STANLEY B. CLARK, Agent for W. D. WOODIN AND COMPANY, LTD., foreign Merchants of England, transacting mercantile Business in the County of Grand Bassa, Appellant, *v.* E. TYSON WOODS, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, GRAND BASSA COUNTY.

Decided January 14, 1930.

1. Where from the nature of the business the employment of sub-agents is necessary and so presumably contemplated, their appointment is authorized; in which case the sub-agent is ordinarily deemed the principal's agent, and for whom the chief agent is not responsible.
2. Where parties bind themselves under a written contract mutually to do business, and it is specifically stated that the agent shall not put out any outstandings or credits except by special permission of the principal in writing, and the principal subsequently authorizes establishment of a sub-factory by letter, the agency shall not be responsible for losses in the said factory when it is proven that it was due to burglary.
3. It is not illegal for a principal to apply rent money due by him to his agent when the latter is deficient in his trading account.
4. An account stated is no longer open or current, but closed by the statement agreed to by both parties of a balance due to the one or other of them; and the statement may be in writing or by word of mouth.
5. To surcharge an account is to show that an item for which credit ought to have been given was not. When set up in the pleadings it must be proved by the party so pleading.
6. Except in the following cases, viz., (1) on bills of exchange; (2) on bonds; (3) on mortgages; (4) under an express contract to pay it; and (5) under a contract to pay it which is implied from previous dealings between the parties, interest shall not be paid by one party to the other for loans or debit balances, until after final judgment.
7. Where there is no account stated, but an open or current account, if an action is brought thereon and by mutual consent of counsel for both plaintiff and defendant the said current account is submitted to the jury, it will be construed that the defendant acknowledges the balance due by him to the plaintiff.

In an action for debt in the amount of £183:12:3 plus interest, judgment was given for plaintiff in the Circuit Court for the amount claimed, less a sum claimed by the

defendant as a set-off. On appeal to this Court by plaintiff, the judgment was *affirmed and amended.*

H. Lafayette Harmon for appellant. *Charles B. Reeves* for appellee.

MR. JUSTICE KARNGA delivered the opinion of the Court.

This action was brought by the agent of W. D. Woodin and Company, Ltd., English merchants doing business in the County of Grand Bassa, and elsewhere in the Republic of Liberia, against one Tyson Woods in the Circuit Court of the Second Judicial Circuit, to recover a debt of $881.34 or £183:12:3 with interest at the rate of 6% for money advanced.

It appears from the records in this case that sometime in the month of October, 1924, E. Tyson Woods, the appellee in this case, was employed by the appellant as a factor and sent to Hartford. It seems further that after trading there for some time, appellee bought a tract of land on the road, and that with the sanction of appellant built a house to which he transferred his business operation.

In the month of January, 1926, when appellant was about to transfer appellee from the Hartford factory to Harlandsville factory, the question of the debt balance was taken up. It was then discovered that the factory money had been used by the appellee to build his house on the lot which he purchased. Appellee then suggested that appellant lease the said premises for the sum of £24:0:0 per annum and that the said rent money be held by appellant as a lien against the account. This suggestion was accepted by the appellant and an agreement was accordingly made, and entered into by both parties on the 25th day of January, 1926, in the County of Grand Bassa.

Thereafter, the said appellee went to Harlandsville and took over the said factory, and continued in appellant's employment until sometime in January 1928 after burglary had been committed on said Harlandsville factory. The appellant, plaintiff in the court below, instituted an action of debt against appellee at the November term of the Circuit Court of the Second Judicial Circuit, Grand Bassa County, 1928. Judgment was given for the plaintiff, but he being dissatisfied with the amount awarded him by the jury for his debt, brings his case on appeal for review by the Court.

The plaintiff in the court below, now appellant, claims that E. Tyson Woods is indebted to his firm in the sum of £183:12:3. Accordingly, he filed an action of debt in the court below at the November term, 1928, against the said defendant, now appellee. The complaint reads as follows:

> "Stanley D. Clark, agent of W. D. Woodin and Company, Limited, foreign merchants of England transacting mercantile business in the County of Grand Bassa, plaintiff, complains of E. Tyson Woods, defendant, that the said defendant is indebted to him, the said plaintiff, in the sum of one hundred twenty-nine pounds and nineteen shillings (£129:19:0) sterling, equal to six hundred twenty-three dollars and seventy-six cents, for sundry matters properly chargeable in account as will appear by a copy of the account herewith filed, and has neglected to pay said debt. And this the plaintiff is ready to prove.
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> "And the said plaintiff further complains that the said defendant is further indebted to him the said plaintiff in the sum of fifty-three pounds thirteen shillings and threepence (£53:13:3) sterling, equal to two hundred fifty-seven dollars and fifty-eight cents ($257.58) for sundry matters properly chargeable in account, as will appear by a copy of the account here-

with filed, and has neglected to pay said debt. All of which the said plaintiff is ready to prove."

The defendant, however, denied that he was indebted to the plaintiff to the amount alleged in his complaint and set up that twenty-five pounds sterling of said claim was an amount of shortage in the Hartford sub-factory; and also that another amount of twenty-three pounds fifteen shillings sterling, was due to burglary committed on the Harlandsville factory. Both of these amounts the defendant contends should have been deducted from the claim. Defendant further contends that he has a lease agreement for a house on the Hartford Road with the plaintiff, and that the annual rent for the second period of five years should be placed by surcharge to the account to the amount of two hundred one dollars and twelve cents, for which credit had not been given by the plaintiff.

Section (f) of the articles of agreement made and entered into on the 1st day of October, 1924, between plaintiff and defendant contains the following stipulation:

> "The party of the second part is further strictly forbidden to have or put out any outstandings or credits except by special permission by the party of the first part in writing. And for all shortages or deficits in account and outstandings not provided for in this section, the party of the second part is responsible and he shall lay himself liable for a criminal charge and prosecution before any court of Liberia having jurisdiction."

There is nothing in the records to show that the defendant violated this section of the agreement; nor has the violation of said agreement been alleged in the brief of the counsel for appellant. On the other hand there is evidence to show that on the 19th of May, 1926, the agent for Woodin and Company, Ltd., authorized the establishment of a sub-factory at Hartford. The letter reads thus:

"MR. E. TYSON WOODS,
MESSRS. W. D. WOODIN & CO. LTD.,
HARTFORD FACTORY.
"DEAR SIR,

"We have your letter of this morning. *Re* the starting of a sub-section, we have already written you; did our letter not reach you? We agree to you having a subsection with say a limit for the time being of about forty pounds (£40). Stock can be taken when yours is due to balance Hartford factory account. Regarding what we allow, we have also agreed to allow an extra two pounds (£2) per month to use as you think best in the way of helping maintain your outside station. This was what was talked over when you were down here, we think you will remember. Of course the thing is to be tried out and it is only then the real value of such a move can be properly estimated.

"To start such an account will not entail you much work, as what you require is a straight value account, debit and credit. If you so wish, we will have our lawyer to draw up an agreement after you have fixed things in final form with Mr. Verdier.

"When we previously wrote you we enclosed a statement of Mr. Verdier's account which shows a balance of sixteen pounds twelve shillings and ten pence (£16: 12s: 10d:) debt, and asked you to have him to agree to this, and to sign before we transfer the amount to your factory account. Mr. Verdier has no complaint whatever regarding our prices, he only needs to compare them with those of competitors to see that, and we cannot believe that a businessman has not already done that.

"We can supply you with a book in which to charge all up to Mr. Verdier and in which to give him his credits, that will be all that will be required for the moment we think.

"Let us know if the letter and statement above referred to did not reach you.

"Yours faithfully,
For W. D. WOODIN & CO., LTD.,
[Sgd.] E. D. ALSTIN,
Agent."

Where from the nature of the business, the employment of sub-agents is necessary and so presumably contemplated, their appointment is authorized; in which case, the sub-agent is ordinarily deemed the principal's agent, for whom the chief agent is not responsible. Bishop, Contract 457, § 1067. We are of the opinion that the sub-agent at Hartford sub-factory was the agent of the firm of Woodin and Company, Ltd., and not E. Tyson Woods, the chief agent. The losses or shortages discovered in the accounts of said sub-agent ought not therefore to be debited to the chief agent's account. The shortages of twenty-five pounds in the Hartford sub-factory are therefore eliminated from appellant's claim.

With reference to the loss of twenty-three pounds fifteen shillings sustained at the Harlandsville No. 1 store, it has been clearly proven by the defendant in the court below that the said loss was due to burglary committed on said factory, on the night of the 6th of January, 1928.

Stanley Clarke, agent for Woodin and Company Limited, on the witness stand testified as follows:

Ques. "As agent for the firm of W. D. Woodin and Company Limited, Grand Bassa County, have you in your employment contractors, factors and watchmen?

Ans. "Yes.

Ques. "Please define the duties of a watchman and factor.

Ans. "The duties of a watchman are to guard such properties that are entrusted to his care from the close of business nightly to the opening of the next day. The duties of the factor are to sell goods and buy

produce on behalf of the firm, and to give an account of the goods, produce, and cash he may have on hand at any time the firm may require.

Ques. "Is it not the fact that on a certain night in your Harlandsville factory of which Mr. Woods, defendant, was the factor, burglary was committed and your former agent Mr. Small went and took stock?

Ans. "Yes.

Ques. "Is it not a fact that after the taking of said stock there was a deficit?

Ans. "Yes.

Ques. "Is it a fact that Mr. Woods, the factor, was advised by your former agent, Mr. Small, to take oath before the Notary Public that he may obtain a certificate for this deficit that he may claim the amount from the Insurance Company thinking that this factory was insured?

Ans. "I believe that is so but I cannot swear.

Ques. "Supposing it was so, and the Insurance Company had accepted this certificate, who would have been responsible for this deficit?

Ans. "If the Insurance Company had paid this amount we would have credited Mr. Wood's accounts with said amount.

Ques. "Can you say upon your oath that there was not a watchman at Harlandsville Factory during the time this burglary was complained of?

Ans. "I cannot say."

From the above testimony it is gathered that E. Tyson Woods, defendant in the court below, was a factor for the plaintiff at Harlandsville factory and not a contractor, nor was he a watchman. Also that on the night of the 6th of January, 1928, burglary was committed on the said factory, and that the agent for Woodin and Company, Ltd., was satisfied of that fact.

In the circumstances we are of the opinion that the

amount of £25:15:0, being the loss sustained at the Harlandsville factory, ought to be eliminated from appellant's claim.

It is a settled principle of law, that where parties bind themselves under a written contract mutually to do business, and it is specially stated that the agent shall not put out any outstandings or credits except by special permission of the principal in writing and the principal subsequently authorizes establishment of the sub-factory by letter, the agent shall not be responsible for losses in the said factory when it is proven that it was due to burglary.

The defendant in the court below contended in his answer that the plaintiff failed to submit an account stated since the termination of the defendant's agency; and that the said account not having been accepted by him no action for the alleged debt balance can be maintained. In reviewing the records in this case we find that during the progress of the case, witness C. Jeane, agent for Woodin and Company, Ltd., testified that in the month of September a balance of four hundred thirteen pounds eleven shillings and one penny was submitted for defendant's signature. Defendant accordingly signed the statement as follows:

"Above balance agreed as being true and correct.
[Sgd.] E. TYSON WOODS,
30th October, 1926."

An account stated is defined to be an account no longer open or current, but closed by the statement agreed to by both parties of a balance due to the one or other of them; and this statement may be in writing or by word of mouth. *Singleton* v. *Barrett,* 2 C & J. (Ct. Exchequer) 368 (1832); Norsley and Whiteley's Law Dictionary 5.

From the above statement and signature of the defendant there can be no doubt in the mind of the Court that the debit balance as submitted by the agent of Woodin and Company, Ltd., was accepted and agreed to by the defendant.

The defendant further contended there was a surcharge in his account in the sum of two hundred one dollars and twelve cents. Though counsel for appellee strongly contended on the point, yet there is nothing in the record to show that his client delivered on the 22nd day of June, 1926, to the firm of the plaintiff, one thousand six hundred seventy-six pounds of coffee valued at two hundred one dollars and twelve cents. To surcharge an account is to show that an item for which credit ought to have been given, was not; and when set up in the pleas it must be proven by the party so pleading. Broom's Law Dictionary 519, "Surcharge." The defendant not having satisfactorily proven this allegation, we are of the opinion that the court below erred in giving credit of said amount to defendant's account.

The defendant further contended that the plaintiff in the court below accepted a lien upon the annual rent for defendant's premises situated at Hartford, and that said rent as it becomes due quarterly in accordance with the lease contract should be placed to the credit of his trading account. The written evidence marked "A" shows that on the 25th day of January, 1926, there was an indenture made and entered into by both parties for five years with the right or option of renewing same upon similar conditions therein expressed for another period of five years after the expiration of the first. The record further shows that in balancing defendant's Hartford account on the 31st of March, 1928, the plaintiff placed the rent money of sixty-six pounds for the said premises, before it was due, to the credit of defendant's account.

This course adopted by the plaintiff appears to be within reason. It is held by courts of justice that it is not illegal for a principal to apply rent money due his agent, when the latter is deficient in his trading account. For while there is no such stipulation in the lease contract, yet to meet the end of justice such a course may be adopted.

The legal maxim *Boni judicis est ampliare justitiam,*

"It is the duty of a judge, when requisite, to amplify the limits of his jurisdiction," has been always construed by the English courts to mean *to amplify its remedies, and without usurping jurisdiction,* to apply its rules to the advancement of substantial justice. The principle therefore upon which our courts of law act is, to enforce the performance of contracts not injurious to society, and to administer justice to a party who can make that justice appear, by enlarging the legal remedy, if necessary, in order to attain the justice of the case. "I commend the judge," observes Lord Hobart, "who seems fine and ingenious, so it tends to right and equity; and I condemn them who, either out of pleasure to show subtle wit, will destroy or, out of incuriousness or negligence, will not labor to support the act of the party by the act or acts of the law." The parties to the contract having themselves regulated their rights and liabilities, this Court will only give effect to their intention, and apply the rent money from the option of five years amounting to one hundred twenty pounds to the credit of defendant's trading account.

Counsel for the appellant in his brief strongly urged that his client is entitled to recover his debt with interest at the rate of six percent for monies advanced to the appellee. While courts have always favored the allowance of interest upon money lent or owing, when the amount was either certain or ascertainable, yet there are certain customs and usages of merchants regulating mercantile transactions which courts are bound to notice. Except in the five following cases, viz.: (1) On bills of exchange; (2) on bonds, and (3) on mortgages and (4) under an expressed contract to pay it, and (5) under a contract to pay it, which is implied from previous dealings between the parties, interest shall not be paid by one party to the other for loans or debit balances until after final judgment.

The Act regulating time for the payment of debt and damages in courts of records approved January 19, 1924, further provides that:

> "Whenever judgment shall have been rendered against a defendant in any suit of debt or damages and such person shall apply to the Court for time to pay same, the Court shall first satisfy itself that said defendant is without money or other assets that can be converted into money to make immediate payment; in which event upon payment of costs, and of twenty five per centum of the principal, and provided that said defendant shall file a bond with at least two good sureties to faithfully comply with said judgment according to the provisions for time hereinafter set forth, and to pay interest upon unpaid balances at the rate of six per centum . . . interest per annum, time may be allowed. . . ." (L. 1923–24, ch. V.)

With reference to the contention of the appellee that the action is on a current account, and not account stated, we are of the opinion that the defendant in the court below is estopped by his own acts. On page 54, the records read thus: "And evidence marked 'A,' 'B' and 'C' and '1' and '2' were therefore submitted to the jury. By mutual consent of both plaintiff and defence counsel, the accounts were submitted to the jury."

Where there is no account stated, but an open or current account, if an action is brought thereon and by mutual consent of counsel for both plaintiff and defendant the said current account is submitted to the jury, it will be construed that the defendant acknowledges the balance due by him to the plaintiff.

Having reviewed this case from the records in a calm and deliberate manner it is but just and equitable that the shortages in the two factories be eliminated from the appellant's claims, and that the rent money of one hundred twenty pounds sterling accruing from the option of lease

for five years be applied to the appellee's trading account. We are therefore of the opinion that the judgment of the court below ought to be amended to read as follows:

The plaintiff shall recover from the defendant the sum of seventy-one dollars and thirty-four cents or fourteen pounds seventeen shillings and three pence with 6% interest costs against appellee. And it is hereby so ordered.

Amended.