and I hold that the trial before the said Native Court was a nullity. I hereby quash the conviction and sentence of the applicant by the said Native Court and order that the records of the said Native Court be altered accordingly.

It seems to me that this is a proper case in which to order the respondents to pay the costs of the applicant.

The applicant protested at the time against the substitution of Lamina Bia on the court and told the court members that he had previously been told by a District Commissioner that a member of court who had not sat at the beginning of the hearing of a case should not join the court after the hearing had started. One, John Kamara, a Native Administration clerk, who was present at the trial, also told the court that this was the law, but, notwithstanding this, the court members continued the hearing with the said Lamina Bia. This is most deliberate, and the applicant has been compelled to come to this court by the obstinacy of the members of the Native Court.

I order the respondents to pay the applicant's taxed costs in these proceedings before me.

[SUPREME COURT]

Freetown
March 28, 1962
Bankole Jones Ag.C.J.

BAIMBA TURAY . . . . . *Plaintiff*

v.

SOCIETE COMMERCIALE DE L'OUEST AFRICAIN . . *Defendants*

[C.C. 212/61]

Contract—Sale of goods—Warranty—Implied condition that goods fit for particular purpose—Sale of Goods Ordinance (*Cap.* 225, *Laws of Sierra Leone*, 1960), *s.* 16.

Contract—Sale of goods—Vendee illiterate—Vendee's agent signed debit note stating "Second-hand car sold with no guarantee"—Whether contents of note brought to vendee's attention—Illiterates Protection Ordinance (*Cap.* 104, *Laws of Sierra Leone*, 1960), *s.* 2.

Plaintiff purchased a second-hand car from defendant for £300. When plaintiff paid for the car, a debit note was made out which stated inter alia, "Second-hand car sold with no guarantee." Plaintiff, an illiterate, did not sign the note himself, but procured someone to sign it for him. When plaintiff took delivery of the car, he discovered that the chassis was broken in two places near the suspension. When plaintiff requested that defendants repair the car, they refused to do so unless plaintiff paid an additional £90. When defendants also refused to return the purchase price, plaintiff brought suit.

Held, for the plaintiff, (1) since plaintiff made known to defendants the particular purpose for which the car was required and relied on defendants' skill and judgment, there was an implied condition that the goods should be reasonably fit for such purpose.

(2) There was no evidence that the contents of the debit note were brought to plaintiff's attention.

The court also said, obiter, that, even if the contents of the debit note had been brought to the notice of the plaintiff, the defendants might still be liable, because (quoting Halsbury's Laws of England, Hailsham ed., Vol. 29, p. 66,

para. 73): "The implied conditions as to fitness for a particular purpose may be excluded by express agreement, but the tendency of the courts is against such exclusion, and clauses purporting to exclude the implied warranty are narrowly construed."

Mrs. Ursula D. Khan for the plaintiff.
Edward J. McCormack for the defendants.

BANKOLE JONES AG.C.J. The plaintiff is a taxi driver and the defendants are a limited liability company carrying on business as dealers in new and second-hand cars in Freetown. According to the plaintiff he bought a second-hand Peugeot car E.763 from the defendants at the price of £300. The transaction for the sale commenced on May 25, 1961, and was concluded on May 27, 1961, when the last instalment was paid and a debit note made out. The essential portion of this debit note reads as follows: "By sale of one Peugeot 403 Family Car, second-hand in its present condition, well known and tried by the customer. Reg. Number E.763—£300 second-hand car sold with no guarantee."

The plaintiff who is an illiterate did not sign this document Exh. "D" but procured someone to do so for him. That person purported to do so in Arabic, a language in which the plaintiff is also not literate. When the plaintiff took delivery of the car the following day, that is May 28, he discovered that it had no battery. He had to go and fetch one. On his return the defendants had closed down for the day but the car was outside.

After fitting in the battery, the plaintiff found, as soon as he started driving the car, that something was wrong. He felt the engine heavy and the steering was vibrating. So, on the next day, which was a Sunday, he took the car to a motor mechanic who, on examination, discovered that the chassis was broken in two places, namely, on the right and left side respectively near the suspension. The plaintiff took the car the very next day to the defendants and complained about its condition. The manager examined the car and then suggested that if the plaintiff paid £90, they would get the car repaired.

The plaintiff said he had no more money to spend on the car and suggested that they could either repair it and give it to him or return his money. The manager refused to take the car in for repairs or return the plaintiff's money.

The plaintiff was forced to take the car away and has since kept it in a garage in Freetown. The plaintiff says that he is entitled to repudiate the contract of sale made between himself and the defendants by reason of the breach of a condition on the part of the defendants and claims the purchase-money, namely, £300.

The defence is that the plaintiff not only knew that he was buying a second-hand car, but that he drove the car out on a test with one of the defendants' servants and expressed satisfaction at its performance before he concluded the contract of sale. The defendants say that Exh. "D," the debit note signed on his behalf, was read over to the plaintiff and he was told that he was buying without any guarantee whatever. This note, they say, absolves them from all liability. Now I find that although the plaintiff procured someone to sign Exh. "D" on his behalf, yet there is no evidence that the contents were brought to his notice. The presumption that the plaintiff knew the contents could only be drawn if the provisions of section 2 of Cap. 104, "The Illiterates Protection Act," had been complied with. This has not been the case.

The manager who prepared and handed Exh. "D" to the plaintiff was not called to be examined on this point.

The law relating to sales of this kind is set out in the Sale of Goods Act, Cap. 225. Section 16 reads as follows:

"16. Subject to the provisions of this Ordinance and of any enactment in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows—

(1) where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose;

(2) where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality: provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed;

(3) an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade;

(4) an express warranty or condition does not negative a warranty or condition implied by this Ordinance unless inconsistent therewith."

I do not accept the defence story that the plaintiff examined the car or drove it out on a test. I accept the plaintiff's version which amounts to this, namely, that he was anxious to get a good road-worthy second-hand car to ply for hire as a taxi and he made this quite clear to the defendants before concluding the agreement. In doing so he relied on the defendants' skill and judgment in determining whether the car was reasonably fit for the purpose for which he wanted it.

The fact that in his anxiety to purchase the car, he did not take the trouble to examine it is neither here nor there. Even if the contents of Exh. "D" had been brought to the notice of the plaintiff (which it was not) the defendants may still be bound. See Halsbury's Laws of England (Hailsham ed.) Vol. 29, at p. 66, para. 73, where it is stated as follows:

"The implied conditions as to fitness for a particular purpose may be excluded by express agreement, but the tendency of the courts is against such exclusion, and clauses purporting to exclude the implied warranty are narrowly construed."

On the facts I find that the car was found not to be road-worthy from the very moment of its receipt by the plaintiff. This, in my view, is a fundamental

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breach, a breach which goes to the very root of the contract and, therefore, entitles the plaintiff to repudiate it and demand restitution of his purchase-price.

In the circumstances, therefore, the plaintiff must succeed and I give judgment for him in the sum of £300 together with interest at the rate of 5 per cent. from May 27, 1961, to the date of payment.

The plaintiff will have the costs of this action.

Freetown
April 9,
1962

Marke J.

[SUPREME COURT]

BERTHAN MACAULAY . . . . . *Plaintiff*

v.

JIM DIAMANTOPOULOS . . . . . *Defendant*

[C.C. 2/62]

Practice and Procedure—Motion for order setting aside writ and subsequent proceedings because of irregularities—Whether defendant delayed too long in making motion.

Plaintiff's writ of summons against defendant was issued from the Bo District Registry on December 10, 1961, and was served on defendant on December 21, 1961. On February 6, 1962, the plaintiff signed judgment in default of appearance, and, on February 19, he filed a notice of motion to assess damages. On March 1, defendant made a motion for an order " setting aside the writ and service thereof and all subsequent proceedings . . . for grave irregularities on the grounds that the service was irregular and that the judgment was irregularly signed."

Held, dismissing the motion, that defendant delayed making his motion for an unreasonable length of time after he had knowledge of the alleged irregularities.

Cases referred to: *Thames Haven Dock and Railway Co.* v. *Hall* (1843) 5 Man. & G., 274, 134 E.R. 568; *Charles P. Kinnell & Co. Ltd.* v. *Harding Wace & Co.* [1918] 1 K.B. 405.

Berthan Macaulay appeared for himself.
Rowland E. A. Harding for the defendant.

MARKE J. This is a motion by the defendant for an order " Setting aside the writ and service thereof and all subsequent proceedings thereafter for grave irregularities on the grounds that the service was irregular and that the judgment was irregularly signed."

Mr. Macaulay for the plaintiff while not admitting any irregularity in the process argued that the defendant by entering an unconditional appearance to this action had taken a fresh step and thereby waived any right he might have had to object to the proceedings; and secondly, that the defendant had delayed unreasonably in objecting to the alleged irregularities.

Very much time was spent on the question of whether the entry of an unconditional appearance was a fresh step and therefore operated as a waiver.