatisfied with the judgment that part of the decision more particularly stated in paragraph 2 of the High Court Abeokuta contained in the judgment of the Honourable Mr. Justice W.H. Irwin dated the 31st day of July 1959 doth hereby appeal to the Federal Supreme Court upon the grounds set out in paragraph 3 and will at the hearing of the appeal seek the relief set out in paragraph 4;

AND THE APPELLANT further states that the names and addresses of the persons directly affected by the appeal are those set out in paragraph 5.

20

2. Part of decision of the Lower Court complained of:

Whole.

3. Grounds of appeal:-

30

1. The learned trial judge having found that the rule in Clayton's case applies to this case erred in his application of that rule.
2. The learned trial judge having found that the principle in the rule in Clayton's case was not followed by the plaintiffs erred in law when he did not dismiss the action.
3. The learned trial judge erred in law when he held that the letter of 21st May 1957 (exhibit 'B') constituted a valid demand in accordance with the terms of the guarantee.

40

4. The learned trial judge erred in law when he held that the appellant is liable to pay the sum of £520 as contained in the cheque dated the 30th day of December 1955

In the Federal
Supreme Court

No.16

Notice and
Grounds of
Appeal
25th September,
1959
(continued)

5. The learned trial judge misdirected himself in law and in fact when he said inter alia "nor was anything made by the 2nd defendant as to the state of the Lagos account. This being so I do not consider that the 2nd defendant can now claim to have the sum of £520 deducted from any amount found due by him".
6. The learned trial judge misdirected himself in law and in fact when he said inter alia "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" 10
7. The learned trial judge erred in law when he failed to consider the effect of the absence of the evidence of appropriation in the case for the plaintiffs. 20
8. The learned trial judge misdirected himself as to the effect of the whole of the evidence led for the 2nd defendant/appellant
9. The learned trial judge erred in law when he said that "each of the cheques was endorsed "refer to drawer" 30

4. Relief sought from the Federal Supreme Court:-

That the judgment of the Court below be set aside.

5. Person directly affected by the appeal

The National Bank of Nigeria Ltd.,
37, Marina,
Lagos.

Dated at Lagos this 25th day of September,
1959. 40

(Sgd.) Thompson and Coker
Solicitors to the 2nd defendant/Appellant.

No. 17

In the Federal
Supreme Court

ADDITIONAL GROUNDS OF APPEAL

No.17

IN THE FEDERAL SUPREME COURT OF NIGERIA

HOLDEN AT LAGOS

H.C.APPEAL NO: AB/11/57:

Additional
Grounds of
Appeal
8th February
1962

F.S.C.NO: 146/1961:

BETWEEN:

M.S.AWOLESI

.....

APPELLANT

AND

10 THE NATIONAL BANK OF NIGERIA LTD...RESPONDENT

ADDITIONAL GROUNDS OF APPEAL

The Respondents having materially altered the Condition of the guarantee by opening a second account for the 1st Defendant and the learned trial Judge having so found erred in law in failing to dismiss the plaintiffs'/Respondents' claim against the Appellant.

Dated at Lagos this 8th day of February 1962.

(Sgd.) ? ? ?

20

APPELLANT'S SOLICITORS.

No.18

No.18

COUNSEL'S ARGUMENTS

Counsel's
Arguments
13th & 14th
February 1962

IN THE FEDERAL SUPREME COURT OF NIGERIA

HOLDEN AT LAGOS

ON TUESDAY THE 13TH DAY OF FEBRUARY, 1962

BEFORE THEIR LORDSHIPS

EDGAR IGNATIUS GODFREY UNSWORTH

FEDERAL JUSTICE

JOHN IDOWN CONRAD TAYLOR

FEDERAL JUSTICE

SIR VAHE BAIRAMAIN

FEDERAL JUSTICE

In the Federal
Supreme Court

No.18

Counsel's
Arguments
13th & 14th
February 1962
(continued)

M. S. AWOLESI

V.

NATIONAL BANK OF NIGERIA

Moore Q.C. and A.Thompson for appellant.

M.A.Odesanya and S.M.Olakunrun for respondents.

13th February
1962

Moore for
Appellant
Awolesi

Mr. Moore

Claim was against appellant as surety. The 1st debtor had two accounts and request to guarantee the account at Shagamu. First the defendant stopped drawing cheques on account and opened a No.2 account in January, 1956. £29,000 was paid into this account. The existence of this account was unknown to the appellant. Judge found at page 21 line 13 that not open to the bank to open new account so as to prevent the application of principle in Clayton case. Judge combined two accounts at Shagamu and one at Lagos. Submit that (1) opening of this new account discharged the surety (2) Sum exceeding amount guaranteed had been paid into the No.2 account.

The first submission is raised in the additional ground of appeal. Duty not to say materially the relationship between the creditor and principal debtor.

HOLME v. BRUNSKILL 1878 3 QB 494, 504.

In reply to Bairamian says that guaranteeing a running account and the opening of No.2 account resulted in money not being paid into running account.

CROYDON GAS CO. v. DICKENSON (1879) 2 L.P. 54. 30

WARD v. NATIONAL BANK OF NEW ZEALAND 1883 8 A.C. 762.

POLOAR v. EVERETT (1876) 1 Q.B.D.669,673.

In reply to Unsworth agrees that fixed debit would have been the same if No.2 account not opened but says that entitled to repudiate.

In reply to Bairmain says that interest would not have been payable or been reduced.

In the Federal Supreme Court

On the second point I refer to -

No.18

KINNAIRD v. WEBSTER (1878) 10 Ch.B.144.
Any amounts paid in should go to reduction of existing account.

Counsel's Arguments

13th February 1962

MILLER BROS. v. ALBERT KUYE 5 N.L.R.100.

Moore for Appellant Awolesi (continued)

Mr. Odesanya

Odesanya for Defendant Bank

10 Two submissions made. The guarantee is valid and not challenged. Refer to guarantee at page 51. A guarantor can waive rights which he might otherwise have at law - this done by Clause 8. Must distinguish between a specific and continuing guarantee. The method of making future advances is not specified. Only complaint would be that not interested in new transaction and should look only to the account.

PAGET ON BANKING 5th Edition page 417,434.

20 70. ROWLATT ON PRINCIPAL AND SURETY 3rd Edition,

Consultation is not to see.

The opening of No.2 account was not material alteration on relationship of creditor and principal debtor. Bank was entitled to freeze the account and open No.2 account. This was method of making further advances.

MUTTON v. PEAT (1900) 2 Ch.79.

On the second point I refer to -

ROWLATT at page 615.

30 Adjourned to Wednesday the 14th February.

(Sgd) E.Unsworth
FEDERAL JUSTICE.

Mr. Odesanya

14th February 1962

It is not every variation that would discharge guarantor.

In the Federal
Supreme Court

Counsel's
Arguments

Odesenya for
Defendant
Bank

14th February
1962

(continued)

SANDERSON v. ASTON (1873) L.R. 8 Ex.73.

When deal with bank must take into account practice of banking. If new indulgences had been granted would have been difficult. Continuing guarantee and opening of new account does not alter the ultimate balances. No notice to terminate had been given.

STEWART v. M'KEAN (1855) 10 Exchequer. 675.
156 E.R.610.

Mode of accounting does not discharge guarantor. 10
Test is whether reasonable. Mode of making further advances is not stated in guarantee. Can open second account but must allow guarantor to have benefit of other accounts. The guaranteed account was not frozen.

(Bairamian says argument is that guarantor loses advantage of payment in to offset interest).

No evidence that bank stopped him from paying into guaranteed account and reducing. Agree that Bank kept accounts separate. Question of interest 20
was not raised before referee who was Manager of the Bank of West Africa. Amount was reduced after other balances taken into account.

EGBERT v. NATIONAL CROWN BANK (1918) A.C.903.

LONDON AND COUNTY BANKING vs. TERRY (1884) 25
Ch.D.692, 701, 705.

In reply to Taylor the word "a" in the Guarantee is suggestive. The rule in Clayton case does not apply in continuing guarantee.

AUGUSTUS BRYAGES HENNIKER v. WIGG (1843) 114 30
E.R. 1095 and 4 Q.B. 792.

Claim was admitted by 1st defendant as guarantor liable under Clause 7 of the guarantee.

Reply
For Appellant
Awolesi

Mr. Thompson

Refer to guarantee. The rule in Clayton case applies. Striking of balance by judge was not in accordance with term of guarantee. Bank varies guarantee and that contracted in respect of one particular account. In Sherry case there were

two accounts, no attempt made to rescind one struck balance between two accounts. Surety was prejudiced in that if had notice of second account would have given notice to terminate guarantee.

In the Federal Supreme Court No.18 Counsel's Arguments

KINNAIRD v. WEBSTER (1878) 10 Ch.D.145.

Reply for Appellant Awolesi 14th February 1962 (continued)

10 Net result of evidence is that sum was paid into No.2 account which should have been appropriated to the existing account. Guarantee was varied in opening of No.2 account and which account they took into consideration. Rule in Clayton case applies.

Judgment Reserved.

(Sgd) E.Unsworth
FEDERAL JUSTICE.

14/2/62.

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IN THE FEDERAL SUPREME COURT OF NIGERIA

HOLDEN AT LAGOS

20 ON FRIDAY THE 30TH DAY OF MARCH, 1962

BEFORE THEIR LORDSHIPS

EDGAR IGNATIUS GODFREY UNSWORTH FEDERAL JUSTICE

JOHN IDOWU CONRAD TAYLOR FEDERAL JUSTICE

SIR VAHE BAIRAMIAN FEDERAL JUSTICE

FSC. 146/1961

BETWEEN:

M.S.AWOLESI APPELLANT

AND

30 THE NATIONAL BANK OF NIGERIA
LIMITED RESPONDENTS

JUDGMENT

TAYLOR, F.J. The facts of this case have been

(1) Taylor,
F.J.

In the Federal
Supreme Court

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Judgments
30th March 1962

(1)Taylor, F.J.
(continued)

sufficiently and clearly set out in the judgment which will be delivered by my Lords Unsworth and Bairamain, F.Js. The authorities in which our attention was drawn at the hearing of the appeal have also been fully dealt with in these judgments and suffice it here for me to direct my attention to what I consider 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 principle debtor, a substantial breach of the agreement of guarantee, exhibit "C" entered into between the appellant and the respondent bank?" 10

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 £6,766.16.9d. as deposed to by the Manager of the respondent bank. Clause 1 of the agreement provides inter alia as follows:- 20

"In consideration of the Bank (which expression shall include their successors and assigns) continuing the existing account with Emanuel Olasemi Adeyemi Taiwo of 140, Akarigbo Street, Shagamu (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 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 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:- 30

"Approximately £29,000 was paid into this account in year 1956. From 1.1.57 to 31.3.57 approximately £4000 was paid in"..... 40

"Defendant opened No.2 account on 12.1.56 with deposit of £354. On 21.8.57 No.2 account was £2.17.5d. in credit. Up to 31.12.56 he paid £14,000 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 going on between the respondent bank and the principal debtor. The words "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 existing on the 30th December, 1955 shall be continued as such, i.e. in an unbroken state, and that to my mind negatives the opening of a second account in the circumstances disclosed above.

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(1) Taylor, F.J.
(continued)

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Clause 1 however, goes on to provide that:-

".....or otherwise giving credit or accommodation or granting time to the Principal, I the undersigned, Moses Sowemime Awolesi, Afin Akarigbo, Shagamu, hereby guarantee....."

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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 looks at the other clauses in the agreement, one finds that the words "ultimate kbalance" in clause 3, and "account" in clause 6 can only be read in the 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 open more than one account, and that 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 (1882-3) 8 App. Cases 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:-

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"The true rule, in my opinion, is that if there is any agreement between the principal 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

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(1) Taylor, F.J.
(continued)

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 an enquiry into the effect of the alteration."

A little earlier their Lordships said at page 763 that:-

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"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."

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 it an alteration that I can say is patently unsubstantial and 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. 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 that Court.

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(Sgd.) John Taylor
FEDERAL JUSTICE.

IN THE FEDERAL SUPREME COURT OF NIGERIA

In the Federal
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HOLDEN AT IAGOS

No.19

ON FRIDAY THE 30TH DAY OF MARCH, 1962

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BEFORE THEIR LORDSHIPS

<u>EDGAR IGNATIUS GODFREY UNSWORTH</u>	<u>FEDERAL JUSTICE</u>
<u>JOHN IDOWU CONRAD TAYLOR</u>	<u>FEDERAL JUSTICE</u>
<u>SIR VAHE BAIRAMIAN</u>	<u>FEDERAL JUSTICE</u>
	<u>F.S.C. 146/1961</u>

BETWEEN:

M. S. AWOLESI APPELLANT

10 AND

THE NATIONAL BANK OF NIGERIA
LTD. RESPONDENTS

JUDGMENT

UNSWORTH, F.J.: This is an appeal from a decision (2)Unsworth,
of Irwin, J. in which he held the appellant F.J.
liable on a guarantee in the sum of £9,610.14s.

20 The facts are that at the end of December
1955 the current account at the respondent Bank
of one Taiwo was overdrawn and cheques to 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 read as follows:-

30 "In consideration of the Bank (which
expression shall include their successors
and assigns) continuing the existing
account with Emanuel 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, 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

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(2)Unsworth, F.J.
(continued)

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 Ten thousand and five hundred pounds 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 counting (continuing) security to the Bank...."

On the day on which the guarantee was signed and the subsequent day cheques which has previously been dishonoured were accepted. The amount of the overdraft was then £10,096.16s.9d.

On the 12th January, 1955 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 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 £2.19s.4d. On the 21st May, 1957, 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 £10,023.14.3 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:-

"The ultimate balance owing under clause 3 of the guarantee is, I think in the circumstances, to be ascertained by combining the two accounts

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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.

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"Judgment will be entered for the plaintiff Bank against the second defendant for the ultimate balance thus ascertained.

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(2) Unsworth, F.J.
(continued)

"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."

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The parties agreed that the referee should be the Manager of the Bank of West Africa at Abeokuta. The referee calculated the liability as £9,610.14.4. The method of calculation adopted by the referee was not disputed in the court below, and judgment was accordingly given for this amount.

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.

20

I have considered the cases referred to by Counsel, and, in particular, the judgment of Lord Selborne and Cotton, L.J., 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, 5th Edition, at p.441:-

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"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.

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"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, L.J., in Re Sherry,

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London and County 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."

(2)Unsworth, F.J.
(continued)

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 or 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 accounts 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.D.79), the method of book-keeping adopted by the Bank must not prejudice the real rights of the surety under the guarantee, 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 broken account.

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 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 appeal.

(Sgd.) E. Unsworth,
FEDERAL JUSTICE

IN THE FEDERAL SUPREME COURT OF NIGERIAHOLDEN AT LAGOSON FRIDAY, THE 30TH DAY OF MARCH, 1962BEFORE THEIR LORDSHIPSEDGAR IGNATIUS GODFREY UNSWORTHFEDERAL JUSTICEJOHN IDOWU CONRAD TAYLORFEDERAL JUSTICESIR VAHE BAIRAMAINFEDERAL JUSTICEF.S.C. 146/1961

BETWEEN:

10

M.S. AWOLESI

APPELLANT

AND

THE NATIONAL BANK OF NIGERIA
LTD.

RESPONDENT

JUDGMENT

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BAIRAMAIN, F.J.: This is an appeal from the judgment of Irwin, J., given on the 21st August, 1959, in suit AB/111/57 of the High Court of the Western Region, in which the Bank sued two defendants - the 1st, E.O. Adeyemi Taiwo, their customer, and the 2nd, his guarantor, who is the appellant - on a claim for £10,023.14s.3d. to which these particulars were appended - "24th July 1957 To 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.

(3) Bairamain,
F.J.

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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 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 from month to month. The overdraft in July

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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.

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(3) Bairamain,
F.J.
(continued)

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 the Ledger Book brought by the manager 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:—

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"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 principal of Clayton's Case, Devavnes v. Noble, 1816, 1 Mer.572.

"In Re Sherry, London and County Banking Co. v. Terry (1884) 25 Ch.D.692 Cotton L.J. 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 these 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. 79, it was held that two accounts of a customer must be treated as one in order not to prejudice the rights of the surety."

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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."

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(3) Bairamian,
F.J.

(continued)

10 He appointed a referee, who later gave this evidence:-

"From exh.F the ledger marked 66 I have extracted the total of the debit and treated amounts applied to a No.1 account in name of E.O.A.Taiwo from the start of business on 30.12.55 to close of business on 24.7.57. From the same ledger I have extracted the totals of the debits and debits and credits applied to a No.2 account in name of E.O.A.Taiwo from 12.1.56 to 24.7.57. From the ledger exh.marked 235
20 I have entered in my reckoning the credit balance of 5/2d. as at 24.7.57.

"Had these three accounts been operated as one account from Dec.30, 1955, to July 24, 1957, the total indebtedness to the bank concerned would have been debit £9,610.14.4. 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, exh.K."

30 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.

40 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 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, Q.C., advised the addition of this ground:-

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(3) Bairamain,
F.J.

(continued)

"The respondents having materially altered the Condition of the guarantee by opening a second account for the 1st defendant and the learned Judge having so found erred in law in failing to dismiss the plaintiffs/respondents' claim against the appellant."

He argued the appeal under two submissions:-

(1) that the opening of the No.2 account materially altered the condition of the guarantee, and the surety was thereby discharged; alternatively 10

(2) that as the principal debtor, after the guarantee was given, paid in more than the amount guaranteed, the guaranteed debt was satisfied.

The second submission is based on the rule in Clayton's Case, 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, under the terms of the guarantee, to open a second account, and the opening of it did not discharge the guarantor. 20

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:-

"3. And further, that this guarantee shall be applicable to the ultimate balance that may become due to the Bank from the Principal".

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:- 30

"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 proceeding brought against me or my legal representatives upon this guarantee." 40

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.

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(3) Bairamian,
F.J.

(continued)

Clause 1 is vital in this dispute; it states that:-

10 "In consideration of the Bank (which expression shall include their successors and assigns) continuing the existing account with Emanuel 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 accommodat-
20 ion or granting time to the Principal, I, the undersigned, Moses Sewemimo Awolesi, Afin Akarigbo, Shagamu, hereby guarantee, on demand in writing being made to me, the due payment of all 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."

30 When the guarantee was given, the existing 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 account, but it cannot be said to come within the words in Clause 1:-

"or otherwise giving credit or accommodation or granting time"

40 to Taiwo: for the credit or accommodation or time was given in and through the insulated account. The new current account was an unauthorised departure from the terms of the guarantee. In Halsbury's Laws (3rd ed., vol.18 at p.506 para.929, on Guarantee and Indemnity) it is said that:-

"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

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(3) Bairamian,
F.J.

(continued)

the principal contract, which is not obviously and without inquiry quite unsubstantial, will discharge the surety from liability, whether it injures him or not, for it constitutes an alteration in the surety's obligations."

Holme v. Brunskill, 1878, 3 Q.B.L., 495, C.A. at pp. 505, 506, per Cotton, L.J., and other cases are cited in support.

In Halsbury's Laws, vol. 2, in the chapter on Banking, at p.172 in para.321, on "Appropriation when account guaranteed", it is said that "the banker is bound, however, to deal with the accounts in the ordinary way of business"; and a little lower it is said that:-

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"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."

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The authorities are Re Sherry (supra), and Deeley v. Lloyd's Bank Ltd., 1912, A.C.756, H.L. Again, at p.236, in para.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."

The authority is Re Sherry, for what Cotton, L.J. said: and one is asked to compare Mutton v. Peat, and Bradford Old Bank Ltd. v. Sutcliffe, 1918, 2 K.B. 833, C.A.

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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, L.J. made in Re Sherry were provoked by a question put by counsel in argument, namely this, at p.700 of the report:-

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"Could the bank have split up the account into two carrying the credit items to the non-guaranteed account?"

Whereupon Lord Selborne, L.C., said this:-

"You are suggesting a fraudulent device to prejudice the surety".

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Counsel repeated the question later; Lord Selborne said:-

"It appears to me that merely splitting the account in that way in the father's lifetime would have no effect."

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F.J.
(continued)

10 What the latter remark means I do not quite understand: I can only surmise, from what Lord Selborne said, towards the bottom of p.703, that as a guarantor is not to be prejudiced by any dealings without his consent between the creditor and the debtor, he ought not to suffer from their splitting the account. That it is a device to prejudice him is clear from the present case.

20 When the account is insulated, the guarantor can be kept in the dark. If he asks the debtor for his pass-book 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 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
30 Clause 6 expects it to be, "the amount for the time being due".

There is another aspect; it relates to the effect that splitting the account can have on the amount of interest.

40 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

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(3) Bairamian,
F.J.

(continued)

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 5/2d. 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 balance on which interest would be reckoned were bound to be different from those appearing in the insulated account.

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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.

There are cases in which the mere adjusting of one account with another will be enough. It was done in Mutton v. Peat. 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 were deposited to secure their general indebtedness, or merely what they owed on the loan account. When the firm defaulted on the Stock Exchange, the bank closed the current account and carried its credit balance of £1,362.10.0d. to a bankruptcy account, instead of setting it against the £7,500 due on the loan account. The Court of Appeal held that the deposit had been made to secure their general indebtedness - which meant that the bonds were security for £7,500 less £1,362.10s.0d.; and that was what the owners of the bonds wanted to be done. There was no question of there being anything wrong with the firm's having two accounts, so far as that was concerned.

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It has been pointed out for the Bank here that the referee was not examined on behalf of the guarantor. That was unfortunate. His counsel did

not appear; when the court offered 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 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 Shagamu accounts into one unbroken account, but merely stood them together.

In the Federal
Supreme Court

No.19
Judgments
30th March 1962
(3) Bairamian,
F.J.
(continued)

10

I am sorry that I cannot accept the suggestion that the opening of the second account was done merely for convenience' 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.

20

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 second account, and that discharged the guarantor; which in my view succeeds on the ground that the opening of the second account was an unauthorised departure from the terms of the guarantee, which (in the words quoted from Halsbury's vol.18) "is not obviously and without inquiry quite immaterial". On the contrary, the present case shows how that may work to the prejudice of the guarantor.

30

(It becomes unnecessary on that view to consider the other submission on the rule in Clayton's Case.)

40

After arriving at that view, I found a precedent for a Guarantee for Advances to a Customer, at p.419 in vol.2 of the Encyclopaedia of Forms and Precedents (other than Court Forms), 3rd edition; it is not identical, but it looks not unlike the one in the present case. It has, at p.421, a special paragraph, which begins thus:-

"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 etc. etc."

In the Federal
Supreme Court

No.19
Judgments
30th March 1962

with provisions on appropriation; which strikes me as being derived from 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.

(3) Bairamian
F.J.
(continued)

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.

(Sgd.) Vahe Bairamian
FEDERAL JUSTICE

10

Mr. O.Moore, Q.C. (Mr. Adewale Thompson with him) for Appellant.
Mr. M.A.Odesanya (Mr. Olakunrin with him) for Respondent.

No.20

No.20

Formal
Judgment
30th March 1962

IN THE FEDERAL SUPREME COURT OF NIGERIA
HOLDEN AT LAGOS

Suit No.AB/111/57

20

F.S.C. 146/1961

ON APPEAL FROM THE JUDGMENT OF THE HIGH COURT OF ABEOKUTA JUDICIAL DIVISION

BETWEEN:

MR. S. AWOLESI

Appellant

and

THE NATIONAL BANK OF NIGERIA
LTD.

Respondents

(L.S.)
(Sgd) E.Unsworth
Federal Justice
(Presiding)

Friday the 30th day of March 1962.

UPON READING the Record of Appeal herein and after hearing Chief O. Moore Q.C., (Mr. Adewale Thompson with him) of Counsel for the Appellant and Mr. M.A.Odesanya (Mr. Olakunrin with him) of Counsel for the Respondents:

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IT IS ORDERED:

1. that this appeal be allowed

2. that the claim against the Appellant be dismissed with costs of appeal assessed at 50 guineas in favour of the Appellant.

In the Federal Supreme Court

No.20

IT IS FURTHER ORDERED that the costs of the Court below be taxed by that Court.

Formal Judgment
30th March 1962
(continued)

(Sgd) J.A.ADEFARASIN
Chief Registrar.

No.21

No.21

ORDER FOR FINAL LEAVE TO APPEAL TO H.M.
IN COUNCIL

Order for final leave to appeal to H.M. in Council
12th November 1962

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IN THE FEDERAL SUPREME COURT OF NIGERIA

HOLDEN AT LAGOS

Suit No. AB/111/57

F.S.C. 146/1961

Application for an order for Final Leave to appeal to the Privy Council.

Between:

The National Bank of Nigeria Ltd.Appellants

20
(L.S.) and

M. S. AwolesiRespondent

(Sgd) A.Ade Ademola
CHIEF JUSTICE OF
THE FEDERATION

Monday the 12th day of November, 1962

UPON READING the Application herein, and the affidavit sworn to on 29th day of October, 1962, filed on behalf of the Applicants, and after hearing Mr. S.M.Olakunrin of counsel for the Applicants and Mr. J.O.Akinyede of counsel for the Respondent:

30

IT IS ORDERED that the Final Leave to appeal to Privy Council be granted.

(Sgd) C.R.I. George
AG. CHIEF REGISTRAR.

Exhibits

EXHIBITS

Defendant's Exhibit "G"

"G". LETTERS. BANK TO E.I.BANJO and to AWOLESI

Letter, Bank to E.I.Banjo 8th February 1954.

THE NATIONAL BANK OF NIGERIA LTD.,
AKARIGBO STREET
SHAGAMU, WEST AFRICA
8th February, 1954.

Letter, Bank to Awolesi (undated)

Chief E.I.Banjo,
Managing Proprietor,
The Nigerian Service Company,
144, Akarigbo Street,
Shagamu.

10

Dear Sir,

With reference to your letter dated the 18th December 1953 we have been instructed by our Head Office, to inform you that you are granted the sum of £300. 0s. 0d. overdraft.

You will start to operate on this overdraft as from the 9th instant, after His Highness, the Akarigbo of Shagamu, has given us his signature on our guarantee Form.

20

Yours faithfully,

MANAGER.

His Highness the Akarigbo of Shagamu,
Afin Akarigbo,
Shagamu, Ijebu-Remo.

Kabiyesi,

The above for your information, please.

You are requested to give your signature on the enclosed Guarantee Form and return to us. It will not be our pleasure to submit this particular document for stamping and registration out of sheer respect for you. We however, hope that you would try to see that Chief E.I.Banjo operates the account properly and would not give us cause for regret.

30

Your Good Friend,

(Sgd) ? ? ?

MANAGER.

"C". GUARANTEE, AWOLESI TO BANK

Exhibits

Singular - For an IndividualPlaintiff's
Exhibit "C"TO THE NATIONAL BANK OF NIGERIA LIMITEDGuarantee,
Awolesi to Bank
30th December
1955

In consideration of the Bank (which expression shall include their successors and assigns) continuing the existing account with Emanuel 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 accomodation 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, 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 Ten thousand and five hundred pounds 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 counting 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 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.

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

Exhibits

 Plaintiff's
 Exhibit "C"

 Guarantee,
 Awolesi to Bank
 30th December
 1955
 (continued)

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. 10

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. 20

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.

8. I waive in the Bank's favour all or any of my rights against the Bank or the Principal far as may be necessary to give effect to any of the provisions of this guarantee. 30

Dated at Shagamu this 30th day of December, 1955.

(Sgd) M.S.Awolesi,
 Guarantor.

Witness: Emanuel Amusan,
 Ishokun Street,
 Shagamu.

Plaintiff's
 Exhibit "A"

 Statement of
 Account 5th
 December 1955
 to 1st August 1957

"A". STATEMENT OF ACCOUNT
 (Not reproduced here as it is the same as
 the Particulars of Claim reproduced pp.
 5 - 8 inclusive).

40

"E". 17 CHEQUES DRAWN BY 1st DEFENDANT
ON PLAINTIFF BANK (not reproduced)

"E"

17 cheques
drawn by 1st
Defendant on
Plaintiff Bank
1955

"H". BANK SCHEDULES (not reproduced)

Plaintiff's
Exhibit "H"

Bank Schedules
1955

"I". CREDIT TRANSFER (not reproduced)

Plaintiff's
Exhibit "I"

Credit transfer
30th December
1955

"B". LETTER, PLAINTIFF TO DEFENDANTS

"B"

21st May, 57

Ref. GSOA/ADE

Me.E.O.A.Taiwo,
140, Akarigbo Street,
Shagamu

Letter,
Plaintiff to
Defendants,
21st May 1957

10

&

His Highness M.S.Awolesi Erinwole II,
The Akarigbo of Ijebu Remo,
Afin Akarigbo, Shagamu.

Dear Sir,

Your Overdraft Account - £9,898. 3. 7d.

We are instructed to invite your special
attention to the sum of £9,898. 3. 7d. (Nine thousand
eight hundred and ninety eight Pounds, three shillings
and seven pence) outstanding against you in the above
named account.

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As there had been no noticeable efforts by which
the account could be considerably reduced, we are to

Exhibits

"B"

Letter,
Plaintiff to
Defendants,
21st May 1957
(continued)

request you to consult the Guarantor, His Highness Erinwole II, with a view to arranging for a collateral security against this overdraft. The existing personal guarantee cannot be allowed to continue indefinitely for another long period.

Unless this arrangement is made, and a substantial amount is paid in this Office before the close of business on Monday the 10th June, 1957 we shall be compelled to hand over the matter to our Solicitor for legal recovery jointly and severally. Your immediate attention will oblige, please.

10

Yours faithfully,

(Sgd) ? ? ?

MANAGER.

Plaintiff's
Exhibit "D"

Letter,
Awolesi to
Bank.
6th June 1957

"D". LETTER, AWOLESI TO BANK

Ref. No. AK.1/231 M.S.AWOLESI ERINWOLE II,
THE AKARIGBO OF IJEBU REMO
AFIN AKARIGBO
Offin, Shagamu,
Ijebu Remo.

20

The Manager,
National Bank of Nigeria Ltd.,
Akarigbo Street,
Shagamu.

6th June, 1957.

My Good Friend,

Thank you for your letter Ref. GSOA/ADE dated the 21st May, 1957. I remember that one Mr. Durosola interviewed me re my nephew Mr. E.O.Taiwo and we discussed his account with him, I would however state that my personal knowledge of him remain as it was then.

30

I will not presently arrange for a collateral security against his overdraft with your Bank.

I may however, consider this when I have the opportunity of meeting Mr. Durosola.

MSA/Solo'/.
C.C.

E.O.A.Taiwo Esq.
140, Akarigbo Street, Shagamu.

Your Good Friend,

(Sgd) M.S.Awolesi, Erinwole
II Akarigbo of Ijebu Remo.

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<u>"K". SUMMARIES OF CREDITS AND DEBITS, TAIWO'S BANK ACCOUNTS</u>		Exhibits	
CREDIT AND DEBIT TRANSACTIONS ON E.O.A.TAIWO No.1 ACCOUNT FROM DECEMBER 30th 1955 to 24th JULY 1957		Referee's Exhibit	
	DR.	CR.	
Dec.30th-31st 1955	£10,503. -- --.	£203. -- --.	"K" Summaries of credits and debits, Taiwo's Bank a/cs 30th December 1955 to 24th July 1957 No.1 a/c
Jan.1st-June 30th 1956	236. 2. 8.	554. 4. --.	
July 1st-Dec.31st 1956	245. 4. 7.	280. 8. 4.	
Jan.1st-June 30th 1957	244. 4.11.	6.10. --.	
July 1st-24th 1957	42. 7. 8.	-- -- --.	
	£11,270.19.10.	£1,044.2. 4.	
	(Sgd) J.A.MELHUIISH.		

<u>CREDIT AND DEBIT TRANSACTIONS ON E.O.A.TAIWO No.2 ACCOUNT FROM JANUARY 12th to 24th JULY, 1957</u>		No.2 a/c	
	DR.	CR.	
Jan.12th-June 30th 1956	£15,474.15. 3.	£15,749.12.5.	
July 1st-Dec.31st 1956	14,308.10.11.	14,440.13.8.	
Jan.1st-June 30th 1957	4,091.18. 3.	4,099.15.8.	
July 1st-24th 1957	5. 0. 0.	-- -- --.	
	£33,880. 4. 5.	£34,290. 1.9.	

Exhibits	<u>TOTALS OF DEBIT AND CREDIT TRANSACTIONS ON ALL THREE ACCOUNTS FROM 30th DECEMBER 1955 to 24th JULY 1957</u>			
Referee's Exhibit	<u>From Ledger '66'</u>			
"K"	<u>Exhibit "F"</u>			
Summaries of credits and debits, Taiwo's Bank a/cs 30th December 1955 to 24th July 1957	Balance of 1 A/C as at start of business on 30/12/55	-. -. -. 203. 3. 3.		
All 3 a/cs	Dr. and Cr. Totals of No. 1 A/c	£11,270.19.10.	£1,044. 2. 4.	
	Dr. and Cr. Totals of No. 2 A/c	33,880. 4. 5.	£34,290. 1. 9.	10
	Balance of No. 2 A/c as at close of business on 24th July 1957	-. -. -. 2.17. 5.		
	<u>From Ledger '233'</u>			
	<u>Exhibit "J"</u>			
	Balance of A/c at 24/7/57	-. -. -. 5. 2.		
		£45,151. 4. 3.	£35,540. 9.11.	
	FINAL BALANCE DR.	9,610.14. 4.		20
		£45,151. 4. 3.	£45,151. 4. 3.	

(Sgd) J. A. MELHUISE.

IN THE PRIVY COUNCIL

No. 8 of 1963

ON APPEAL FROM

THE FEDERAL SUPREME COURT OF NIGERIA

BETWEEN:

THE NATIONAL BANK OF NIGERIA LIMITED
(Plaintiffs)

Appellants

- and -

OBA M. S. AWOLESI
(Defendant)

Respondent

RECORD OF PROCEEDINGS

A. L. BRYDEN & WILLIAMS,
~~43, Victoria Street,~~ *20, Old Queen Street,*
London, S.W.1.
Solicitors & Agents for Appellants