

ELIAS BROTHERS, Syrian Merchants doing business in Monrovia and elsewhere, W. S. MURDOCH, Agent for CAVALLA RIVER COMPANY, LTD., an English Firm also carrying on mercantile business in Monrovia and elsewhere, Appellants, *v.* MADAM KUTU, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT,
MONTSERRADO COUNTY.

Argued April 10, 11, 15, and 16, and November 26, 27, 28, and December 3, 1935.
Decided December 13, 1935.

1. In order to bind one to answer for the debt, default or miscarriage of another, a written undertaking is necessary.
2. One of the essential distinctions between the contract of guaranty and that of suretyship is that the engagement of the former is merely collateral; that of the latter is an original undertaking.
3. A surety is a party to the principal obligation, and is bound with the promisor in but one contract; in contracts of guaranty there are two contracts, one for the principal obligor, and the other for the guarantor. A surety is primarily liable on his contract from the beginning, and his liability springs out of no breach of condition; but the liability of the guarantor is fixed only by the subsequent happening of the prescribed condition.
4. Equity will not relieve a party from the results of his own carelessness, negligence or laches, not induced by the conduct of the other party; but if he is induced to enter a contract to his injury by false representations, and he in fact relies thereon, the question whether a careful and prudent man has been misled in like circumstances is material.
5. The relation between a bank and a special depositor is not that of debtor and creditor, but that of bailor and bailee.
6. Laches and neglect are always discountenanced by a court of equity, which is never active in relief against stale demands, or where the party has slept upon his rights.
7. The jurisdiction of the Supreme Court is principally appellate, and hence the essential element of its jurisdiction is that of review of the action of a lower court.
8. A fundamental principle of courts of equity is to make so complete a decision on all the points as to preclude all further litigation between the same parties; as well as to obviate the possibility of the same parties being at any further period disturbed or harassed by any other party claiming the same matter.
9. Equity jurisdiction having once rightfully attached, it shall be made effectual for the purpose of complete relief to avoid a multiplicity of suits.

The plaintiff, appellee herein, brought suit in the Circuit Court of the First Judicial Circuit, Montserrado County, for an accounting. A decree was granted in favor of the plaintiff, from which the defendants appeal to this Court. *Judgment modified and affirmed.*

H. Lafayette Harmon for the appellant Cavalla River Company, Ltd. *Anthony Barclay* for appellant Elias Brothers. *P. Gbe Wolo* for appellee.

MR. JUSTICE DIXON delivered the opinion of the Court.

This case travels from the Equity Division of the Circuit Court of the First Judicial Circuit.

We find in the records sent up to this Court copies of four bills of exceptions, filed respectively by Elias Brothers, Syrian merchants doing business in Monrovia and elsewhere, Charles T. O. King, Samuel M. Snyder and W. S. Murdoch, agent for Messrs. the Cavalla River Company, Limited, an English firm also carrying on mercantile business in Monrovia and elsewhere, each respondent having elected to make an independent defense. But of these four parties only two, viz.: Messrs. Elias Brothers and Messrs. Cavalla River Company, Ltd., completed their appeals, and thus are the only two appellants now before this Court. Of the four bills of exceptions, there is only one count of intrinsic value, and that is count four of the bill of exceptions submitted by respondent Elias Brothers, which this Court will elaborate upon, the other counts of the bills of exceptions containing only exceptions or objections to sundry features of the decree as handed down, there being no irregularities complained of during the trial by any one of the appellants.

The facts from the records are as follow:

One Kutu, a native woman, was in possession of the sum of one hundred sixty pounds sterling which she

deposited with Elias Brothers on the 5th day of September, 1932, for a period of one year at 6½ percent interest on said amount. The amount remained in the custody of Elias Brothers until about two months before the expiration of the period of deposit, when, in July 1933, one Samuel M. Snyder, with whom there existed some relationship with the said Kutu, became an administrator of an estate of one Hannah Fuller. Said estate having a house and lot for sale, the said Samuel M. Snyder approached Kutu and persuaded her to purchase said premises. Kutu seemed not to have had other moneys except her deposit at Elias Brothers from which she tried to draw the amount of forty-five pounds which, Mr. Snyder claimed, was the amount of the purchase money for the house and lot; but she was denied the accommodation by Elias Brothers. She then approached the Cavalla River Company, Ltd., to advance her the amount of forty-five pounds, and offered her receipt for the deposit with Elias Brothers as security against the refund of said loan at the termination of the time of said deposit. This request Mr. Murdoch of the Cavalla River Company, Ltd., readily complied with. It is said from the records that only the amount of twenty-five pounds was taken up on the day the arrangement for the forty-five pounds was effected with the Cavalla River Company, Ltd.; but there is among the records an undisputed letter dated July 21st, 1933, signed by Kutu with her cross, and witnessed by the said Samuel M. Snyder and Chas. T. O. King, which reads thus:

“THE MANAGER,

MESSRS. THE CAVALLA RIVER COMPANY, LTD.,
MONROVIA.

“SIR,

“The purpose of this letter is to authorize you to collect from Messrs. Elias Brothers, Monrovia, the

sum of (one hundred and sixty pounds) £160.—sterling plus interest on the 5th day of September, 1933 in accordance with the terms of the deposit receipt dated September 5th 1932 now in your possession, you are hereby authorized to deduct therefrom any amount which I may owe you.

“[Sgd.] KUTU her X cross.

“*Witnessed:*

[Sgd.] CHAS. T.O. KING

“ S. M. SNYDER.”

It will be observed that this letter although appearing to be the basis of the negotiation between Kutu and the Cavalla River Company, Ltd., for the loan of the forty-five pounds, yet, the amount of Kutu's indebtedness is apparently intentionally omitted, thus on the 5th day of August ensuing, about fourteen days after the arrangement between Kutu and the Cavalla River Company, Ltd., had been effected, Mr. Snyder and one A. T. Coleman entered the business place of the Cavalla River Company and presented the following letter:

“MONROVIA, LIBERIA,
August 5th 1933.

“THE MANAGER,
C. R. C., LTD.,
MONROVIA.

“DEAR SIR:

“From my fixed deposit at Elias Brothers for which you hold receipt of £160—plus its interest (to be) £10 8s. od. sterling a total of £170 8s. od. and against which amount you have made sundry payments as per several orders, you are further authorised to make the following allocations of the balance, viz.:

“(1) As security for goods and cash are authorized to supply to Mr. S. M. Snyder, £100.

“(2) Balance to be paid to Mr. S. M. Snyder (house a/c.) £14.

“(3) Amount for Elias Brothers, £4. And the

remainder to be paid to myself. This is your authority for so doing.

“Yours faithfully,
[Sgd.] KUTU her X cross.

“*Witnesses:*

[Sgd.] A. T. COLEMAN

“ S. M. SNYDER”

The contents of this document are emphatically denied by Kutu to have been written either with her consent or even her knowledge. She swears to be ignorant of the transaction. From this fact it is clear as to the reason of the amount of forty-five pounds, Kutu's real indebtedness to the Cavalla River Company not having been inserted in the authority of July 21st.

It appears that the unfortunate illiteracy of the said Kutu and her ignorance of the English language in which the negotiations and conversations were carried on, were exploited to take advantage of her, and eventually developed into what appears to have subsequently become a fixed determination to deprive her of her money by fraud, extending even to her Attorney, Chas. T. O. King, Esquire, as will be seen further in this opinion.

When fraud had been discovered by Kutu, she referred to Attorney King and got him to accompany her to Messrs. Elias Brothers and there, in the presence of Attorney King, instructed Messrs. Elias Brothers not to pay her deposit over to anyone except to herself in person.

The following correspondence then passed between King as Attorney for Kutu and Messrs. the Cavalla River Company, Ltd. A letter dated October 4th to Cavalla River Company, Limited, reads thus:

“MONROVIA, LIBERIA,
October 4, 1933.

“MESSRS. THE CAVALLA RIVER COMPANY,
MONROVIA.

“GENTLEMEN,

“I am instructed by my client, Miss Kutu, of Mon-

rovia, to forward you the enclosed letter of authority to Messrs. Elias Brothers of this City to pay you or your order the full amount of forty-five pounds sterling (£45.) which amount covers the amount received by her from you account loan [*sic*] sometime in the month of July of this year and as a security for which she placed her deposit receipt with you.

"The authority given by her to you dated July 21, 1933, to receive full amount of said deposit is hereby cancelled as you will see from her authority.

"Faithfully yours,
[Sgd.] CHAS. T. O. KING,
Attorney-at-Law."

"MONROVIA, LIBERIA,
BASSA,
October 4th, 1933.

"H. LAFAYETTE HARMON,
SOLICITOR AND COUNSELLOR-AT-LAW.

"Cable Address:

HARMONY.

"MR. CHARLES T. O. KING,
ATTORNEY-AT-LAW FOR MISS KUTU,
MONROVIA.

"DEAR SIR,

"We return herewith your order dated October 4, 1933, drawn on Messrs. Elias Brothers for £45, and beg to inform you that we could under no circumstances accept it, in view of the fact that said amount does not represent the total amount due to my client. Messrs. the Cavalla River Company, Limited, by your client Miss Kutu, and for which we are holding her authority and receipt to draw the full amount of her deposit from Messrs. Elias Brothers, and which authority cannot now be cancelled the transaction relating to same having been completed and closed

as far as the withdrawal of funds are concerned.

"Your letter of today's date admits that the authority given by her on July 21st this year, was to receive the full amount of the deposit, aside from this fact being specifically stated in the letter of authority and your attempt to try and cancel same now is both illegal and impossible.

"As soon as we have received the money from Messrs. Elias Brothers your client may call at the Office of the C. R. C., Ltd., and adjust this portion extracted from said letter of authority to wit:

'On receipt of the amount in question, you are hereby authorized to deduct therefrom any amount which I may owe you.'

and then as a natural consequence, the balance will be handed to her in keeping with the original arrangement.

"Yours faithfully

H. LAFAYETTE HARMON

[Sgd.] H. LAF. HARMON,

Solicitor and Counsellor-at-Law.

For the Cavalla River Company, Ltd."

"MONROVIA, LIBERIA,

October 6, 1933.

"MESSRS. THE CAVALLA RIVER COMPANY, LTD.

MONROVIA,

c/o COUNSELLOR H. L. HARMON.

"DEAR SIR,

"We shall be pleased to have a representative of your Company to proceed with us to-morrow the 7th instant, at the hour of ten o'clock a.m., to Messrs. Elias Brothers for the receipt of the amount of forty-five pounds sterling (£45.) (since you have refused to accept our order) to cover the loan of £45. sterling made to us by you on the 21st July, 1933, and for which our

Deposit Receipt for one hundred and sixty pounds sterling (£160.) with interest at the rate of 6½ per cent. was placed with you by us as a security.

“We would point out that our Deposit Receipt with interest matured on the 5th September last and we are at the present losing all further interest on the Principal caused by your refusal to release the Deposit Receipt and as well as your non-acceptance of our notice of cancellation of our authority to you dated July 21, 1933.

“Unless, therefore, our tender is accepted, we shall be compelled to hold you responsible for any loss inconvenience and/or injury which we might be called upon to sustain growing out of your unwarranted and illegal act to lace up any amount or amounts which we have not offered the said deposit receipt as a security for, which is evidenced by your receipt which we hold and which disavowment was brought to your notice long since before our letter of October 4th 1933.

“Yours faithfully,
[Sgd.] C. T. O. KING,
Attorney for Miss Kutu.”

If Attorney King had maintained this position throughout the transaction, it would have been impossible to connect him with the fraud perpetrated against Kutu; but on the contrary he, through some medium, after coming into contact with Counsellor Harmon in a conference had in Counsellor Harmon's office, was influenced to believe A. T. Coleman whom he interviewed in the absence of his client Kutu, and who had apparently conspired with Snyder in his fraudulent design, and, without the knowledge of Kutu, did on the 14th of October, 1933, eight days after writing the above quoted letter to the Cavalla River Company, Ltd., write another letter to said Company as follows:

“MONROVIA, LIBERIA,

October 14, 1933.

“MESSRS. THE CAVALLA RIVER COMPANY, LTD.,
c/o COUNSELLOR H. L. HARMON,
MONROVIA.

“GENTLEMEN,

“Having had a conversation with Mr. A. T. Coleman the gentleman whose signature appears on the authority dated 5th August, 1933, as one of the attesting witnesses to the signature of Miss Kutu, my client, who subsequently endeavoured to mislead the writer by disavowing any knowledge of the whole transaction, and in keeping with the mutual understanding of your counsel when it was agreed upon by both of us that the whole transaction was contingent upon the avowment or disavowment of the said A. T. Coleman, please be informed that that said gentleman at the interview had with him stated emphatically and positively that the said signature was his genuine signature and that Miss Kutu did touch the pen and did authorize the authority guaranteeing Mr. S. M. Snyder to be written, and that everything was explained to her and she had full knowledge of said transaction.

“This is to advise my withdrawal from this matter and hope that you will now be able to settle this matter in keeping with her authority of August 5th, and July 21st 1933. I have informed Miss Kutu of my withdrawal.

“Faithfully yours

[Sgd.] CHAS. T. O. KING,
Attorney-at-Law.”

In support of the position we have taken, we now quote the following testimony as given by Attorney King in the court below:

“On or about the 9th or 10th of October Counsellor Harmon suggested a conference. We met at his of-

fice, Harmon representing the Cavalla River Company, I representing Miss Kutu and Snyder, it was there for the first time that I heard that Miss Kutu had as a security from Mr. Snyder a certain deed to his property in Brewerville, as to whether it is a fact I do not know. Mr. Snyder held the position that the security dated 5th of August, 1933, was genuine and that he could prove it. We went into the matter as far as humanly possible and it was agreed that the other witness to this authority Mr. Coleman be sent for, all parties paying the necessary expenses. It was put up to Miss Kutu in the event Mr. Coleman came down and say that the authority was genuine, what to be the consequence? She replied that *she do not know the said Coleman, that she had never met him in her life and that she was sure that no one wrote that authority but Mr. Snyder and if Mr. Coleman came down and say yes, that the authority was genuine, the Cavalla River Company should draw the amount.* That was the understanding at that conference as to whether she meant it or not, I do not know. I then became further strengthened in the position that I had taken; luckily Coleman came down that very day to attend to business with the Government, I met him in the presence of Mr. Carney Johnson on the water front and I was introduced to him and I asked him as to whether this authority was genuine and the circumstances under which it was given if at all; he replied me that there was no undue influence, duress, force or undue persuasion used by Mr. Snyder on Miss Kutu, but that this girl of herself had said that they, that is, she and Snyder, should try and open up a business at Brewerville. I was not present, if at all such transpired, but acting upon what we had agreed to I told him, Mr. Coleman, to come to my office and from there he would go to Mr. Harmon's. When we got to Mr. Harmon's office unfortunately Harmon was

out. He Coleman had to leave that afternoon by the steam boat for his home. It was then that I communicated with Elias Brothers and Cavalla River Company informing them of what had taken place and announcing my withdrawal from the matter. It was on a Saturday morning, Miss Kutu met me at the landing stage about midday, she was on her way up to the river, the very day that Counsellor Barclay and his wife were also going up the river, Brewerville. I told Kutu of my action she begged me to leave the matter alone but to continue in her interest."

It does not appear from the testimony so given by Mr. King himself that when he met Miss Kutu he informed her fully what had been stated at the interview held at Counsellor Harmon's office, and with Mr. Coleman at the waterside; nor that he promised to continue to represent her as her attorney when he wrote a letter dated October 16th evincing a position wholly inconsistent with that previously taken which reads as follows:

"MONROVIA, LIBERIA,
October 16, 1933.

"MESSRS. ELIAS BROTHERS,
MONROVIA,

"GENTLEMEN,

"I beg to hand you herewith enclosed a copy of a letter addressed by me to-day to Messrs. the Cavalla River Company, Limited, Monrovia, touching their claim against Miss Kutu, my client, for which they now hold her Deposit Receipt; and have to advise that having been misled in the whole transaction of this client of mine, I now have no further alternative but to advise your compliance with her authorities of July 21, and August 5th, respectively, 1933.

"Faithfully yours
[Sgd.] CHAS. T. O. KING,
Attorney-at-Law for Miss Kutu."

This act of Attorney King's in the circumstances, that is to say, he having voluntarily cancelled his relationship with Kutu as her lawyer upon his meeting A. T. Coleman and consulting with him in the absence of Kutu his client, and of having thereafter served a notice on the Cavalla River Company, Ltd., and Messrs. Elias Brothers, respectively, without having his ambiguous position clarified, was unprofessional, and therefore surrounds him with a cloud of suspicion, for Elias Brothers would certainly not have paid out the amount but for his above quoted letter.

As regards the position of the Cavalla River Company, Ltd., in advancing any amount to S. M. Snyder, this Court has not been able to discover in the records sufficient evidence of any agreement by which Kutu legally bound herself to become security for any amount Snyder might draw save the letter dated August 5th, 1933, the authenticity of which Kutu denies, and which letter this Court considers insufficient authority under such circumstances to warrant the advance to Snyder of the sum of a hundred pounds.

For, according to the statute of frauds (29 Car. II c. 3), which statute has been adopted as a part of our own common law, there was introduced into the body of the law a distinction between *written* parol and *oral* parol transactions which render a writing necessary for the valid performance of the matters to which they relate. Among these matters are special promises "to answer for the debt, default, or miscarriages of another." B.L.D., "Frauds, Statute of."

It will be observed that Mr. Harmon in his letter to Attorney King dated October 4th seemed to have assumed that the expression in the letter from Miss Kutu dated July 21st, namely, "On the receipt of the amount in question you are authorised to deduct therefrom any amount which I may owe you," was sufficient to guarantee any amount that Snyder might draw; but this Court

cannot accept that contention of Counsellor Harmon's. First of all her expressions used were specifically that "any amount which I may owe you"; not "any amount I and Snyder may owe you"; and secondly, even if said letter had evidenced any intent on the part of Kutu to guarantee Snyder, which we repeat we have not been able to find, even then, the money of Kutu could not legally have been disposed of in the manner in which it had been done. For it is to be observed that there is a very material difference between a contract of guarantee and a contract of suretyship.

According to R.C.L.:

"The distinction between the contract of guarantee and the contract of suretyship is not always clear. Especially is this true where the guaranty is absolute, as distinguished from a conditional guaranty. The vital difference between the contract of a surety and that of a guarantor is that a surety is charged as an original promisor, while the engagement of the guarantor is a collateral undertaking. A surety is a party to the principal obligation, undertaking together with the principal debtor that it shall be performed, while the guarantor is not a party to the principal obligation. In case of suretyship, there is but one contract binding the surety and the promisor, but in the case of a guaranty there are two contracts, one binding the principal debtor and one binding the guarantor. . . ." 12 R.C.L. 1057, § 6.

But the position seems to have been a little more clarified in an opinion given by the Honorable L. A. Grimes, then the Attorney General of Liberia, in his 4th Annual Series (1925), page 54 which reads:

"While guaranty is a branch of suretyship the two subjects have many distinguishing features. A surety is primarily liable on his contract from the beginning; his obligation springs out of no breach or condition; but the liability of the guarantor is fixed only by the

happening of the prescribed condition at a time after the contract itself is made. A surety is bound with the principal on the identical contract under which the liability for the performance of a prior collateral contract upon which the principal is alone indebted. The contract of the surety is made at the same time and jointly with that of his principal; while that of the guarantor is a contract separate and distinct from that of his principal; it may be made at the same time and upon the same consideration, but it is often made later and upon a separate consideration; the obligation of the surety is primary, that of the guarantor is secondary. The contract of the surety is a direct original agreement with the obligee that the very thing contracted for shall be done; a guarantor enters into a cumulative collateral engagement by which he agrees that the principal is able to and will perform a contract which he has made or is about to make, and then if he fails he will, upon being notified thereof, pay the resulting damages."

There is no testimony appearing in the record to support the representation made by S. M. Snyder, who was the beneficiary of said order of August 5th, and that of A. T. Coleman, who as it were had appeared to have conspired with Snyder in his fraudulent designs, the more so as the record shows that Kutu stated in the conference with Harmon, representing the Cavalla River Company, Ltd., and Attorney Chas. T. O. King, that she was not even acquainted with the said Coleman. Under such circumstances this Court is in a quandary to understand why Mr. Murdoch, the agent of the Cavalla River Company, Ltd., neither himself personally signed the affidavit to the answer and other pleadings, nor, having known of the commencement of this action, and having been regularly summoned as a party in the case, should have left the country without at least having had his deposition taken *de bene esse* so that if he could not be

present his testimony on behalf of the firm would have been preserved. It is also discovered from the records that in the presence of Attorney Chas. T. O. King and S. M. Snyder himself, at the time of the negotiation of the forty-five pounds, Mr. Murdoch was cautioned by Kutu against Mr. Snyder's having anything to do with this business of hers as she had discovered some fraudulent tendencies of his (Snyder's) which had been evidenced in her previous dealings with Mr. Snyder with respect to this very same money. This testimony of Kutu on this score as she gave it in the court below and which was not rebutted, nor even denied in any respect, is as follows:

"When we got to Mr. Murdoch I showed him my deposit receipt, I cautioned Mr. Murdoch against any business transaction of Mr. Snyder on my behalf. I made Mr. Murdoch to understand that Mr. Snyder being unreliable in some dealings on my behalf with Woermann, I would not wish for him to take part in our present deal. I strictly instructed Mr. Murdoch in the presence of Attorney King that at any time Mr. Snyder should call on him and order any goods or money in my name he should not serve him for reasons above stated bearing on Mr. Snyder's character. . . ."

As a result of this unimpeached testimony of Kutu, and the neglect of Mr. Murdoch or other representative of the Cavalla River Company, Ltd., to dispute, rebut or explain same by evidence either oral or written we have reached the conclusion that Kutu's obligation to the Cavalla River Company, Ltd., is limited to the amount of forty-five pounds only, used to purchase a house from Hannah Fuller's estate of which estate S. M. Snyder was an administrator and that any other amount advanced Mr. Snyder by the Cavalla River Company, Ltd., is considered as having been done at their own risk and responsibility, and that Kutu under the principle of equity and justice cannot be held responsible for the amount of

£88 1s. 7d. supposed to have been advanced Mr. Snyder by the Cavalla River Company, Ltd., Monrovia. For, "it is a general principle that courts of equity will not relieve a party from the results of his own carelessness, negligence or laches not induced by the conduct of the other party. But if he is induced to enter into a contract to his injury by false representations and he in fact relies thereon, the question whether a careful and prudent man would have been misled in like circumstances is immaterial. This rule has been applied to imposition on aged and ignorant persons." 10 R.C.L. 326, § 69.

Apropos appellant Elias Brothers, this Court observes that they did not contemplate fraud in the transaction with Kutu, for on the 18th day of September a few days after the expiration of the period for which the amount of one hundred sixty pounds was deposited with them by Kutu, they wrote a letter, and Kutu having failed to turn up, they repeated their invitation by letter under date of October 15th, 1933, requesting her to come for her money.

Kutu did not hurry to go to Elias Brothers until she had heard of the fraud S. M. Snyder was perpetrating against her. Whereupon, in company with her lawyer Attorney King, she called on Elias Brothers and instructed them not to pay over the amount to anyone except herself in person; that she was indebted to the Cavalla River Company, Ltd., in the sum for forty-five pounds only, but that she had heard that the Cavalla River Company, Ltd., was charging her with being responsible, or rather claimed that she had stood responsible, to them in the sum of one hundred pounds for and on behalf of S. M. Snyder.

In consequence of this fact, Attorney King on behalf of Kutu wrote the Cavalla River Company, Ltd., informing them of the report which had reached Kutu with respect to her being held responsible for an amount which

S. M. Snyder had received from them, and repudiating such an authority; she claiming to be responsible for forty-five pounds only which she had borrowed and for which she had given them her deposit receipt as a guaranty against her refunding the loan of forty-five pounds, and in the meanwhile cancelling the authority bearing date of July 21st, 1933, which she had given them to draw the one hundred sixty pounds with accrued interest at the expiration of the deposit and enclosing an order on Elias Brothers against said deposit receipt in the sum of forty-five pounds.

It appears that after the receipt of this communication by the Cavalla River Company, Ltd., from Kutu through Attorney King, pressure was brought to bear on S. M. Snyder by Counsellor H. Lafayette Harmon, Counsellor-at-Law for the Cavalla River Company, Ltd., but without here going into the detail of his activities we may mention that the matter culminated in Attorney King's writing Elias Brothers the following letter:

"MONROVIA, LIBERIA,
October 16, 1933.

"MESSRS. ELIAS BROTHERS,
MONROVIA.

"GENTLEMEN,

"I beg to hand you herewith enclosed a copy of a letter addressed by me to-day to Messrs. the Cavalla River Company, Limited, Monrovia, touching their claim against Miss Kutu my client, for which they now hold her deposit receipt; and have to advise that having been misled in the whole transaction of this client of mine, I now have no further alternative but to advise your compliance with her authorities of July 21st and August 5th respectively 1933.

"Faithfully yours,
[Sgd.] CHAS. T. O. KING,
*Attorney-at-Law Counsel
for Miss Kutu."*

We cannot concede that upon the mere receipt of the last quoted letter Elias Brothers can escape responsibility for their negligence in this transaction, for Attorney King had previously informed them that he had severed his relationship with Kutu as her attorney from the copy of a letter dated October 16; hence the said firm of Elias Brothers who had taken upon themselves the responsibility of bankers were bound to exercise all the care in seeing to it that they paid the amount of the deposit to the right person, their responsibility so to do having been increased by the dubious position in which King had thus placed himself.

We here give the definition of "banking":

"The subject covered by this title relates to the business of dealing in money by receiving deposits, making loans, discounting commercial paper, making collections, and issuing bills and notes." 3 R.C.L. 374, § 1.

"The right to do a banking business is not a franchise, but is a common right which belongs to citizens generally." 3 R.C.L. 378, § 4.

Elias Brothers had the general right to do banking business in connection with their mercantile business.

"As heretofore shown, the relation between the bank and a special depositor is not that of debtor and creditor but that of bailor and bailee. In the case of a contract of bailment when the bailee shows the exercise of that degree of diligence required by law of his class he is discharged, although the thing bailed be stolen or lost." 3 R.C.L. 559, § 186.

From the records in the case this Court is compelled to charge Elias Brothers with gross negligence by paying said amount over to the Cavalla River Company, Ltd., (a) because Kutu had warned them of the fraud contemplated by S. M. Snyder with the consent of the Cavalla River Company, Ltd., and had instructed them not to pay said amount over to anyone save herself in

person; (b) because Attorney King had informed them of his having severed his professional relation with Kutu.

Having thus traversed the evidence we will now give our attention to the position taken by the respective lawyers during the course of the arguments.

Counsellor H. Lafayette Harmon for the Cavalla River Company, Ltd., one of the appellants, after endeavoring to impress the Court of the *bona fide* position of his clients, contending most strenuously their non-participation in any fraudulent designs that may be apparent on the face of the records, on the 3rd day of December, 1935, when he had submitted his arguments on the opening, offered an amended brief in which he contended that the case should be remanded in order to give his clients, the Cavalla River Company, Ltd., the opportunity of placing some evidence on the record to justify their position. There being nothing discoverable in the records to show that Counsellor Harmon had issued subpœnas for witnesses who were out of the jurisdiction of the court, or who had been summoned but had not appeared, or for whom subpœnas had been issued but they had not been located in order to be summoned, and that he had made an application to the trial court to continue the cause to such time as would enable them to have their witnesses present, and that said application had been denied by the trial judge, this Court of appeal would not be warranted in remanding said cause for a retrial as might have been the case had he during the trial attempted to do any of the above, and been prevented by any act of the court below. But even if any or all of these contingencies had arisen, or, if for any other reason he had had a right to apply for a new trial, surely Counsellor Harmon should know that that could not be done by an "amended brief." It is most unreasonable and contrary to the well established principles of law for Counsellor Harmon to expect this Court of appellate jurisdiction to correct for him errors he made due to his own negligence

or carelessness in the prosecution of the interests of his client in the trial court. Litigants should not expect courts to do for them what they should do for themselves. *Blacklidge v. Blacklidge*, 1 L.L.R. 371 (1901).

Moreover:

“Laches and neglect are always discountenanced by a court of equity. A Court of Equity, which is never active in relief against stale demands, will always refuse relief where the party has slept upon his rights and acquiesced for a great length of time. Nothing can call into activity this court but conscience, good faith, and reasonable diligence; where these are wanting, the court is passive and does nothing.” 1 Story, Equity Jurisprudence 87, § 85.

This Court is one of appellate jurisdiction, and as such the essential element of such jurisdiction is that of review of the action of a lower court in an action instituted therein, and the record having failed to disclose any irregularity in the trial, exceptions being taken only to the nature of the decree handed down by the trial judge cannot accede to such contention of Counsellor Harmon's.

Counsellor Anthony Barclay in his argument simply emphasized the inequitable nature of the decree of the lower court. He contended that the decree was mandatory in some instances and optional in others.

“It is a fundamental principle of courts of equity to make as complete a decision on all the points embraced in a cause as the nature of the case will admit; so as to preclude not only all further litigation between the same parties, but the possibility of the same parties being at any future period disturbed or harassed by any other party claiming the same matter, as well as of any danger that may exist of injustice being done to other parties who are not before the court in the present proceedings.” 10 R.C.L. 556, § 339.

1 Story, Equity Jurisprudence, § 105 reads:

“Another rule respects the exercise of jurisdiction

when the title is at law and the party comes into equity for a discovery, and for relief as consequent on that discovery. In many cases it has been held that where a party has a just title to come into equity for a discovery and obtains it, the court will go on and give him the proper relief, and not turn him round to the expenses and inconveniences of a double suit at law. The jurisdiction having once rightfully attached, it shall be made effectual for the purposes of complete relief. And it has accordingly been laid down by elementary writers of high reputation, that 'The court, having acquired cognizance of the suit for the purpose of discovery, will entertain it for the purpose of relief in most cases of fraud, account, accident, and mistake.' The ground is stated to be the propriety of preventing a multiplicity of suits; a ground of itself quite reasonable and sufficient to justify the relief, and one upon which Courts of Equity act, as we shall presently see, as a distinct ground of original jurisdiction."

But inasmuch as this Court has by implication the right and duty to see that the ethics of the profession are not lowered, and that all legal men conform to the approved standards of morality, and inasmuch as, from the records, it appears that Attorney Chas. T. O. King has acted unprofessionally in the handling of the interests of his client, Madam Kutu, it is hereby ordered:

- (a) That in every respect in which the decree of the court below is optional, it shall be made mandatory upon all the parties to the record in the court below.
- (b) That inasmuch as the conduct of Attorney Chas. T. O. King, after his conference at the office of Counsellor H. Lafayette Harmon, and his interview with Mr. A. T. Coleman appear to us to be so radically inconsistent with the position he had previously taken as to be censurable, but he has

not, before this Tribunal, had his day in court, this Court hereby orders the trial court to direct the Local Bar Committee to investigate his conduct by giving him an opportunity to be heard, together with Counsellor H. L. Harmon—Miss Kutu, Mr. A. T. Coleman and Mr. Carney Johnson are to be used as witnesses, together with any other witness available—and to forward a certified copy of the record of the proceedings taken during said investigation to this Court at our April term for appropriate action.

With these modifications the decree of the trial judge should be affirmed; and it is so ordered. Costs of appeal proceedings ruled against the appellants.

Modified and affirmed.