reference to the cases cited, I will give judgment for the plaintiff, and I make the following order: (a) that the will dated March 10th, 1952 and produced in this case be declared invalid; (b) that letters of administration be granted to the first plaintiff to administer the estate of the late Kabba Turay (deceased) late of 40 Goderich Street, Freetown, and (c) that each party pay his or her own costs.

Order accordingly.

SILLAH v. S.C.O.A. LIMITED

High Court (Tejan, J.): April 14th, 1972
(Civil Case No. 365/70)

[1] **Contract—damages—hire-purchase—breach of agreement by owner—hirer's loss of right to possession and option to purchase—deposit and instalments paid constitute measure of damages but additional loss to hirer by resale of goods may justify larger award:** The damages for the loss sustained by the hirer under a hire-purchase agreement in consequence of a breach of the agreement which defeats his right to possession of the goods and prevents him from exercising his option to purchase, are the amount of the deposit and instalments he has paid, but any additional loss caused to the hirer by the owner's resale of the goods may justify a larger award (page 202, line 36 — page 203, line 4; page 203, lines 11—17).

[2] **Contract—damages—measure of damages—hire-purchase—hirer's loss of right to possession and option to purchase by owner's breach of agreement—deposit and instalments paid constitute measure of damages but additional loss to hirer by resale of goods may justify larger award:** See [1] above.

[3] **Contract—modification—modification by acquiescence—owner's acceptance of several irregular instalments under hire-purchase agreement is acquiescence in variation and prevents enforcement of unperformed balance of original agreement:** If an owner accepts an instalment under a hire-purchase agreement after the hirer has defaulted in an earlier payment he waives his right to exercise his option to terminate for breach of the agreement; if he accepts several irregular payments then he is deemed to acquiesce in a variation of the contract so that he cannot subsequently insist upon strict performance of the original agreement (page 200, lines 16—22, lines 28—32).

[4] **Contract—waiver—nature and effect of waiver—acceptance of instalment payment under hire-purchase contract waives right to terminate for earlier default:** See [3] above.

[5] **Documents—interpretation—document to be interpreted as a whole—intention of parties clearly expressed on face of instrument prevails over ordinary meaning of words used:** The words of a written contract

should usually be given their obvious and ordinary meaning but if this conflicts with the intention of the parties clearly expressed on the face of the instrument the parties' intention prevails (page 199, lines 11—30).

[6] **Hire-purchase—damages—breach of agreement by owner—hirer's loss of right to possession and option to purchase by owner's breach of agreement—deposit and instalments paid constitute measure of damages but additional loss to hirer by resale of goods may justify larger award:** See [1] above.

[7] **Hire-purchase—damages—measure of damages—hirer's loss of right to possession and option to purchase by owner's breach of agreement—deposit and instalments paid constitute measure of damages but additional loss to hirer by resale of goods may justify larger award:** See [1] above.

[8] **Hire-purchase—determination of contract—hirer's default—failure by owner to exercise rights to resume possession and terminate agreement—agreement remains in force despite hirer's default:** A hire-purchase agreement which gives the owner an option to terminate the agreement and take possession of the goods upon the hirer's making default in payment of the rent is not *ipso facto* terminated by such default, nor is the hirer's option to purchase thereby lost; the agreement continues in force, and the right of the hirer subsists to pay all the purchase money and acquire the property in the goods, until the option to terminate is exercised (page 200, line 38 — page 201, line 6).

[9] **Hire-purchase—hirer's rights—option to purchase—not lost by hirer's default until owner resumes possession or terminates agreement:** See [8] above.

[10] **Hire-purchase—owner's rights—right to resume possession—failure to resume possession or terminate agreement—agreement remains in force despite hirer's default:** See [8] above.

[11] **Hire-purchase—owner's rights—right to terminate agreement—failure to resume possession or terminate agreement—agreement remains in force despite hirer's default:** See [8] above.

[12] **Hire-purchase—payment—default in payment of instalments—agreement remains in force until owner terminates or resumes possession:** See [8] above.

[13] **Hire-purchase—payment—default in payment of instalments—owner's acceptance of subsequent payment waives right to terminate for breach; acceptance of several irregular instalments is acquiescence in variation and prevents enforcement of unperformed balance of original agreement:** See [3] above.

The plaintiff brought an action against the defendants for damages for breach of a hire-purchase agreement.

The plaintiff took a bus from the defendants' company on hire-

purchase with an option to purchase for 10 cents at the end of the hire period if the agreed daily payments were made. He defaulted in payment of the daily rent but did make irregular payments of varying amounts which the defendants accepted, giving him receipts for them.

Clause 14 of the agreement stated that if the plaintiff failed to pay any "monthly rent" the hiring would, at the option of the owners, be *ipso facto* determined but there was no provision governing the consequences of a default in daily payments.

Some time after the expiration of the repayment period but before the plaintiff had paid the total amount due under the agreement, the defendants seized the vehicle, purporting to exercise their option to terminate the agreement on the ground of the plaintiff's default in payment. They later sold the vehicle to a third party.

The plaintiff brought the present proceedings against the defendants contending that (a) the defendants' purported exercise of their option to terminate conferred by cl. 14 of the agreement was invalid since that clause referred to "monthly rent" and the default was in daily payments in respect of which there was no provision; (b) the defendants had waived the plaintiff's default by subsequently accepting payments from him; (c) having elected to depart from the terms of the original agreement and having acquiesced in the plaintiff's payment of varying amounts at irregular intervals, the defendants were estopped from insisting upon strict performance of the original agreement; and (d) by their seizure of the vehicle the defendants were therefore in breach of the agreement. He claimed damages for this breach which he maintained should take into account the fact that the plaintiff had lost not only his right to possession but also his option to purchase, since the vehicle had been sold to another. The plaintiff also claimed interest at 5% from the date of breach to the date of judgment.

The court gave judgment for the plaintiff and awarded him damages but without interest as claimed.

Cases referred to:

(1) *Belsize Motor Supply Co.* v. *Cox*, [1914] 1 K.B. 244; (1914), 110 L.T. 151, distinguished.

(2) *Besseler Waechter Glover & Co.* v. *South Derwent Coal Co. Ltd.*, [1938] 1 K.B. 408; [1937] 4 All E.R. 552.

(3) *Helby* v. *Matthews*, [1895] A.C. 471; (1895), 72 L.T. 841.

(4) *Jalloh* v. *Baydoun*, 1968—69 ALR S.L. 24, distinguished.

(5) *Mallam* v. *Arden* (1833), 10 Bing. 299; 131 E.R. 919.

(6) *S.C.O.A. Ltd.* v. *Cassell*, 1968—69 ALR S.L. 133, *dicta* of Tambiah, J.A. applied.

(7) *Whiteley Ltd.* v. *Hilt*, [1918] 2 K.B. 819; (1918), 119 L.T. 632, considered.

Gelaga-King for the plaintiff;
Barlatt for the defendants.

TEJAN, J.:

In this action the plaintiff claims damages for breach of contract, the return of the sum of Le2762.81 paid by the plaintiff to the defendants and interest at 5% *per annum* from November 23rd, 1968 till payment or judgment.

On October 13th, 1967, the plaintiff who is a transport operator entered into a hire-purchase agreement with the defendants' company, importers of motor vehicles, for the hire of one J2 M16 bus, registration No. WR 687.

The evidence of the plaintiff is that he agreed with the defendants that after the initial payment of Le700, he would pay the sum of Le12 daily for a period of 213 days, that the price of the vehicle was Le2728.85, and that after he had paid this amount plus a further token sum of 10c. the ownership of the vehicle was to pass to him. The plaintiff paid the total sum of Le2762.81 which said sum included the initial payment of Le700. The evidence is that while the plaintiff was driving the vehicle along the Waterloo—Freetown Road, on November 23rd, 1968, a break-down vehicle belonging to the defendants stopped in front of him. The plaintiff stopped his vehicle and two men came out of the break-down vehicle and told the plaintiff to get out of his vehicle as the manager of the defendants' company had sent them to seize the vehicle. The plaintiff went to the manager and asked him why he had sent men to seize his vehicle. The manager told the plaintiff to get out of his sight and said that he (the manager) had authorised the vehicle to be seized because the plaintiff had instituted legal proceedings against the defendants' company and that he (the manager) would like to see what the court would do about it.

In their statement of defence, the defendants denied that the plaintiff paid the total sum of Le2762.81 and said that the plaintiff never completed payment of the sum of Le2928.85, the total

value of the vehicle. The defendants admitted seizing the vehicle because the plaintiff was in default in respect of payments long overdue.

The plaintiff was cross-examined by Mr. Barlatt, counsel for the defendants. In answer to Mr. Barlatt, the plaintiff said he was given a receipt when he paid the sum of Le12 for the release of his vehicle after it had been seized.

When being examined by his counsel, the plaintiff put in evidence the following documents: (a) The hire-purchase agreement, (b) a document given to him by the defendants and (c) 61 receipts showing payments made to the defendants.

It appears from the evidence that negotiations for the hire of the vehicle began before October 13th, 1967. Five of the 61 receipts were referred to in the document given to the plaintiff by the defendants and according to these receipts, payments made between September 20th, 1967 and October 9th, 1967 amounted to the sum of Le700, and according to the document this amount represented the following:

Incidental expenses:

Licensing	Le 21.55
Number plates	7.00
Insurance	486.60
Deposit on H.P.	184.85
Total	Le700.00

The rest of the receipts which represented instalment payments are as follows: [The learned judge listed payments totalling Le2169.61 and continued:] Now, it appears from the receipts tendered that the plaintiff has paid the total sum of Le2169.61 plus the sum of Le184.85 being the hire-purchase deposit making an overall total of Le2354.46.

According to the evidence of the plaintiff, he paid the total sum of Le2762.81. Presumably, the plaintiff took into consideration the sum of Le515.15 paid to cover the costs of licence, number plates and insurance policy. Even if the plaintiff had taken into account this amount, then the total payment should have been the sum of Le2869.61. I do not think the sum of Le515.15 was included in the value of the vehicle. The document which was signed by the plaintiff clearly shows that the value of the vehicle was Le2500 plus the sum of Le228.85 as interest, making the total value of the vehicle, apart from the incidental expenses for licence,

number-plates and insurance policy, the sum of Le2728.85. From my calculations, deducting the sum of Le2354.46 paid by the plaintiff from the sum of Le2728.85 the value of the vehicle, it would appear that the plaintiff is still indebted to the defendants' company in the sum of Le374.41 plus the sum of 10 cents.

In their statement of defence, the defendants stated that the value of the vehicle was Le2928.85. With due respect to the defendants, the document which they prepared clearly states that the total value was the sum of Le2728.85. Under cross-examination and in his address, Mr. Barlatt stressed the point that the receipts put in evidence by the plaintiff included payments made for the seizure of the vehicle and the cost of four tyres. I have examined all the receipts very carefully, and none of the receipts was either for payments made for seizure of the vehicle or for the cost of tyres. Every receipt was for payments made to defray the cost of the vehicle.

The agreement between the plaintiff and the defendants is a hire-purchase agreement. The general nature of a hire-purchase agreement is that of bailment. The hire-purchase agreement in this case stipulates as follows:

"1. The owner shall let to the hirer and the hirer shall take on hire from the owners, with an option to purchase as hereinafter mentioned the vehicle J2 M16 bus registration No. WR 687 (hereinafter called the "motor vehicle") to be delivered on the signing of this agreement for a term of 213 days from the date hereon (subject to prior determination as hereinafter provided).

2. The hirer shall pay to the owners on the signing of the agreement the sum of Le184.85 and thereafter during the hiring pay to the owners the sum of Le12 on each day of the month without demand.

3. The hirer shall during the hiring at his own expense keep the motor vehicle in good perfect [*sic*] working order and condition to the satisfaction of the owners and take every reasonable precaution to guard the same and on termination of the hiring otherwise than by purchase shall deliver the same to the owners in good and perfect working order and condition, ordinary wear and tear alone excepted."

Clause 1 of the hire-purchase agreement confers on the plaintiff an option to purchase on the performance of certain conditions.

Clause 3 on the other hand confers the right to terminate the hiring by either party otherwise than by purchase. It follows therefore that the agreement is a contract of hire of the vehicle by the defendants, conferring on the plaintiff-hirer an option to purchase, and under cl. 3, the plaintiff was under no obligation to buy, as he could determine the agreement and return the goods at any time: see *Helby* v. *Matthews* (3).

Clause 2 of the agreement required the plaintiff to pay the sum of Le12 on each day of the month during the hiring after the plaintiff had paid the sum of Le184.85 on the signing of the agreement. The agreement was signed on October 13th, 1967, and the plaintiff was to start payments on the next day. The evidence before me shows that the first payment was made on October 16th, 1967 and was of Le16. After the signing of the agreement, payments of various sums were made irregularly and inconsistently with the terms of the agreement. It seems to me that the defendants were well aware of the defaults of the plaintiff and continued to accept irregular payments up to July 26th, 1968. Having accepted the irregularities and defaults in payments made by the plaintiff, the defendants on November 23rd, 1968, suddenly decided to exercise their rights under cl. 14 of the agreement. Clause 14 states that—

> "if the hirer shall make default of any monthly rent aforesaid or any part thereof for seven days after the same shall become due (whether the same shall have been legally demanded or not) or shall fail to observe and perform any of his other obligations to the owner, then in any such case the hiring shall at the option of the owners be *ipso facto* determined and thereupon it shall be lawful for the owners to seize and take possession of the motor vehicle wherever the same may be."

Paragraph 4 of the statement of defence states as follows:

> "With regard to para. 5 of the statement of claim the defendants admit that they seized the vehicle and say in doing so they exercised their right since the plaintiff was in default in respect of payments long overdue."

I take it that para. 4 of the statement of defence refers to the right conferred on the defendant company under cl. 14 of the agreement. But there is another conflicting clause, that is, cl. 2 of the agreement, which requires the plaintiff to make daily and not monthly payments as referred to in cl. 14. There is no provision in the agreement to define the rights of the defendant company if the

plaintiff should be in default in making his daily payments.

As I have said earlier, the payments made by the plaintiff were irregular not only as to dates but also as to the amounts paid. The defendants on the other hand, received these payments and issued receipts for them without exercising their rights under cl. 14 which, I think, they could not have done in view of cl. 2 which unequivocally states that during the hiring, the hirer was to pay the sum of Le12 on each day of the month without demand. There is no doubt that cl. 2 and cl. 14 conflicted.

I have to construe the contract between the parties to find out what their precise intentions were. In the construction of a written contract, the cardinal presumption is that the parties are presumed to have intended what they have in fact said. The universal principle is that an agreement ought to receive the construction which its language will admit and which will best effect the intention of the parties, and that greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent. With regard to construction of contracts, *Chitty on Contracts*, 21st ed., at 144 (1955) says that—

> "if the provisions are clearly expressed, and there is nothing to enable the court to put upon them a construction different from that which the words import, no doubt the words must prevail; but if the provisions and expressions be contradictory and if there be grounds, appearing from the face of the instrument, affording proof of the real intention of the parties, then that intention will prevail against the obvious and ordinary meaning of the words. If the parties have themselves furnished a key to the meaning of the words used, it is not material by what expression they convey their intention."

The hire-purchase agreement is a printed document, and cl. 14 which is also printed, makes reference to "default in payment of any monthly rent." But the provision which requires the plaintiff to pay a daily rent is typewritten on the agreement. In a situation like this where there are two conflicting provisions, I think the defendants should make their election. With regard to the doctrine of election, *Chitty*, 21st ed., at 185 (1955) says that—

> "if the promisor once makes his election, he is absolutely bound thereby, even though the mode of performance he elects afterwards becomes impossible to carry out. . . . Thus, where rent was reserved by agreement, 'to be paid quarterly,

or half-quarterly if required,' and the landlord had received such rent quarterly for a twelvemonth, the court seemed to incline to the opinion that he had made his election as to the period of payment. . . ."

In the present case, cl. 14 which is printed makes provision for default in payment of any monthly rent. Clause 2 which is typewritten makes provision for daily payments to be made by the plaintiff. It is my view that the typewritten provision, which was made later, was the true expression of the intention of the parties, that is, the rent should be paid at the rate of Le12 on each day of the month. But the agreement contains no provision as to what was to be done if the plaintiff should fail to make a daily payment. Moreover the defendants have been issuing receipts for these payments. The only conclusion I could come to in the circumstances is that although the intention of the parties was that a daily payment should be made, the conduct of the defendants as regards receipts clearly indicated that payments by the plaintiff could be made at any time he wished and that the defendants would accept payments and issue receipts. Even if the construction could be stretched to the point that the parties intended cl. 14 to apply, the conduct of the defendants in the receipt of rents demonstrated their intention of adopting the principle of the doctrine of waiver. The conduct of the defendants, when one considers the 61 receipts, may have amounted to an election, whereby the defendants have tacitly agreed with the plaintiff that he might pay varying sums as rents on irregular dates, for which various sums the defendants issued receipts in non-pursuance of the terms of the hire-purchase agreement. The evidence in this case clearly shows a variation of the hire-purchase agreement by acquiescence by both parties, and in such circumstances, I think the plaintiff can prevent the defendants' company from insisting upon a strict performance of the original agreement. See *Mallam* v. *Arden* (5) and *Besseler, Waechter Glover & Co.* v. *South Derwent Coal Co. Ltd.* (2).

The present case does not even fall within the principle in the case of *Belsize Motor Supply Co.* v. *Cox* (1). One of the passages in the judgment of Channell, J. reads as follows ([1914] 1 K.B. at 252):

"In the view I take of the agreement of December 10, 1910, the hirers did not lose their right to purchase the cab merely by making default in the payment of the instalments. That default did not ipso facto determine the bailment. On default

clause 6 of the agreement gives the plaintiff an option to take possession of the cab and to terminate the agreement. That option has to be exercised, otherwise the agreement continues in force; until it is exercised the right of the hirers subsists to pay all the purchase-money and acquire the property in the cab." [These words do not appear in the report at 110 L.T. 151.]

In his book *Hire Purchase*, 1st ed., at 71 (1930), Earengey says:

"With regard to the owner's right to terminate, the agreement usually provides that if and whenever any one or more specified events happen the owner may *by notice* to the hirer terminate the hiring . . . in some cases the agreement provides that on the happening of any of the specified events the hiring shall *ipso facto* terminate. It does not follow, however, that in the latter event the hiring does *ipso facto* terminate; on the true construction of other clauses of the agreement this may be read as merely giving the owner a power to terminate it by giving some notice or doing some act required by the other clauses. . . . "

In the case of *Whiteley Ltd.* v. *Hilt* (7) Warrington, L.J. stated the principle thus ([1918] 2 K.B. at 819; 119 L.T. at 635):

"The nature of interest taken by the hirer under the agreement appears to me to be this: First, a right to retain possession of the chattel so long as she performed the conditions of the agreement. Secondly, an option to purchase the chattel exercisable by payment of the instalments provided for by the contract. Thirdly, in case of failure to pay any instalment or breach of any other of the provisions of the agreement and possession thereupon taken by the plaintiffs, the right to have restored first her right to possession and secondly the option of purchase upon performing the conditions prescribed by the agreement. That, in my opinion, was the interest of the hirer. The general property in the chattel no doubt remained in the plaintiffs, but that general property in it was qualified and limited by the contractual interest conferred by the agreement upon the hirer."

In this same case, Swinfen Eady, M.R. said ([1918] 2 K.B. at 819; 119 L.T. at 635):

"A bailment may be determined by doing any act entirely inconsistent with the terms of the bailment . . . but it does not follow from that that if the bailee has any further interest

in the chattel of a proprietary kind he forfeits that interest by any dealing with the chattel not warranted by the terms of the bailment. There is no foundation for such a notion .... "

In the case before me, the agreement was signed on October 13th, 1967, and according to para. 2, the plaintiff was to pay the sum of Le12 on each day of the month. The plaintiff started to pay on October 16th, 1967 and not on October 14th, 1967 as should have been the case. Moreover, he paid the sum of Le16 and not the sum of Le12. From then on various payments were made on various dates completely in contravention of the terms of the agreement, and the defendants by issuing receipts for these various amounts, in my opinion, have by their conduct agreed to variation of the terms of the agreement. In view of the conduct of the parties in this case, I can discern no stipulation however remotely implied, as to the terms of payment and the consequences of default, and I see no reason why on November 23rd, 1968, the defendants should invoke the aid of cl. 14 of the agreement by seizing the vehicle. In the first place, the plaintiff has never been in the position of a hirer paying monthly instalments. Considering the evidence, it is difficult not to believe the plaintiff's evidence that it was because he instituted proceedings in October 1968 against the defendants' company that the defendants seized the vehicle. However, taking all the circumstances into consideration I hold that the defendants were in breach of the agreement between them and the plaintiff by the seizure of the vehicle, in the absence of any stipulation and the plaintiff is therefore entitled to damages for the said breach.

The question now to be considered is the question of damages. The plaintiff was only required according to the agreement to pay to the defendants' company the sum of Le12 daily. The breach occurred in November, 1968 and the writ of summons was issued on October 8th, 1970. Although it is the rule that plaintiffs must minimise their damages, the present case is difficult. It is different from the case of *Jalloh* v. *Baydoun* (4). In that case, the plaintiff was awarded general damages, special damages and an order was made for the return of the vehicle to the plaintiff. But in the present case, there is undisputed evidence that the vehicle in question has been disposed of by the defendants. The plaintiff cannot now ask for the return of his vehicle since it has already been sold. This is a factor which I think I can take into consideration in the assessment of damages. If the plaintiff had been

allowed to complete the purchase of the vehicle, he might have been able to dispose of it for a reasonable sum after having realised the purchase price and incidental expenses. In the circumstances I award the sum of Le1000 as general damages to the plaintiff.

The plaintiff is also claiming the sum of Le2762.81, being the amount already paid to the defendants' company. I have said earlier from my own calculation of the 61 receipts that the plaintiff paid the sum of Le2169.61 plus the sum of Le184.85 deposit. This gives a total of Le2354.46. Following the principle of Tambiah, J.A. in the case of *S.C.O.A. Ltd.* v. *Cassell* (6) (1968—69 ALR S.L. at 138) that— "there is no reason why damages should be granted up to the date of judgment," I believe as in the case just cited, that the plaintiff should be entitled to the amount he deposited, and I order that the sum of Le2354.46 be paid by the defendants to the plaintiff, that being the amount paid by the plaintiff by instalments in order to complete the purchase of the vehicle. The plaintiff will have his costs which are to be taxed.

Judgment for the plaintiff.

JALLOH v. CONTEH

High Court (During, J.): July 10th, 1972
(Civil Case No. 73/72)

[1] **Succession—executors and administrators—right to maintain proceedings —fatal accidents—if personal representative fails to sue within six months, person entitled to benefit may bring action:** An action under the Fatal Accidents Acts may be maintained by and in the name of any person entitled to share in the estate at any time from the death of the deceased if a grant of representation to the deceased's estate is not made, but if such a grant is made an action may be maintained by any person entitled to share only on the expiration of six months from the death if the personal representative has failed to bring an action within that time; in any event the action must be brought within three years (page 206, lines 21—27, lines 37—40; page 207, lines 14—17).

[2] **Time—time for bringing action under Fatal Accidents Acts—person entitled to benefit may bring action immediately if no personal representative appointed or after six months if personal representative fails to sue—action to be brought within three years:** See [1] above.

[3] **Tort—death—proceedings in respect of death—fatal accidents—person entitled to benefit may bring action immediately if no personal representative appointed or after six months if personal representative fails to sue—action to be brought within three years:** See [1] above.