

9445.67.2
IN THE PRIVY COUNCIL

49, 1961

No.67 of 1960

ON APPEAL
FROM THE WEST AFRICAN COURT OF APPEAL

B E T W E E N :-

BENJAMIN LEONARD MacFOY
(Defendant) Appellant

- and -

UNITED AFRICA COMPANY LIMITED
(Plaintiff) Respondent

RECORD OF PROCEEDINGS

UNIVERSITY OF LONDON
W.C.1.
19 FEB 1962
INSTITUTE OF ADVANCED
LEGAL STUDIES

63642

T.L.WILSON & CO.,
6, Westminster Palace Gardens,
London, S.W.1.

Solicitors for the Appellant.

LINKLATERS & PAINES,
59-67, Gresham Street,
London, E.C.2.

Solicitors for the Respondent.

IN THE PRIVY COUNCILNo.67 of 1960

ON APPEAL
FROM THE WEST AFRICAN COURT OF APPEAL

B E T W E E N:-

BENJAMIN LEONARD MACFOY (Defendant) Appellant

- and -

UNITED AFRICA COMPANY
LIMITED (Plaintiff) Respondent

RECORD OF PROCEEDINGS
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1.

IN THE PRIVY COUNCIL

No.67 of 1960

ON APPEAL

FROM THE WEST AFRICAN COURT OF APPEAL

B E T W E E N :-

BENJAMIN LEONARD MacFOY
(Defendant) Appellant

- and -

UNITED AFRICA COMPANY LIMITED
(Plaintiff) Respondent

10

RECORD OF PROCEEDINGS

No. 1.

WRIT OF SUMMONS

C.C.663/58

1958 U. No.6

IN THE SUPREME COURT OF SIERRA LEONE

BETWEEN:- THE UNITED AFRICA COMPANY
LIMITED

Plaintiff

- and -

B. L. MacFOY

Defendant

20

ELIZABETH THE SECOND by the Grace of
God of the United Kingdom of Great
Britain and Northern Ireland and of
Her other Realms and Territories,
Queen, Head of the Commonwealth, De-
fender of the Faith

To B.L.MACFOY of 141, Balckhall Road, Kissy Village,
or Mobil Oil Filling Station, Kissy By Pass,
Kissy.

30

WE command you that within eight days
after service of this Writ on you, inclusive of
the day of such service you do cause an appearance
to be entered for you in the Supreme Court of
Sierra Leone in an Action at the Suit of The United
Africa Company Limited and take notice that in de-
fault of your so doing the Plaintiff may proceed
therein, and judgment may be given in your absence.

Witness the Honourable Emile Fashule Luke Justice

In the
Supreme Court.

No. 1.

Writ of Summons.

16th August,
1958.

In the
Supreme Court

of Sierra Leone at Freetown, the 16th day of August
in the year of Our Lord 1958.

No. 1.

Sgd: F.H.S. Bridge,
Master and Registrar.

Writ of Summons.
16th August,
1958
- continued.

N.B. - This Writ is to be served within twelve
calendar months from the date thereof, or if re-
newed within six calendar months from the date of
the last renewal including the day of such date,
and not afterwards.

The Defendant may appear hereto by entering an
appearance either personally or by Solicitor at the
Master's Office, Supreme Court of Sierra Leone.

10

A Defendant appearing personally may, if he desire,
enter his appearance by post and the appropriate
forms may be obtained by sending a Postal Order for
2/6d. with an addressed envelope foolscap size to
the Master & Registrar, Supreme Court Law Courts,
Westmoreland Street, Freetown.

The Plaintiff's Claim is for the sum of
£5,690.15.9. for goods supplied to the Defendant
as a dealer for sale to the Public.

20

This Writ was issued by Rowland E.A. Harding, of
7 Pultney Street, Freetown, whose address for ser-
vice is the same, Solicitor for the Plaintiff whose
business address is at Ludgate House, Water Street,
Freetown.

No. 2.

No. 2.

Statement of
Claim.
5th September,
1958.

STATEMENT OF CLAIM

C.C.663/58

958. U. No.6

IN THE SUPREME COURT OF SIERRA LEONE

30

BETWEEN:- THE UNITED AFRICA COMPANY
LIMITED

Plaintiffs

- and -

B.L. MACFOY

Defendant

STATEMENT OF CLAIM

1. The Plaintiffs are Merchants operating in
Sierra Leone, and are agents for Mobil Oil Products
in Sierra Leone. The Defendant is a dealer in

Mobil Oil Products at the Plaintiffs filling station on the Freetown/Waterloo Road, Kissy, Sierra Leone.

In the
Supreme Court.

No. 2.

Statement of
Claim.

5th September,
1958

- continued.

2. By a written Agreement dated 27th April, 1955 the Plaintiffs supplied the Defendant with Mobil Oil Products on a current account for sale to the public as a dealer on a commission basis.

10 3. On the 1st September, 1957 the Defendant's debit with the Plaintiffs was £980.3.0d. and from the 1st September, 1957 to the 14th April, 1958 the Plaintiffs supplied oil products to the Defendant amounting to £17,536.0.8d., and on the 14th April, 1958 the Defendant's total debit was £18,516.3.8d.

20 4. From the 1st September, 1957 to the 9th April, 1958 the Defendant made cash payments amounting to £12,825.7.11. and there is a debit balance of £5,690.15.9. outstanding, detailed particulars of the said supplies and cash payments are contained in a statement of account handed to the Defendant by Mr. M.I. Noah, District Manager, at the Plaintiffs office at Water Street, Freetown, in April, 1958.

5. The Defendant is indebted to the Plaintiffs in the sum of £5,690.15.9. for oil products supplied to him, which he has sold to the public and has not paid, and still refuses to pay for.

AND the Plaintiffs claim the sum of
£5,690.15.9. and Damages.

30

Sgd: Rowland E.A. Harding,
Plaintiffs Solicitor.

DELIVERED and filed this 5th day of September, 1958 by Rowland E.A. Harding of 7, Pultney Street, Freetown, Plaintiffs Solicitor.

In the
Supreme Court

No. 3.

JUDGMENT IN DEFAULT OF DEFENCE

No. 3.

C.C. 663/58

1958. U. No.6

Judgment in
default of
Defence.

IN THE SUPREME COURT OF SIERRA LEONE

BETWEEN:- THE UNITED AFRICA COMPANY
LIMITED

Plaintiffs

- and -

B.L. MACFOY

Defendant

29th September,
1958.

Monday the 29th day of September, 1958.

The Defendant not having delivered any defence herein it is this day adjudged that the Plaintiffs recover against the said Defendant £5,690.15.9. and damages to be assessed.

10

Sgd: F.H.S. Bridge,
Master & Registrar.

No. 4.

Affidavit in
Support of
Application to
set aside
Judgment
(with
Annexures)

No. 4.

AFFIDAVIT IN SUPPORT OF APPLICATION TO SET ASIDE
JUDGMENT (With Annexures)

C.C. 663/58

1958. U. No.6

IN THE SUPREME COURT OF SIERRA LEONE

BETWEEN:- THE UNITED AFRICA COMPANY
LIMITED

Plaintiffs

20

- and -

B.L. MACFOY

Defendant

20th December,
1958.

I, Prince Bankole Doherty, of 21 Charlotte Street, Freetown in the Colony of Sierra Leone hereby make oath and say as follows :-

1. That I am Solicitor for the Defendant herein.
2. That I have been authorised by the said Defendant herein to swear to this Affidavit.
3. That on the 28th day of November, 1958, I delivered at the Master's Office, Supreme Court, Freetown in the Colony aforesaid a fresh Notice of Motion to set aside the said Judgment

30

and all subsequent proceedings thereon. A copy of the said Notice of Motion is annexed hereto and marked "A".

In the
Supreme Court

- 10 4. That I delivered and filed at the said Master's Office at the same time that I delivered the said Notice of Motion on the 28th day of November, 1958 and Affidavit in support of the Notice of Motion, which Affidavit was sworn by the Defendant on 27th day of November, 1958. A copy of the said Affidavit is annexed hereto and marked "B".
5. That hearing of the said fresh Notice of Motion (that is Exhibit "A") was fixed at the Master's Office aforesaid for Wednesday the 10th day of December, 1958.
- 20 6. That the said Notice of Motion was filed by me at the Master's Office aforesaid on the 1st day of December, 1958, the day on which I was informed by the Chief Clerk of the said Master's Office and verily believed that the date for hearing of the said fresh motion had been fixed.
7. That the seal copy of the said Notice of Motion was served on Rowland E.A. Harding, Esq. Solicitor for the Plaintiffs herein on the 1st day of December, 1958.
- 30 8. That at 8.45 o'clock in the forenoon on Wednesday the 10th day of December, 1958, I received from the said Master's Office a Notice, copy of which is annexed hereto and marked "C", informing me that the hearing of the said fresh Motion had been adjourned to Friday the 9th day of January, 1959.
9. That a Writ of Fieri Facias has been issued in execution of the said judgment in the cause by the Solicitor for the Plaintiffs against the Defendant, a copy of the Praecipe of the Writ of Execution is annexed hereto and marked "D".
- 40 10. That I am informed by the Defendant herein and verily believe that the said Writ has not yet been executed against him.
11. That I verily believe that the said Writ of Fieri Facias will be executed against the Defendant before the hearing of the said fresh motion unless an Order for stay of further execution on the said Judgment is made by this Honourable Court.

No. 4.

Affidavit in
Support of
Application to
set aside
Judgment
(with
Annexures)

20th December,
1958

- continued.

In the
Supreme Court.

No. 4.

Affidavit in
Support of
Application to
set aside
Judgment
(With
Annexures).

20th December,
1958

- continued.

12. That this Affidavit is sworn in support of an application for and on behalf of the said Defendant herein to stay all further execution on the said Judgment by the Plaintiffs or their Solicitor in particular the execution of the said Writ of Fieri Facias until the hearing and decision of the said motion.

Sgd: P.E.B. Doherty

SWORN at Freetown in the
Colony of Sierra Leone
this 20th day of December,
1958 at 9.40 o'clock in
the forenoon.

10

Before me,

Sgd: I.B.Sanusu

A Commissioner for Oaths.

This Affidavit is filed the 20th day of December, 1958, by Prince Bankole Doherty of 21 Charlotte Street, Freetown on behalf of the Defendant herein.

Annexure "A".

ANNEXURE "A"

20

Notice of
Application to
set aside
judgment.

NOTICE OF APPLICATION TO SET ASIDE JUDGMENT

C.C. 663/58

1958. U. No.6

IN THE SUPREME COURT OF SIERRA LEONE AT FREETOWN

28th November,
1958

BETWEEN:- THE UNITED AFRICA COMPANY
LIMITED

Plaintiffs

- and -

BENJAMIN L. MACFOY

Defendant

TAKE NOTICE that this Honourable Court will be moved on Thursday the 10th day of December 1958 at 9 o'clock in the forenoon or so soon thereafter as Counsel can be heard by Prince Bankole Doherty of Counsel on behalf of B.L. MacFoy the Defendant herein on the application on the part of the Defendant the Judgment obtained in default of Defence on the 29th September, 1958 and all subsequent proceedings thereon set aside pursuant to Order XXIII Rules 15 of the Rules of the Supreme Court 1947.

30

AND FURTHER TAKE NOTICE that at the hearing of this application the said Prince Bankole Doherty intends to make use of the Affidavit of the said B.L.MacFoy sworn the 27th day of November, 1958 and

40

filed herein.

DATED the 28th day of November, 1958.

THE MASTER AND REGISTRAR,
SUPREME COURT, FREETOWN

and

THE UNITED AFRICA CO. LTD.
Or their Solicitor
R.E. HARDING, ESQ., B.L.,
7, PULNEY STREET, FREETOWN.

In the
Supreme Court.

No. 4.

Annexure "A"

Notice of
Application to
set aside
Judgment

28th November,
1958

- continued.

10 This is the copy Exhibit referred to in the
Affidavit of Mr.P.E.B.Doherty of 21, Charlotte
Street, Freetown sworn the 20th day of December,
1958 and marked "A".

Sgd: I.B.SANUSI,
A COMMISSIONER FOR OATHS.

ANNEXURE "B"

AFFIDAVIT OF B. L. MACFOY

C.C.663/58

1958. U. No.6

Annexure "B".

Affidavit of
B.L. MacFoy.

IN THE SUPREME COURT OF SIERRA LEONE AT FREETOWN

27th November,
1958.

20 BETWEEN:- THE UNITED AFRICA COMPANY
LIMITED

Plaintiffs

- and -

BENJAMIN L. MACFOY

Defendant

I, BENJAMIN LEONARD MACFOY of 141 Blackhall Road,
Kissy Village in the Rural Area of the Colony of
Sierra Leone, Trader make oath and say as follows:-

1. That I am the Defendant in the above-named ac-
tion.
- 30 2. That I have in my possession Plaintiff's
Statements of Accounts numbered 2452 and 1619
copies of which are annexed hereto and marked
"A" and "B" respectively.
3. That the debit balance shown in the Statement
of Accounts No.2452 marked "A" at 31st March
1958 was £720.7.10d.
4. That the debit balance brought forward at 25th
April 1958 in the Statement of Accounts
No.1619 was £6,703.19.9d.
5. That during the period 1st to 25th April 1958

In the
Supreme Court.

No. 4.

Annexure "B".

Affidavit of
B.L. MacFoy.
27th November,
1958
- continued.

I did not receive supplies of oils on credit to the value of £5,383.16.11d. which is the difference between the debit balance shown in Statement No.2452 marked "A" at 31st March 1958 and the debit balance brought forward as at 25th April 1958 in Statement No.1619 marked "B".

6. That I did not receive the detailed particulars or Statement of Account referred to in paragraph 4 of the Statement of Claim filed in this action. 10
7. That I verily believe that there are material differences or discrepancies between the Statements attached and marked "A2" and "B" and the Statement of Accounts referred to in paragraph 4 of the Statement of Claim.
8. That a copy of the Statement of Accounts referred to in paragraph 4 of the Statement of Claim was sent to my Solicitor on the 25th November 1958, on my present Solicitor's application. 20
9. That I was late to file a Defence for the following reasons:- (1) in spite of several verbal requests made to Mr.N.I.Noah, District Manager of the Plaintiffs' business, I was not allowed to examine the Ledger kept by the Plaintiffs which shows the monthly state of my accounts and which book was always signed by me at the end of each month, and (2) I was informed by the Clerk of my previous Solicitor and verily believe that my previous Solicitor was in the Provinces on professional duties for a considerable period of the time which lapsed between filing and delivery of the Statement of Claim in this action and the signing of judgment in default of defence. 30
10. That I consider it necessary and still so consider that it necessary for me or my Solicitor to inspect the said Ledger in order to confirm my true debit balance therefrom. 40
11. That my account with the Plaintiffs was limited to £1,000 and this fact was so indicated on the Customers Passbook kept in my name, which book has always been in the possession of the Plaintiffs.
12. That I believe I have a good defence to the Claim in this action. A Statement of the

Defence has already been delivered to the Plaintiffs' Solicitor a true copy of which is annexed hereto and marked "C".

13. That I make this Affidavit in support of an application that the Judgment obtained in default of Defence herein be set aside.

Signed: B.L.MacFoy.

SWORN at Freetown in the Colony of Sierra Leone this 27th day of November, 1958 at 3 o'clock in the afternoon

Before me,

Signed: I.B.SANUSI

A COMMISSIONER FOR OATHS.

This Affidavit is filed the 20th day of November, 1958 by Prince Bankole Doherty at 21 Charlotte Street, Freetown on behalf of the Defendant herein.

ANNEXURE "C"

NOTICE OF ADJOURNMENT

C.C. 663/58

MASTER'S OFFICE,
FREETOWN, SIERRA LEONE
9th DECEMBER, 1958.

BETWEEN:- UNITED AFRICA COMPANY
LIMITED

Plaintiffs

- and -

B.L. MACFOY

Defendant

YOU ARE HEREBY NOTIFIED that the hearing of the above MOTION fixed for Wednesday the 10th day of December 1958 at 9 o'clock in the forenoon has been ADJOURNED TO FRIDAY 9th JANUARY.

(Signed) I.B.SANUSI
Asst.Master and Registrar.

To P.E.B.DOHERTY, Esq.,
21, CHARLOTTE STREET, FREETOWN.

This is the copy Exhibit referred to in the Affidavit of Mr.P.E.B.Doherty of 21 Charlotte Street, Freetown sworn the 20th day of December, 1958 and marked "C".

Sgd: I.B.SANUSI
A COMMISSIONER FOR OATHS.

In the
Supreme Court.

No. 4.

Annexure "B".

Affidavit of
B.L. MacFoy.
27th November,
1958
- continued.

Annexure "C"

Notice of
Adjournment.
9th December,
1958.

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20

30

40

In the
Supreme Court.

No. 4.

Annexure "D".

Praecipe for
Writ of
Fieri Facias.

(Undated)

ANNEXURE "D"

PRAECIPE FOR WRIT OF FIERI FACIAS

C.C. 663/58

1958. U. No.6

IN THE SUPREME COURT OF SIERRA LEONE

BETWEEN:- UNITED AFRICA COMPANY
LIMITED

- and -

B.L. MACFOY

SEAL a writ of Fieri Facias directed to the Sheriff of Freetown, Sierra Leone, against B.L.MacFoy, of 141, Blackhall Road, Kissy Village, Sierra Leone, upon a judgment dated the 29th day of September, 1958 for the sum of £5,690.15.9 and interest at £4 per centum from the 29th day of September, 1958.

10

Indorsed to levy £5,690.15.9. and interest thereon at £4 per centum from 29th day of September, 1958 and costs of execution.

Signed: Rowland E.A.Harding,
Plaintiffs Solicitor.

This is the copy Exhibit referred to in the Affidavit of Mr.P.E.B.Doherty of 21 Charlotte Street, Freetown sworn the 20th day of December, 1958 and marked "D".

20

Sgd: I.B.SANUSI
A COMMISSIONER FOR OATHS.

No. 5.

Affidavit of
B.L. MacFoy.
5th January,
1959.

No. 5.

AFFIDAVIT OF B.L. MACFOY

C.C. 663/58

1958. U. No.6

IN THE SUPREME COURT OF SIERRA LEONE

BETWEEN:- U.A.C. LTD.

Plaintiffs

30

- and -

B.L. MACFOY

Defendant

I, BENJAMIN LEONARD MACFOY of 141, Blackhall Road, Kissy Village in the Colony of Sierra Leone make oath and say as follows :-

1. That I am the Defendant in this action.
2. That in March 1958, I was asked by the Plaintiffs to return my statements of account.

- 3. That I did return the Statements of Account to the Plaintiffs.
 - 4. That the balance showing on my last statement of account was £650.
 - 5. That I subsequently paid the sum of £400 to the Plaintiffs.
 - 6. That I now owe the Plaintiffs the sum of £250.
- Sgd: B.L. MacFoy.

In the
Supreme Court

No. 5.
Affidavit of
B.L. MacFoy.
5th January,
1959
- continued.

10 SWORN at Freetown this 5th
day of January, 1959 at
11.20 o'clock in the fore-
noon

Before me,
Percy R. Davies,
A Commissioner for Oaths.

No. 6.

AFFIDAVIT IN REPLY OF R.E.A. HARDING

C.C. 663/58 1958. U. No.6

IN THE SUPREME COURT OF SIERRA LEONE

20 BETWEEN:- THE UNITED AFRICA COMPANY
LIMITED Plaintiffs

- and -

B.L. MACFOY Defendant

I, ROWLAND EUGENE ALEXANDER HARDING of 7,
Pultney Street, Freetown, Sierra Leone, make oath
and say as follows :-

- 30 1. I am Solicitor for the Plaintiffs in this ac-
tion, and I make this Affidavit in reply to
the Affidavit of Prince Bankole Doherty, sworn
on the 2nd December, 1958.
- 2. That judgment in default of defence was signed
on the 29th September, 1958, 23 days after the
delivery of the Statement of Claim.
- 40 3. Mr.A.H.C.Barlatt was appointed Solicitor for
the Defendant on the 18th October, 1958, 10
days after judgment had been signed. Mr. Bar-
latt left Freetown on the 4th November, 1958,
17 days after his appointment as Defendant's
Solicitor, there was nothing he could do other-
wise he would have done it.

No. 6.
Affidavit in
Reply of
R.E.A. Harding.
5th January,
1959.

In the
Supreme Court

No. 6.

Affidavit in
Reply of
R.E.A. Harding.

5th January,
1959

- continued.

4. Mr. Prince Bankole Doherty, was appointed Defendant's Solicitor on the 21st November, 1958, whilst execution of the judgment had been levied since the 19th November, 1958 which is 51 days after judgment.
5. The reason for the delay to set aside the judgment as stated in para. 5 of Mr. Doherty's Affidavit is futile in view of paras. 2, 3 and 4 above.
6. That my duty to my clients is paramount and levying execution of the judgment is one such duty.

10

SWORN at Freetown, this 5th
day of January, 1959 at
3.10 o'clock in the afternoon

Before me,

Sgd: I.B. SANUSI

A COMMISSIONER FOR OATHS.

Notice of intention to use this Affidavit at the
hearing of the motion.

The Affidavit is filed on behalf of the Plaintiffs. 20

No. 7.

Affidavit in
Reply of
R.E.A. Harding
(With
Annexures)

5th January,
1959.

No. 7.

AFFIDAVIT IN REPLY OF R.E.A.HARDING
(With Annexures)

C.C. 663/58

1958. U. No.6

IN THE SUPREME COURT OF SIERRA LEONE

BETWEEN:- UNITED AFRICA COMPANY
LIMITED

Plaintiffs

- and -

B.L. MACFOY

Defendant

I, ROWLAND EUGENE ALEXANDER HARDING of 7 Pult-
ney Street, Freetown, Sierra Leone, make oath and
say as follows :- 30

1. I am a Solicitor for the Plaintiffs in this action and I make this Affidavit in reply to the Affidavit of Benjamin Leonard MacFoy, sworn on the 27th day of November, 1958.
2. That the Statement Nos. 2452 and 1619 sent to Mr. MacFoy did not contain all the debits and

credits of Mr. MacFoy's account with the Plaintiffs, in connection with the goods supplied to Mr. MacFoy, for which claim this action is brought, and Mr. MacFoy knows it. Mr. MacFoy was asked to confirm those statements, but said nothing although he knew they contained omissions.

- 10 3. That a correct statement of Mr. Macfoy's account No.3201 Sheets 1 to 7 dated 15th April, 1958 was handed to Mr. MacFoy by the District Manager, Mr. M.I. Noah at the Plaintiffs office at Water Street, Freetown, in April, 1958. This was told me by the said Mr. M.I. Noah and I verily believe it.
- 20 4. That on the 8th May, 1958 a letter Reference 33/7 WCSB/K was sent by registered post receipt No.2714 to Mr. MacFoy at Kissy, reminding him of the said statement of account No.3201 handed to him showing his debit of £5,690.15.9. and requesting him to settle the said claim by the end of May, 1958 to which Mr. MacFoy never replied. The Duplicate Original of the said letter is attached hereto and marked "A". The Postmaster's notification that the letter "A" was delivered to the addressee is attached hereto and marked "B".
- 30 5. The reasons given in para.9 of Mr. MacFoy's Affidavit already to in para.1 above, for not filing a defence are futile. Mr. MacFoy never applied to me as Solicitor for the Plaintiffs to inspect any ledger. Mr. Barlatt was appointed Defendant's Solicitor 20 days after judgment had been signed in default of defence, therefore Mr. Barlatt's absence from Freetown cannot be accepted as reason for not filing a defence, since judgment had already been signed 20 days before his appointment as Defendant's Solicitor.
- 40 6. That the delivery notes of goods supplied to Mr. MacFoy are made in triplicate, the originals are retained by Mr. MacFoy, and the duplicates and triplicates are retained by the Plaintiffs, after they have been signed by Mr. MacFoy and his agents. Receipts of monies paid by Mr. MacFoy are made in duplicates, originals are handed to Mr. MacFoy and the duplicates retained by the Plaintiffs. The ledger entries are made from these delivery notes and receipts retained by the Plaintiffs of which Mr. MacFoy retains the originals. The Statement of

In the
Supreme Court

No. 7.

Affidavit in
Reply of
R.E.A. Harding
(With
Annexures)

5th January,
1959

- continued.

In the
Supreme Court

No. 7.

Affidavit in
Reply of
R.E.A.Harding
(With
Annexures)

5th January,
1959

- continued.

Account No.3201 Sheets 1 to 7 already handed to Mr. MacFoy and again to his Solicitor is a copy of the ledger. Mr.MacFoy has not challenged or queried a single item in the said Statement of Account, although the items in the Statement of Account are for the purpose of checking and reference.

- 7. That the Plaintiffs of themselves limited Mr. MacFoy's credit to £1,000 because of limited space in their storage tank, before the sale of oil rose far more than anticipated, and Mr. MacFoy's limit was increased to meet the demand. 10
- 8. That Mr.MacFoy has no defence to the claim, he therefore allowed judgment to by default, since no defence is admission of the claim. What appears to be Mr.MacFoy's defence is, that because an erroneous Statement of Account was sent to him showing less debit than he actually owes, a correct Statement of Account cannot be sent subsequently, which is no defence on the merits. 20

Sgd: Rowland E.A.Harding.

SWORN this 5th day of
January, 1959 at
3 o'clock in the after-
noon

Sgd: I.B.SANUSI

A COMMISSIONER FOR OATHS.

Notice of intention to use this Affidavit at the hearing of the motion. 30

This Affidavit is filed on behalf of the Plaintiffs.

Annexure "A"

ANNEXURE "A"

Letter, United
Africa Co., Ltd., 33/7 WCSB/K
to B.L.MacFoy.
8th May, 1958.

LETTER, UNITED AFRICA CO., LTD., to B.L.MACFOY

Clients' File

District Manager's Office,
FREETOWN, Sa. Leone.
8th May, '8.

Mr.B.L.MacFoy,
FREETOWN.

Dear Sir,

Your Statement of Account showing a debit balance of £5,690.15.9. at 14/4/58 has been handed 40

to you, and I must ask you to pay this account as soon as possible. We shall certainly require full settlement by the end of May, 1958.

Yours faithfully,

For: THE UNITED AFRICA COMPANY LIMITED.

Sgd: M.I.NOAH
DISTRICT MANAGER.

c.c.G.M.

Petroleum Manager.

In the
Supreme Court

No. 7.

Annexure "A"

Letter, United
Africa Co., Ltd.,
to B.L.MacFoy.

8th May, 1958
- continued.

10 This is the letter addressed to Mr.B.L.MacFoy referred to in the Affidavit of Rowland Eugene Alexander Harding sworn on the 5th January 1959 marked "A".

I.B.SANUSI
A COMMISSIONER FOR OATHS.

ANNEXURE "B"

LETTER, POSTMASTER, FREETOWN to R.E.A.HARDING

20 This is the Postmaster's notification of the delivery of the letter "A" to addressee referred to in the Affidavit of Rowland Eugene Alexander Harding sworn on the 5th January, 1959 marked "B".

I.B.SANUSI
A COMMISSIONER FOR OATHS.

POSTS & TELEGRAMS DEPARTMENT,
FREETOWN.
SIERRA LEONE.

20th December, 1958.

Sir,

30 With reference to your letter dated 13th December, 1958 regarding disposal of registered letter No.271B addressed to: Mr.B.L.MacFoy, Kissy Bye Pass, Kissy I have to inform you that the letter in question was delivered to the addressee on 12th May, 1958.

I am, Sir,
Your obedient servant,
? ? ?
for Postmaster, Freetown.

Mr.Rowland E.A.Harding,
7, Pultney Street,
Freetown.

Annexure "B".

Letter,
Postmaster,
Freetown to
R.E.A.Harding.
20th December,
1958.

In the
Supreme Court

No. 8.
Court Notes.
9th January,
1959.

No. 8.

COURT NOTES

THE UNITED AFRICA COMPANY

Vs.

B.L. MACFOY

Coram Bairamian Friday 9th January, 1959

O.B.R.Tejan for Defendant-Appellant (Harding in Ct. No.2)

Appearance for Defendant by Mr.Mackay on 2nd September, 1958; no defence;

10

That by Defendant on 29th September.

Notice on 18 October that Mr.Barlatt is the Solicitor. Mr. Doherty put in an application on 17 November to set aside judgment. On 21st November it was dismissed by Jones, Ag.J., because Mr.Doherty did not notify he was Solicitor, without prejudice to fresh motion within 8 days. Fresh motion on 28th November.

Stay of execution refused on 22 December by Marks, J. Affidavit of Defendant on 27 November, 1958: Deft. exhibited statements of A/C; Re paragraph 9 of his Affidavit that Defendant was not allowed to look at Company's ledger.

20

Mr.Barlatt was to blame.

(Judgment by default on 29 September; Barlatt Solicitor on 18 Oct.)

(What evidence is there why defence was not put in before 29 Sept.)

Defendant's Affidavit is that Mr.Barlatt should have put in his defence. I don't know how, seeing he came in as Solicitor after judgment was signed. The reason why Defendant did not put in defence is that District Manager would not give him the ledger. Re Defendant's Affidavit of 5 January that the balance was £650 and he paid £400 later and owes £250. (Why couldn't he have said so in Sept.?)

30

Harding: as I am busy in other Ct. would Ct. adjourn to 12 noon. I served Mr. Doherty with my Affidavits not knowing that Mr.Tejan has become Solicitor; no notice of it, though on back of Affidavit of 5 Jan. he is Solicitor.

40

At 12 noon

V.R.B.

C.J.

At 12 noon.

Harding: I show my book of letter deliveries S/C was on 3rd Sept. There is no evidence why defence was not filed before 29th September. It was not until 21 Nov. that execution began.

Acct. was sent in May by registered letter which was delivered; mention in Supreme Court of a/c sent. Not denied - A/Cs 2452 & 1609 (8796 etc. some sheet omitted).

10 Tejan: I concede there is no explanation why no defence was filed before 29th Sept. will Ct. give time for evidence why not.

Defendant paid some money on 11 Sept. 1957 to Mr. Barlatt. for pleading.

(He gave notice of being Solicitor on 18 Oct.)

In the
Supreme Court

No. 8.

Court Notes.

9th January,
1959

- continued.

No. 9.

JUDGMENT

20 Judgment. The application to set judgment aside or stay of execution is dismissed with costs to Plaintiffs.

Reasons have been given orally and Mr. Tejan says he does not wish to have reasons given in writing to go higher.

Sgd: V.R. BAIRAMIAN
C.J.

No. 9.

Judgment.

9th January,
1959.

No. 10.

ORDER.

C.C. 663/58 1958. U. No.6

IN THE SUPREME COURT OF SIERRA LEONE

30 BEFORE the Honourable Mr. Justice Vahe Robert Bairamian, Chief Justice in Chambers.

BETWEEN:- THE UNITED AFRICA COMPANY
LIMITED

Plaintiffs

- and -

BENJAMIN LEONARD MACFOY

Defendant

Before the Hon. Chief Justice

FRIDAY the 9th day of January, 1959

No. 10.

Order.

9th January,
1959.

In the
Supreme Court

No.10.

Order.

9th January,
1959

- continued.

UPON HEARING Mr.O.B.R.Tejan deputising for Mr. Prince Bankole Doherty of Counsel for the Defendant and Mr. Rowland E.A.Harding of Counsel for the Plaintiffs and UPON READING the Affidavit of the said Prince Bankole Doherty sworn the 20th day of December, 1958 and filed herein, the Affidavit of the Defendant, Benjamin Leonard MacFoy sworn the 5th day of January, 1959 and filed herein and the two Affidavits of the said Rowland E. A. Harding sworn on the 5th day of January, 1959 and filed herein.

10

IT IS ORDERED that the application to set aside the judgment or stay of execution herein be dismissed with costs to be taxed and paid by the Defendant to the Plaintiffs.

By the Court,

Sgd: F.H.S.BRIDGE

MASTER AND REGISTRAR.

The above costs have been taxed and allowed by the Master and Registrar dated the day of 1959.

20

In the
West African
Court of Appeal

No. 11.

NOTICE AND GROUNDS OF APPEAL
IN THE WEST AFRICAN COURT OF APPEAL

No.11.

Notice and
Grounds of
Appeal.

14th March,
1959.

NOTICE OF APPEAL

BETWEEN:- THE UNITED AFRICA CO. LTD. Plaintiffs

- and -

B.L. MACFOY

Defendant

TAKE NOTICE that the Defendant being dissatisfied with the Supreme Court Order of VAHE ROBERT BAIR-AMIAN, Esq., Chief Justice of Sierra Leone dated the 9th day of January 1959 doth hereby appeal to the West African Court of Appeal upon the ground set out in paragraph 2 and will at the hearing of the appeal seek the relief set out in paragraph 3.

30

AND the Appellant further states that the names and addresses of the persons directly affected by the appeal are those set out in paragraph 4.

2. That the refusal of the Learned Chief Justice to set aside a judgment in default in this matter is unreasonable having regard to the fact that

40

the Defendant disclosed a substantial defence upon his application to the Supreme Court dated 28th November, 1958 to set aside the judgment by default.

3. That the judgment in default herein be set aside and the case be remitted to the Supreme Court of Sierra Leone with a direction that the Defendant be allowed to defend the action.
4. United Africa Company Limited, Lugate House, Water Street, Freetown.

10

DATED this 14th day of March, 1959.

Sgd: B.L.MACFOY
APPELLANT.

In the
West African
Court of Appeal

No.11.

Notice and
Grounds of
Appeal.

14th March,
1959

- continued.

No. 12.

COURT NOTES

IN THE WEST AFRICAN COURT OF APPEAL

Civ.App.18/59

| | |
|-----------------------------|-----------------------------|
| Coram:- Wilfred Hugh Hurley | Acting Justice of Appeal |
| Cecil Geraint Ames | Acting Justice of Appeal |
| Peter Watkin Williams | Puisne Judge. |

20

U.A.C.LTD. Vs. B.L.MACFOY

Macaulay for Appellant

Harding for Respondent

Macaulay: I have given notice that I would ask leave to amend the ground of appeal. The proposed ground is additional, not in substitution. I now move. My friend will oppose. The ground does not allege a defect in jurisdiction, but I submit the matter should be treated in analagous matter. Delivery of statement of claim is a nullity; that will be my argument if that is correct, all subsequent proceedings are void. Secondly, the proposed ground of appeal alleges an irregularity, I shall submit that it is an irregularity that defies a mandatory provision, and it is too much to ask this Court to close its eyes to such irregularity.

30

Thereby, proposed ground of appeal is not one on which it is necessary to adduce further evidence.

40

No.12.

Court Notes.

1st June, 1959.

In the
West African
Court of Appeal

No.12.

Court Notes.

1st June, 1959

- continued.

Harding: Appeal is against exercise of discretionary power on ground put before learned C.J. Nothing like the present application was before him, and he did not exercise any discretion in regard to it, or arrive at any determination.

To Ag.P.: Application was under Order 23 Rule 15, which is English Order 27 Rule 15. "Any judgment by default may be set aside by the Court, upon such terms"

(Continues): The application should not be allowed now. The part cannot be taken now, because the question now is whether Chief Justice's discretionary power was wrongly exercised - wrong principles. 10

The irregularity having been raised the Court had jurisdiction. It is not as as a defect of jurisdiction because the parties can excuse it.

As to appearance of a mandatory Provision I have nothing to add.

Macaulay: It is not a case of filing a pleading out of time, but of filing it at a time when it was illegal to file it. Order 52, Rule 3, S.L. (stopped) 20

Leave granted.

Macaulay: I shall argue that ground now. Vacation. Courts Ordinance, Section 7(2) "no such cause or matter shall be heard or obtained....." Section 24, Rules Committee, including Power Sec.24(e) as amended 31 of 46, Prescribing the Sittings and Vacation Rules, Order 44: "The vacation shall be three in every year 15 July - 11 September" 6/3 filed 5 September Order 16, delivery of pleadings - 1. "Within 10 days after appearance..... deliver statement of claim and forthwith file a copy..... 2. (Ditto, s.defence). Unlike English rules, there must be a delivery followed by filing of a copy. In England, there is a summons for direction first. Rules are alert as to whether pleadings may be delivered or filed on vacation. Can pleadings be filed in vacation? Submit it can, Section 7(2) of Courts Ordinance - "Court shall be open throughout the year". That doesn't cover delivery. Then Order 52 Rule 3 as amended. Now, to English Order 64 Rule 4, 1A 31 1957 W.B. "In causes intended to be tried (and so on, other causes) pleadings may be filed only last eleven days of long vacation....." In English, 30 40

long vacation is under Order 65 Rule 4 - our Order 44. I have not looked up any English analogies of Sec.7(2).

Order 16 Rules 1, 2 must be read under Order 64 Rule 4 amend by order 52, Rule 3, because there is analogous provision to these Rules in Order 20, Rule 1 in England.

On page 371 "ten days after appearance.

10 Filing in England not before summons for directions - Order 25 Rule 6(2) as amended. "Copies of pleadings to be delivered to office for the Judge"

Judgment was signed in default of delivery of pleadings that could not have been delivered. Order 16 Rule 2.

Ag.P.: Was delivery on vacation refused as illegal? if not, there was a waiver?

20 Macaulay: A waiver relation to the practice is only a fresh step which acknowledges the act - a fresh step, not an omission.

Again, if a man can accept delivery and effect a waiver, Order 64 Rule 4 is nullified.

It does not say by consent of the parties.

Delivery is delivery permitted by the rules.

Order 23 Rule 15 is what this application is under. English Order 27 Rule 15 same words. Interpretation of English rule should guide this Court. Page 449 "My Judgment" - ex debito justitiae.

30 Jurisdiction: A judge is entitled to hear a motion to set aside judgment regularly obtained. Equally, if judgment irregularly obtained. Can he refuse the application if judgment has been irregularly allowed?

If not jurisdiction, fresh point may be argued if other step would be prejudiced; and sometimes, if it can be done without fresh evidence.

40 Would it do justice on the merit as between parties if the fresh point is argued? This will be agreed under ground 2.

W.Williams: If there was not a waiver by acceptance of delivery, was not there a waiver by abandonment, by not arguing it on the motion to set aside? A further step.

In the
West African
Court of Appeal

No.12.

Court Notes.

1st June, 1959
- continued.

In the
West African
Court of Appeal

No.12.

Court Notes.

1st June, 1959
- continued.

Macaulay: Not on any definitions of waiver. My definition is deducible from - Order 70, Rule 2 "taken any fresh step" W.B.1601, our Order 50 Rule 2 word for word.

Rubric at 1601, not waiver.

Court: Waiver at page 62.

Macaulay: Boyle v. Sacker: I concede we argued the application. But Order 23 Rule 1 speaks of any judgment whether regular or irregular.

Add: Court cannot shut its eyes to a breach of a mandatory provision. 10

Ag.P.: Don't the cases on waiver show the contrary?

W.B.449 Regular and wrong judgment.

15 minutes recess.

Macaulay: My next ground. I ask to correct "20th December" to "28th November". I have told my friend.

No objection.

Order as prayed. 20

Macaulay: On this ground: In an application to set aside, Courts are more disposed to accede where substantial defence is shown.

Secondly, although in exercising this discretion the Court will have regard to the fact whether or not there is an explanation of the delay, it will not necessarily refuse because delay unexplained, if it is not long, and there is a substantial defence.

These propositions are in Evans v. Bartlam (1937) A.C. at page 473, headnote and page 479, second line from end, to 408 - Order 27 Rule 15 gives a discretionary power. 30

I will argue this ground as alternative to 1.

Plaintiffs claim, page 2 statement of claim page 5; application to set aside page 10, supported by a Plaintiffs Affidavit page 11; page 12, defence at paragraph 12 not in record, but it does not matter.

My case is this: Plaintiff says written agreement to supply to Defendant and supplies were made over a period and payments made, and probably £6,000 outstanding. Reply to this page 11, paragraph 5; paragraph 11: I did not receive the 40

goods and I could not have. April 19 para. 7 at page 20. This raises a triable issue.

Ag.P.: Only a conflict of evidence.

Watkin Williams: Is paragraph 7 inconsistent with what Defendant said in his paragraph 11. Paragraph 11 November 27, paragraph 7 January 5, hearing January 9. MacFoy lives at Kissy, see his Affidavit. No time to reply.

In the
West African
Court of Appeal

No.12.

Court Notes.

1st June, 1959
- continued.

10 Next answer of defence is in MacFoy paragraph 2 - 5 at page 11; also page 6.

He ignored letter of 8 May, I agree - it is at page 22. Statement of account there mentioned appears to be that referred to in paragraph 4 Statement of Claim. That the Appellant denies.

Ag.P.: He did not deny it on 8 May: he admitted it by default.

20 Macaulay: He did in his Affidavit paragraph 6 Plaintiff in Affidavit page 20 paragraph 5. Defendant do not know particulars of claim till he had statement of claim on 5 September. Defendant need not have applied to inspect before that.

Watkin Williams: But letter of 8th May?

Macaulay: He says he asked to inspect after that, 12 paragraph 9. That is not answered on page 20 paragraph 6 "The Statement of Account M.3201....." and is answered nowhere else.

Watkin Williams: He signed every month, and would know the balance?

30 The contention is he made some payment between the £6,703 account of 25 April and the £5,690.15.9d account?

Macaulay: I did not concede.

Affidavit page 16 paragraph 4 - 6.

Submit that evidence should be heard, because -

- (a) There are conflicts of evidence.
- (b) Quantum of subject matter is large, and justice should appear to be done.
- (c) Delay is not such as to preclude exercise of discretion.

40 Therefore ask Court to set aside judgment, costs to be borne by applicant if Court is against me on first ground.

In the
West African
Court of Appeal

No.12.

Court Notes.

1st June, 1959
- continued.

Harding asked to argue on the original ground of appeal - is defence page 11 substantial? page 11, 3 & 4; 4 not correct. My counter-affidavit does not correct that. The Court not relying on 1619, but 14 April: 5 paragraph 3. 11 paragraph 4 doesn't answer statement of claim.

Denial paragraph 4 statement of claim - but letter 8 May no reply, and nothing done until August.

Passport only shows balance.

10

Limit of £1,000: 20 Para.7.

I apply for leave to file a duplicate original of the statement of account mentioned in paragraph 4 of the Statement of Claim. I have no evidence to show that the document I tendered is a duplicate original of that statement.

Harding: 12 paragraph 8 is then meaningless (Sic).

22 letter 8 May - it is referred to them too.

Leave refused.

To Ames: Plaintiff has issued execution and part.

20

(Continues) Statement of Account 2542 page 11 paragraphs 3, and 1619 paragraph 4: figures not on record in detail.

Adjourned to 2 June 1959. Macaulay is excused on his application.

Sgd: W.H.Hurley
Ag.P.
1.6.59.

2nd June, 1959

Tuesday 2nd June, 1959.

Harding for Respondent.

30

Appellant not represented; see Note of 1.6.59.

Harding: On the original ground of appeal: endorsement of claim. Statement of Claim page 5 paragraph 4. Page 22, Ex.A confirms; it was delivered, page 23 page 12, paragraph 8, confirmatory copy. Page 19, paragraph 4 (he is back at pages 22 - 23).

Warne now appears holding Macaulay's brief for Appellant.

Harding, continuing: No of Statement sent on 8 May was 3201 - page 19, paragraph 4. In the

40

lower Court, ground for setting aside at page 11 paragraphs 2, 3, 4, 5. This is in relation to statements 2452 and 1619, which are irrelevant to this action, i.e. to the Statement of Claim and Exhibit A, page 22 this only reference to No.3201 is in paragraph 8. Never attempted to give a defence for Statement of Claim.

It follows that there is no defence at all.

10 If they'd seen the ledger, they'd have seen what was in 2452 and 1619 (sic). Page 11 paragraph 5, 25 April; page 5, paragraph 3, 14 April - 25 April not our claim page 4 was the date the statement was made, not the date of the last transaction, presumably 14 April).

On receiving a statement, he could check each item against documents in his possession relating to the relevant transaction.

20 Judgment has now been executed, and interests acquired by third parties; too late to come here, especially with no defence. Harley v. Samson 30. T.L.R. 450.

My affidavit page 17 in reply to page 8 (Dec. 2 is for Dec.20 in 17 paragraph 1, a clerical error). The stay was refused: see page 25 L.9.

Ag.P.: Was not execution complete in January, 1959?

Harding: No; it held our hands until after the Judgment in January 1959. After that, no further attempt to obey. In January the application to stay execution was dismissed.

30 Ag.P.: So they couldn't usefully have applied again.

Harding: To this Court pending appeal, I have nothing further to add.

Warne does not wish to reply.

Adjourned to 5 June, 1959 for Judgment.

Sgd: W.H.Hurley

Ag.P.

2/6/59.

In the
West African
Court of Appeal

No.12.

Court Notes.

2nd June, 1959
- continued.

In the
West African
Court of Appeal

Civ.App. 18/59.

B.A.MACFOY Vs. U.A.C.

During for Appellant.

Harding for Respondent.

No.12.
Court Notes.
5th June, 1959.

Judgment of the Court read by Hurley Acting Justice
of Appeal.

Appeal dismissed with costs.

Sgd: W.H.Hurley Ag.P. 5.6.59.

Sgd: C.G. Ames.

Sgd: P.Watkin-Williams, Ag. J.A.

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No.13.
Judgment.
5th June, 1959.

No. 13.

JUDGMENT

IN THE WEST AFRICAN COURT OF APPEAL

Civ.App. 18/59

General Sittings holden at Freetown in
the Colony of Sierra Leone on 1st and
2nd June, 1959.

Coram: Wilfred Hugh Hurley Ag.Justice of Appeal
Cecil Geraint Ames Ag.Justice of Appeal
Peter Watkin-Williams P.Judge.

20

United African Company Limited Respondents

Vs.

Benjamin Leonard MacFoy Appellant

For Appellant: S.C.B. Macauley, Esq.,

For Respondents: R.E.A.Harding, Esq.

Judgment delivered on 5th June, 1959

The Defendant-Appellant was sued by the Plain-
tiffs-Respondents in an action in which they
claimed £5,690.16.9d. for goods supplied to the
Defendant. A Statement of Claim was filed on 5th
September, 1958. By Order 16, Rule 1, of the
Supreme Court Rules, 1947, a Plaintiff is to de-
liver his statement of claim to the Defendant within
ten days after appearance, and is to file a copy
of the Statement of Claim forthwith. It is common
ground that the Statement of Claim was filed after
being delivered within ten days of appearance. By
Rule 2 of Order 16, the Defendant was required to

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10 deliver his defence within ten days of the delivery of the Statement of Claim. He did not deliver a Statement of defence, and on 29th September the Plaintiffs obtained Judgment against him in default of defence. By Order 23, Rule 15, of the Supreme Court Rules, 1947, any judgment by default may be set aside by the Court upon such terms as to costs or otherwise as the Court may think fit. The Defendant moved on 17th November, 1958 to set aside the judgment of 29th September, 1958. The motion was dismissed on 21st November without prejudice to a fresh motion within 8 days. A fresh motion was delivered on 28th November and was heard and dismissed on 9th January, 1959. The Defendant now appeals against the dismissal.

20 When the appeal came on for hearing on 1st June, 1959, learned Counsel for the Appellant applied for leave to amend the notice of appeal by adding a fresh ground of appeal, namely, the judgment in default was irregular because the Statement of Claim had been delivered in the vacation when the rules did not permit it to be delivered. The point was not taken in the Court below, and learned Counsel for the Respondents opposed the application for amendment for that reason. Counsel for the Appellant, in submitting that the fresh ground could be properly entertained, relied on reasons which it seemed to us could not be fully explained without putting before us the greater part of what
30 would be urged in support of the ground itself, so we heard the whole of the argument of the Appellant's Counsel on the ground.

40 By Order 50, Rule 1, of the Supreme Court Rules, 1947, non-compliance with any of the Rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the Court shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court shall think fit. By Rule 2, no application to set aside any proceedings for irregularity shall be allowed unless made within reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity. Rules 1 and 2 of Order 70 in the English practice are in practically the same words. The Defendant knew when the Statement of Claim was delivered to him, and he knew it was then vacation. He made no application in the Court below to set
50 aside the Statement of Claim as having been delivered irregularly; he did not raise the point in

In the
West African
Court of Appeal

—
No.13.

Judgment.

5th June, 1959
- continued.

In the
West African
Court of Appeal

No.13.

Judgment.

5th June, 1959
- continued.

any way until he appeared in this Court to argue the appeal, over eight months after the Statement of Claim had been delivered. Instead of applying to have the Statement of Claim set aside, he allowed Judgment to go against him by default and then moved to have the judgment set aside. In that application, he proceeded on the basis that the judgment was a regular and subsisting one. In support of the application, he made an Affidavit with the object of showing that he had a defence on the merits, and set out certain averments intended to establish a basis of fact for that contention. At the hearing of the application he appeared by Counsel, and the application was argued on the merits of the defence.

10

In Boyle vs. Sacker, L.R.30 Ch.D.249. an *ex parte* order was made in vacation by Charles, J., for the issue of a writ against a Defendant who was abroad, and for substituted service of the writ and a notice of motion for an injunction and a receiver, by service on the Defendant's Solicitor in England. The substituted service was effected and the motion for an injunction and a receiver came before Chitty, J., in term. It was stood over for a week at the request of the Defendant, who was represented by Counsel, and was then stood over for a further week before coming on to be disposed of. At the hearing Affidavits had been filed on both sides. Defendant's Counsel raised an objection to the order for the issue of the writ and for substituted service. Chitty, J., thought that probably the right course would have been to apply to the Court of Appeal for an order discharging the *ex parte* order of the vacation Judge, since Order 63 Rule 12 provided that no order made by a vacation Judge should be reversed or varied except by a Divisional Court or the Court of Appeal or the Judge who made it; but he was of opinion that he need not consider the question of his jurisdiction to discharge the order because there was no motion before him to discharge it, and because the objection was of a kind which could not be entertained when it had been taken suddenly, particularly after the Defendant had appeared and filed Affidavits on the merits. The motion was then heard on the merits and an order for a receiver was made. The Defendant next moved the Court of Appeal to discharge the order made in vacation by Charles, J. At the hearing the Plaintiff-Respondent relied on Order 70, Rule 2, which as I have said is the same

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as Order 50, Rule 2, in the 1947 Rules, and argued that the Defendant's proper course was to have moved the Court below under Order 12, Rule 30, for an order to discharge the order of Charles, J. In reply, the Defendant contended that the case was not one of irregularity, but of want of jurisdiction, so that Order 70, Rule 2, did not apply. And he argued that he could not have moved the Court below to discharge the order of Charles, J., because Charles, J. had no jurisdiction after the vacation had ended and Chitty, J. was not the Judge who made it and therefore by Order 63, Rule 12, had no jurisdiction to reverse or vary it. On that second point, the Court of Appeal held that Order 63, Rule 12 did not apply to an ex parte Order, so that the Defendant could and should have applied to Chitty, J., to whose Court the action was attached, to discharge the order. This had not been done, and Chitty, J. had properly refused for that reason to entertain the objection raised before him. The Defendant's Counsel having then argued the case on the merits, which he had no right to do except on the footing that the Defendant was a party, the Court of Appeal were of opinion that he could not be heard to say that he had not been properly served under the order of Charles, J.

In Boyle vs. Sacker, as has been seen the Defendant did take an objection to service, but it failed because it could not be heard in the form in which it was made. Here, the Defendant on his application to set aside the judgment could have been heard on an objection that the statement of claim had not been delivered, but he did not take it. Instead, as the Defendant in Boyle vs. Sacker did, he argued the case on the merits on the footing that the statement of claim had been delivered. In our opinion, having done that, he cannot now be heard to say that the Statement of Claim was not delivered.

Turning to the other ground that was argued, we observe that on the 8th May, 1958, the Respondents wrote to the Appellant stating that his statement of account showing a debit balance of £5,690.15.9d. at 14th April, 1958 had been handed to him and demanding payment as soon as possible. The Appellant ignored the letter. On the 16th August, 1958 the Respondents issued a writ claiming the sum of £5,690.15.9d. On the 5th September, 1958 a Statement of Claim was delivered showing how the sum of £5,690.15.9d. was arrived at. The

In the
West African
Court of Appeal

No.13.

Judgment.

5th June, 1959

- continued.

In the
West African
Court of Appeal

Appellant entered appearance but failed to deliver any defence and on the 29th September, 1958 judgment was entered in default.

No.13.
Judgment.
5th June, 1959
- continued.

Two months later, on the 28th November, 1958, the Appellant moved to have the judgment set aside. Execution was commenced but withheld pending the hearing of the motion to set aside the judgment. This motion was dismissed by the learned Chief Justice on the 9th January, 1959, reasons being given orally as the Solicitor for the Appellant stated that he did not wish to have reasons given in writing for the purpose of an appeal. 10

A stay of execution was refused at the same time and we understand that the property of the Appellant has now been sold to bona fide purchasers.

The Appellant has failed to offer any valid explanation for his default in pleading. Furthermore it is almost inconceivable that he would ignore a letter demanding £5,690.15.9d. if in fact he knew that he owed to the Respondents a small part of that sum. 20

He now asks leave to defend on the grounds that his debit balance as at 31st March, 1958 was £720. 7. 10d. and his debit balance on the 25th April, 1958 was £6,703.19. 9d. and that he did not receive credit to the value of £5,383.16. 11d. between these two dates. He then goes on to say that he has not been permitted to see the Respondents' ledger to confirm his true debit balance therefrom. If he had wanted to see the ledgers, he should have applied for an order for discovery and he should have asked for further time in which to deliver the defence. 30

The averment is irrelevant. He was not sued on the statements showing balances of £720.7.10d. or £6,703.19. 9d. He was sued for a balance of £5,690.15. 9d. and he has never attempted to meet that claim. The statements if unexplained tend to disprove the claim but they are only evidence. The defence now disclosed is no more than this, that the claim is for goods not supplied and possibly in respect of other goods already paid for. 40

This is not a case in which a Defendant has merely been in default of pleading. He has made no response to a demand for over £5,000; he has allowed judgment to go by default and it was only when execution was to be levied that he took steps to have the judgment set aside. In these circumstances much doubt is thrown on the validity of any defence which he may set up. The defence which he now seeks to put in is extremely nebulous.

We cannot say that the learned Chief Justice exercised his discretion wrongly. Indeed we do not think that he could reasonably have decided the matter in favour of the Defendant.

Appeal dismissed with costs.

Sgd: W.H.Hurley
Ag. President.

Sgd: C.C.Ames
Ag.J.of Appeal.

Sgd: P.Watkin-Williams
Puisne Judge,
S. Leone.

5th June, 1959.

Judgment read by Hurley Ag. J.A. (Presiding
Judge).

In the
West African
Court of Appeal

No.13.

Judgment.

5th June, 1959

- continued.

In the
Privy Council

No. 14.

ORDER GRANTING SPECIAL LEAVE TO APPEAL
(L.S.)

No.14.

AT THE COURT AT BUCKINGHAM PALACE

Order granting
Special Leave
to Appeal.

The 7th day of June, 1960

PRESENT

7th June, 1960.

THE QUEEN'S MOST EXCELLENT MAJESTY

LORD PRIVY SEAL
LORD CARRINGTON

LORD MILLS
MR. WALKER-SMITH

WHEREAS there was this day read at the Board
a Report from the Judicial Committee of the Privy
Council dated the 16th day of May 1960 in the
words following, viz.:- 10

"Whereas by virtue of His late Majesty King
Edward the Seventh's Order in Council of the
18th day of October 1909 there was referred un-
to this Committee a humble Petition of Benjamin
Leonard MacFoy in the matter of an Appeal from
the West African Court of Appeal between the
Petitioner and United Africa Company Limited
Respondent setting forth (amongst other matters) 20
that by a Writ of Summons dated the 16th August
1958 the Respondent claimed in the Supreme Court
of Sierra Leone the sum of £5,690.15.9d. for
goods supplied to the Petitioner as a dealer
for sale to the public: that Judgment in de-
fault of defence was signed on the 29th day of
September 1958: that an Application by the
Petitioner dated the 17th November 1958 to set
aside the said Judgment was dismissed on the 30
21st November 1958 without prejudice to a fresh
motion within 8 days: that on the 28th Novem-
ber 1958 a further Application to set aside the
Judgment was filed and on the 9th January 1959
the Court dismissed the Application with costs
to the Respondent: that the Petitioner appealed
to the West African Court of Appeal and that
Court by a Judgment and Order dated the 5th
June 1959 dismissed the Appeal: that the Petit-
itioner applied to the West African Court of Ap- 40
peal for leave to appeal to Your Majesty in
Council but such leave was refused as the Appli-
cation was out of time: And humbly praying
Your Majesty in Council to grant the Petitioner
special leave to appeal against the Judgment
and Order of the West African Court of Appeal
dated the 5th day of June 1959 or for further
or other relief:

10 "THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof no one appearing at the Bar in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute his Appeal against the Judgment and Order of the West African Court of Appeal dated the 5th day of June, 1959 upon depositing in the Registry of the Privy Council the sum of £400 as security for costs:

20 "And Their Lordships do further report to Your Majesty that the proper officer of the said Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioner of the usual fees for the same."

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

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

W.G. AGNEW.

In the
Privy Council

No.14.

Order granting
Special Leave
to Appeal.

7th June, 1960
- continued.