## S.V. FELIX and A.H. FELIX v. CAMPBELL and LUMPKIN

Supreme Court (Tew, C.J.): February 2nd, 1931

[1] **Guarantee and Indemnity — surety — action against surety — action may be taken immediately on default of debtor — no notice of default, previous action against debtor, or simultaneous action against co-surety required:** A surety has a duty to ensure that his principal meets his obligations and on the failure of a principal debtor to pay his debt when it falls due the surety is immediately liable to the creditor for the full amount of his guarantee and is not entitled to require either that the creditor should give him notice of the default or that the creditor should take previous action against the principal or simultaneous action against any co-surety (page 197, lines 22–32; page 197, line 36—page 198, line 40).

The plaintiffs brought an action to recover a sum of money owed to them by a Dr. Bankole-Bright for whose indebtedness the defendants had acted as sureties.

In earlier proceedings the plaintiffs obtained judgment against Dr. Bankole-Bright who was given leave to appeal on condition that he paid £200 into court and gave security for the payment of a further £450 to the plaintiffs should his appeal be unsuccessful. The defendants each signed Dr. Bankole-Bright's bond for £450 as sureties.

The appeal was dismissed and the £200 in court was paid to the plaintiffs but they failed to obtain payment of the further £450 even on demand and so brought the present proceedings against the defendants claiming that amount from them jointly and severally.

The second defendant did not enter an appearance but the first defendant contested the claim alleging that no demand for payment had been made of Dr. Bankole-Bright and contending *inter alia* that in the absence of such a previous demand or any other attempt by the plaintiffs to obtain execution against Dr. Bankole-Bright, the bond was unenforceable against either of the sureties.

The court gave judgment for the plaintiffs.

**Cases referred to:**

(1) *Walton v. Mascall* (1844), 13 M. & W. 452; 153 E.R. 188, *dicta* of Parke, B. applied.

(2) *Wright v. Simpson* (1802), 6 Ves. Jun. 714; 31 E.R. 1272, *dicta* of Lord Eldon, L.C. applied.

TEW, C.J.:

In this action the plaintiffs are suing on a bond given by the two defendants together with one H.C. Bankole-Bright to secure payment of £450. No appearance was entered by the defendant Lumpkin.

The plaintiffs had obtained judgment for £491.5s.6d. against Bankole-Bright, and the costs were taxed at £191.8s.6d. Bankole-Bright obtained leave to appeal on condition that he deposited £200 in court and gave security for the payment of £450. The appeal was dismissed on October 10th, 1930. The £200 in court has already been paid out to the plaintiffs. The bond is in the following form:

"*In The West African Court Of Appeal.*

*Know All Men* by these presents that *We* Herbert Christian Bankole-Bright of Garrison Street, Medical Practitioner, Lemuel Erastus Oyesile Campbell of Fourah Bay Road, Merchant, and William Rainy Lumpkin of Kissy Street, Building Contractor and Undertaker, all of Freetown in the Colony of Sierra Leone, are jointly and severally held and firmly bound to Sigismund Valentine Felix and Abigail Harris Felix his wife of Freetown aforesaid in the sum of four hundred and fifty pounds sterling of lawful money to be paid to the said Sigismund Valentine Felix and Abigail Harris Felix their executors administrators or assigns for which payment well and truly to be made we bind ourselves and each of us for himself in the whole, and every one of our heirs executors and administrators, firmly by these presents. Sealed with our seals. Dated June 2nd, in the year of Our Lord 1930.

*Whereas* a suit is now pending in the court at Sierra Leone in which the above-named Sigismund Valentine Felix and Abigail Harris Felix, his wife, are plaintiffs and the above-named Herbert Christian Bankole-Bright is defendant and *Whereas* judgment was given by the court therein on May 15th, 1930 for the said Sigismund Valentine Felix and Abigail Harris Felix and the said Herbert Christian Bankole-Bright has applied for leave to appeal from the said judgment and for a stay of execution of the said judgment and the court below has ordered a stay of execution on the condition among others that the said Herbert Christian Bankole-Bright should give a bond jointly and severally with two sureties in the sum of £450.

*And Whereas* the above-named Lemuel Erastus Oyesile Campbell and William Rainy Lumpkin have agreed at the request of the said Herbert Christian Bankole-Bright to enter into this obligation for the purposes aforesaid.

*Now* the condition of the obligation is such that if the above-named Herbert Christian Bankole-Bright and Lemuel Erastus Oyesile Campbell and William Rainy Lumpkin any or either of them shall pay to the said Sigismund Valentine Felix and Abigail Harris Felix their executors administrators or assigns the full amount of judgment in case the said appeal is unsuccessful then this obligation shall be void, otherwise in full force."

The defence reads as follows:

"1. In answer to para. 1 of the statement of claim the defendant Lemuel Erastus Oyesile Campbell admits that he signed a bond with Herbert Christian Bankole-Bright and William Rainy Lumpkin but the said defendant will contend that the said bond is unenforceable against him for the reasons stated below.

2. The defendant Lemuel Erastus Oyesile Campbell deny (*sic*) the correctness of the allegations in para. 2 of the said statement of claim and will contend that his liability to pay the amount stated in the said bond only arises on the failure on demand of the said Herbert Christian Bankole-Bright, to pay the said judgment or on the failure to realise the amount of the judgment against the said Herbert Christian Bankole-Bright.

3. The said Herbert Christian Bankole-Bright has not failed on demand to pay the amount nor has there been any attempt to enforce the judgment against the said Herbert Christian Bankole-Bright.

4. The defendant Lemuel Erastus Oyesile Campbell will further contend that the amount of £200 ordered to be paid into court is also in part satisfaction of the amount for which the bond was executed.

5. The said defendant Lemuel Erastus Oyesile Campbell will further contend that by the conduct of the plaintiffs he is relieved from any obligation under the bond aforesaid.

6. The defendant aforesaid will also further contend that as no order was applied for or made by the West African Court of Appeal authorising the Supreme Court aforesaid to

enforce the judgment of the said West African Court of Appeal the plaintiffs cannot succeed in this action."

Paragraph 6 of the defence needs no serious consideration. It is quite true that the order made by the West African Court of Appeal contained no direction that it should be carried out by the court below, and it might therefore be argued, with reference to rr.28 and 29 of the Rules of the Court of Appeal that this court cannot enforce this order of that court. But to argue that on that account the plaintiff cannot sue in this court on the bond is a mere absurdity. As to para. 4, there is nothing on the face of the bond, nor is there any other evidence to support this contention.

The meaning of para. 5 is very obscure. From the arguments addressed to me on behalf of the defendant I am inclined to think that it was intended to mean that he is absolved from liability because the plaintiffs have not issued execution against Bankole-Bright.

As to paras. 2 and 3 the argument apparently is that the plaintiffs cannot sue the sureties on the bond because: (a) Bankole-Bright has not failed to pay the amount on demand; and (b) They have not sued Bankole-Bright or attempted to enforce their judgment by execution. This argument rests on an entire misconception of the law on this point. In the absence of any stipulation to the contrary in the instrument of obligation, it is not necessary for a creditor, before proceeding against a surety, to request the principal debtor to pay or to sue him, if solvent. In *Walton* v. *Mascall* (1) Parke, B. said (13 M. & W. at 458; 153 E.R. at 191):

> "[I]t is clear that a request for the payment of a debt is quite immaterial, unless the parties to the contract have stipulated that it shall be made; if they have not, the law requires no notice or request; but the debtor is bound to find out the creditor and pay him the debt when due."

As to the second part of the argument, see *Wright* v. *Simpson* (2) where Lord Eldon, L.C. stated the law thus (6 Ves. Jun. at 734; 31 E.R. at 1282):

> "As to the case of principal and surety, in general cases I never understood, that as between the obligee and the surety there was an obligation of active diligence against the principal. If the obligee begins to sue the principal, and afterwards gives time, there the surety has the benefit of it. . . . But the surety is a guarantee; and it is his business to see, whether the principal pays, and not that of the creditor. The holder

of the security therefore in general cases may lay hold of the surety. . . ."

Thus, although the plaintiffs, by their solicitor, did make a demand on Bankole-Bright, through his solicitor, for three weeks before they commenced this action it is clear that they were not bound in law to do so before proceeding against the sureties. The misconception to which I have alluded appears to be due to a failure to apprehend the true sense of the expressions found in the book that — "a surety's liability only arises on default of the principal," and other expressions to a similar effect. The real position is most lucidly explained in *Rowlatt on Principal & Surety*, 2nd ed., at 141 (1926) and I cannot do better than quote the passage *in extenso*:

"The common expressions (accurate enough in their true sense) that a surety 'is only liable on default of the principal,' or 'only promises to pay if he does not,' must not be construed to convey that there must, before the surety becomes liable, be any demand and refusal between the parties to the principal contract, or any final failure to pay on the part of the principal debtor. When the subject-matter of the guarantee is conduct, some breach of duty by the principal causing damage to the holder of the guarantee must, of course, arise before there is anything which the surety can be called upon to make good. But as soon as a breach is committed of the duty performance of which is guaranteed, or in the case of a debt the day of payment arrives, the default of the principal is complete, and every surety is, apart from special stipulation, immediately liable to the full extent of his obligation, without being entitled to require either notice of the default, or previous recourse against the principal, or simultaneous recourse against co-sureties. . . .

The reason for the rule is that it is the surety's duty to see that the principal pays or performs his duty, as the case may be. . . and every right which a surety has, by virtue merely of his position as such, to throw the burden upon the principal, or to have it borne in common by the whole body of sureties, arises, so far as concerns his ability to make the creditor give effect to it, only upon satisfaction by him of his liability to the creditor. . . . These rights do not enable a surety to delay and impose terms upon the creditor who asks for payment of his legal demand. . . ."

In the present case "the day of payment" arrived as soon as the

principal debtor's appeal was dismissed, and the plaintiffs were thereupon at liberty to claim from either or both the sureties the amount which they had bound themselves to pay. There must be judgment for £450 against both defendants jointly and severally with costs.

*Judgment for the plaintiffs.*

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## MACAULEY v. AFRICAN AND EASTERN TRADE CORPORATION LIMITED

Supreme Court (Tew, C.J.): February 16th, 1931

[1] **Agency — gratuitous agent — duty of care — gratuitous agent undertaking work without requisite skill only liable for failure to exercise reasonable care of ordinarily prudent man:** Where a person, not professing to be skilled in the particular matter, undertakes to do an act for another, without reward, he is only bound to exercise that care which he, as an ordinarily prudent man, would exercise if acting for himself; so that where a person who is not specifically trained for the job attempts, without reward, to float a submerged motor launch and tow her to safety and fails to exercise reasonable care in so doing, he is guilty of negligence only in so far as he has not exercised the degree of care which would have been exercised by an ordinarily prudent man (page 203, line 37—page 204, line 10).

[2] **Shipping — collisions — damages — measure of damages for loss of launch used in trade — cost of replacement plus loss of anticipated profits during period reasonably required for acquisition of new launch:** The primary measure of damages in tort is the amount of the party's loss which is one of actual outlay and anticipated profits; so that where a motor launch engaged in carrying goods for reward is sunk through the negligence of the guilty party, damages will amount to the replacement value of the launch plus the value of profits lost during the time it takes to acquire a new launch (page 209, lines 21—38; page 210, line 27—page 211, line 3; page 211, lines 27—31).

[3] **Shipping — salvage — duty of care — gratuitous agent undertaking salvage operation without requisite skill only liable for failure to exercise reasonable care of ordinarily prudent man:** See [1] above.

[4] **Tort — damages — measure of damages — loss of chattel used in trade — cost of replacement plus loss of anticipated profits during period reasonably required for acquisition of new chattel:** See [2] above.

[5] **Tort — negligence — damages — measure of damages for loss of launch used in trade — cost of replacement plus loss of anticipated profits during period reasonably required for acquisition of new launch:** See [2] above.

[6] **Tort — negligence — duty of care — gratuitous agent — gratuitous agent undertaking salvage operation without requisite skill only liable for**