

**SUPREME COURT OF NIGERIA**  
17TH JULY, 1997. SC. 180/1993  
**CORAM:- M. L. UWAIS CJN, S. M. A. BELGORE, I. L. KUTIGI,**  
**M. E. OGUNDARE, A. I. IGUH, JJSC.**

1. JOACHIN EBEILUIGBUHI OSEYOMON ..... 1ST DEFENDANT  
2. BENIN RUBBER PRODUCERS ..... 2ND DEFENDANT/  
CO-OPERATIVE MARKETING UNION LTD. APPELLANT  
AND  
S. O. OJO ..... PLAINTIFF/RESPONDENT

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**ACTIONS** - *Filing of a claim - Where statutory provisions are made for filing of a claim - The procedure laid down ought to be followed in making such a claim.*

**ACTIONS** - *Competence - Arbitration - Whether failure to refer dispute to an arbitrator - Before filing this action - Affects competence of the action.*

**ACTIONS** - *Statute bar - Action that was instituted within the limitation period - Is not statute bar - And the Court of Appeal is in error - As to the date cause of action arose.*

**APPEALS** - *Cross-appeal for special damages - Was wrongfully not considered by the Court of Appeal - Though the cross-appeal is allowed - Cross-appellant can only recover part of the damages.*

**CONSTITUTIONAL LAW** - *Inconsistency - Provisions of State Law which are inconsistent with sections of the 1979 Constitution - That confer unlimited jurisdiction on the high court - Shall to the extent of such inconsistency be void.*

**DAMAGES** - *Special damages - Must be proved by credible evidence - Claim for loss of use of a vehicle over a long period time - Onus of proof is not discharged - Where commercial life span of the vehicle may be very short.*

**DAMAGES** - *Mitigation - Plaintiff is expected to take all reasonable steps - Towards mitigating damages accruing from a wrong - He cannot recover any damage that could have been avoided.*

**DAMAGES** - *Mitigation - Detention of plaintiff's lorry - Where plaintiff is*

*supposed to mitigate his damages on loss of use - Period of 3 months is enough within which to replace the lorry - He can only recover damages for 3 months and not the 5 years in issue.*

**STATUTES** - *Cooperative Societies - S.51(1)(c) Cooperative Societies Law - Dispute between a society and its officer - Shall be referred to the Registrar - Person aggrieved by the Registrar's order - May appeal to the appropriate authority.*

**PLEADINGS** - *Counterclaim amendment - Need to set it out in the statement of defence - Where an amendment of pleading is ordered - And defendant fails to include counterclaim in the amended statement of defence - The counterclaim shall be deemed abandoned.*

**TORTS** - *Detinue action - Is based upon wrongful detention of plaintiff's chattel - It was when appellant's ruled that the vehicle would no longer be returned - That its possession turned adverse.*

**TORTS** - *Detinue - Return of the chattel or its value is the primary claim - Damages if proved will also be awarded.*

### **FACTS**

In the High Court of Benin City the Plaintiff instituted an action against the defendants claiming a declaration that the vehicle No. BD 803 B in the defendants' possession is the property of the Plaintiff, return of the vehicle and N80.00 damages per day for detinue till judgment. The defendants, a co-operative society placed the vehicle in dispute for sale for N6,000.00. After negotiations, the vehicle was sold to the plaintiff for N2,500.00. He effected repairs and change of ownership. In February 1984, the plaintiff was charged with illegal removal of the vehicle by the 1st defendant and its return to the 2nd defendant was demanded. The plaintiff promptly complied with the demand pending the report of a panel of inquiry set up to investigate the alleged sale. At the conclusion of the inquiry the panel recommended that the vehicle be returned to the plaintiff. The 1st defendant rejected the recommendation of the Panel and communicated same to the 2nd defendant. Consequently, the 2nd defendant held on to the vehicle and refused to return same to the plaintiff. It was as a result of this development that the plaintiff instituted the action leading to this appeal.

At the conclusion of trial the learned trial Judge entered judgment for the plaintiff. The defendants' appeal to the Court of Appeal was dismissed

but the Cross-Appeal was allowed. The 2nd defendant has further appealed to the Supreme Court on five issues and the plaintiff has also cross-appealed to the Supreme Court on a lone issue.

**ISSUE FOR DETERMINATION**

"01. Whether the trial Court had jurisdiction to entertain and grant the reliefs claimed by the plaintiff/respondent in this action.

02. Whether the appellants were given fair hearing by the Court of Appeal.

03. When is a notice of appeal said to be incompetent?

04. Whether the appellants acting on the order and authority of the first defendant, a Public Officer can take advantage of the statute of limitation which protects him.

05. Having regard to the totality of the evidence before the Court of Appeal, were the Justices of the Court of Appeal, right in dismissing appellants' appeal?"

**HELD** (Unanimously dismissing the appeal per lead judgment of **IGUH JSC**)  
**Actions - Filing of a claim**

1. Where special statutory provisions are made for the filing of a claim, the procedure so laid down ought to be followed in making such a claim. So, too, where some statutory conditions precedent are prescribed before a particular relief or remedy is claimed by Court action, the aggrieved party must comply with and exhaust the prescribed conditions before the institution of a Court action in respect of such a relief or remedy. (p. 1840 F)

**Co-operative societies - Dispute within the society**

2. It is not in dispute that the appellant is a Co-operative society, a Co-operative Marketing Union registered under section 7 (1) of the Co-operative societies Law, Cap. 45, Laws of Bendel State of Nigeria, 1976. It is also clear, pursuant to section 51 (1) (c) of the said Law, that where a dispute arises between a society, its committee or any officer, agent or servant of the society, as in the present case, such dispute shall be referred to the Registrar of the Co-operative Society, in this case, the 1st defendant, for decision. Section 51 (5) provides that the decision of the Registrar under sub-section (2) or sub-section (4) shall, save as otherwise provided in sub-section (6), be final and shall not be called to question in any Court. Section 51 (6) on the other hand, provides that any person aggrieved by any order of the Registrar may appeal to the appropriate authority, in this case the Commissioner for Trade and Industry, within 21 days from the date of such order and the decision of the appropriate authority shall be final and conclusive. (p. 1841 F)

**Actions - Competence**

3. In the present case the Registrar on the dispute being referred to him decided, as he was entitled to do, to look into the matter and decide the same himself. I entirely agree with the trial court that to the extent that the matter arising from the sale of the appellant's vehicle amounted to a dispute, the law imposed no responsibility on the respondent to have the dispute determined firstly by an arbitrator as a condition precedent to seeking any remedies which may be open to him in respect of the vehicle by action. I also endorse the view of the court below on the same issue when in effect, it affirmed the said opinion of the trial court. In my view, the appellant's contention that failure by the respondent to have the dispute referred to an arbitrator before the present suit was filed is fatal to the action is clearly not backed up by the law and cannot be sustained. (p. 1842 C)

**D Constitutional law - Inconsistency**

4. More importantly however, there are the provisions of section 6(6) (b), 236 and 274 of the Constitution of the Federal Republic of Nigeria, 1979. The combined effect of these sections of the 1979 Constitution is, subject to the other provisions of the said Constitution, to confer unlimited jurisdiction on the High court of a State and all existing law and/or any provisions in a State Law which are not in conformity with the provisions of the Constitution or tend to derogate from the powers of such Courts shall, to the extent of such inconsistency, be void. State Law or any provision of a State Law which purports to oust the Jurisdiction of the State High Court is void as being inconsistent with the Constitution of the Federal Republic of Nigeria, 1979. In my view, therefore, the provisions of sections 51 (1) (a), 51 (1) (b) and 51 (6) of the Co-operative Societies Law, Cap. 45, Laws of the former Bendel State of Nigeria, 1976 which are State enactments must be regarded as void in so far as they purport to limit or oust the jurisdiction of the High Courts as therein provided contrary to the express provisions of the 1979 Constitution. (p. 1843 A)

**Counterclaim - Need to set it out in the statement of defence**

5. Where the defendant, as in the present case, pleads both a defence and his counter-claim, the counter-claim shall be set out in the Statement of Defence with the particulars thereof, numbered serially paragraph by paragraph and as a continuation of the paragraphs of the material facts relied upon and pleaded by the defence. The law is well settled that once ordered, what stood before an amendment of pleadings is no longer material before the Court and no

longer defines the issues to be tried in a suit. The operative Statement of Defence before the Court dated the 4th February, 1987 clearly contained no counter-claim. It seems to me that the obvious result must be that the counter-claim earlier set out in the appellant's original Statement of Defence shall be deemed abandoned. (p. 1844 E)

B

### **Detinue action - Is based upon wrongful detention**

6. An action in detinue is based upon a wrongful detention of the plaintiff's chattel by the defendant, evidenced by the refusal of such a defendant or his agent to deliver it up on demand. The detention of a chattel cannot be wrongful unless, of course, the defendant's possession thereof is adverse. In the present case, it is plain that the appellant's possession of the vehicle in issue was not in any way adverse to the respondent's claim originally. In these circumstances, no question of detinue arose until the appellant, through its agent, the 1st defendant, ruled on the 6th April, 1984 after considering the report of the inquiry that the vehicle would no longer be returned to the respondent. It seems to me that it was from that date that the appellant's possession of the vehicle turned adverse. (p. 1847 A)

### **Actions - Statute bar**

7. The respondent's court action was instituted on the 11th June, 1984, well under three months from the date the cause of action arose. I think, with respect, that the Court of Appeal was in error when it held that the respondent's cause of action in detinue arose on the 24th February, 1984 on which date he originally delivered the vehicle to the appellant pending the conclusion of investigations in respect of its sale. In my view, the respondent's action against the 1st defendant and the 2nd defendant/respondent is clearly not statute-barred and no question of whether or not section 2(a) of the Public Officers Protection Law, Cap. 137, Laws of Bendel State of Nigeria enures to the appellant arises in the present case. Accordingly issue 4 must be resolved against the appellant. (p. 1847 D)

G

### **Detinue - Return of chattel is the primary claim**

8. In an action for detinue, such as the present case, the claim, primarily, is not for damages but for the return of the specific chattel wrongfully detained or its value as assessed. Damages, however, if any is proved to have been sustained as a result of the detention of the chattel, will, in addition to an order for delivery of the chattel be awarded. The claim in issue in the present case is that of loss of use from the date the writ of summons was issued until the delivery of judgment. Strictly speaking, any claim for loss of earnings is a

claim in special damages in the sense that full particulars must be given by the plaintiff in his pleadings of his rate of earning and of such other facts as may be necessary to enable the court to calculate as best and as accurately as it can, the actual amount of the plaintiff's loss. (p. 1849 C)

**B Special damages - Must be proved by credible evidence**

9. All the above seem to me issues of considerable importance in cases where special damages are claimed in circumstances such as exist in the present case as the onus is on a plaintiff to prove his entitlement to special damages strictly by credible evidence of such a character as would suggest that he is indeed entitled to an award under that head of damage. This onus he does not discharge where he makes a claim for loss of use in respect of a vehicle at a given rate over a particularly long period of time, running into several years, when in the face of the evidence, the remaining commercial life span of the vehicle may only be a matter of months if not weeks. (p. 1850 B)

D

**Mitigation - Plaintiff is expected to take all reasonable steps**

10. In the third place there is the question of the mitigation of damages in which the most important rule is that a plaintiff must take all reasonable steps to mitigate the loss to him consequent upon the defendant's wrong and cannot recover damages for any such loss which he could thus have avoided but has failed, through unreasonable action or inaction, to avoid. Accordingly it is the plaintiff's duty to minimize his damage as far as possible, and therefore anything which must be ascribed to his failure to do so is not recoverable from the defendant. Persons against whom wrongs have been committed are not entitled to sit back and suffer more loss which could be avoided by reasonable efforts. The duty is imposed on a plaintiff of taking all reasonable steps to mitigate the loss consequent on the wrong and debars him from claiming any part of the damage which is due to his neglect to take such steps. (p. 1850 H)

G

**Cross appeal for special damages**

11. The Court of Appeal was, quite clearly, in error to have failed to consider the cross-appellant's claim for loss of use as fully set out in his further amended Statement of Claim. To that extent, it seems to me plain that this cross-appeal is liable to be allowed. I cannot however accept that the cross-appellant is entitled to his claim for loss of use for the period of 5 years now in issue. This is mainly because of his total failure to take reasonable steps to mitigate the loss to him consequent upon the appellant's wrongful act. There was also the failure by the cross-appellant to establish that the vehicle in issue, having

regard to its antecedents and old age was in a position to be profit earning for the period of five years claimed. But the cross-appellant is clearly entitled to some award in respect of loss of use of his vehicle for some part of the period in question. (p. 1853 D)

### **Mitigation - Detention of plaintiff's lorry**

12. In this regard, I ask myself, as I did in the Paul Ordia case, how long it will take a reasonably prudent business man to replace an old third hand vehicle from the 6th April, 1984 when the cause of action arose. Although this, without doubt, is easily replaceable in the markets,<sup>2</sup> I am prepared ex abundanti cautela to hold that a period of three months, that is to say, ninety days is reasonable as a fair length of time within which the respondent could have replaced his vehicle with a view to mitigating his loss. Accordingly I will award to the respondent the sum of N7,200.00 as loss in respect of the use of his vehicle in issue for a period of ninety days (three months) from the 11th June, 1984 to 9th September, 1984 at the rate of N80.00 per day being a reasonable period within which the cross-appellant ought to have replaced his vehicle in issue in mitigation of his losses. The lone issue in the cross-appeal is accordingly resolved in favour of the cross-appellant. (p. 1853 F)

### **NOTABLE POINT OF INTEREST**

#### **IGUHJSC**

#### *Counterclaim - Recognized practice in respect thereof*

1. Accordingly where a defendant seeks to rely upon any facts as supporting a right of set-off or counter-claim, he must in his Statement of Defence state

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<sup>2</sup> There is need for an appropriate appraisal of what the apex court is saying in this judgment lest some people think they can afford to unlawfully detain a poor man's chattel and go scot-free at the end of the day. If that were to be the case, one may seize another's vehicle, put it into lucrative commercial use for over 10 years and be prepared to pay only 3 months damages for loss of use at the end of appeals in the matter after about 13 years. The court of justice looks at every case according to the special facts of the case. If we refer to the holdings at pp. 1850 B & 1853 D, it would be clear that the gravamen of the decision here is that the respondent failed to prove the special damages on loss of use for the 5 years in issue. It would seem that if the respondent gave acceptable credible evidence to show that detention of the vehicle subjected him to such a poor state that replacement was impossible, and to establish that his N80 per day (which would have been increasing in course of time) could sustain the vehicle in a commercial state for over the period of 5 years thereby proving the special damages claimed, the court may grant loss of earning for the whole 5 years in issue.

specifically that he does so by way of set-off or counter-claim. He shall proceed therein to give particulars of such set-off or counter-claim. The recognized practice is to separate the facts relied upon to sustain the counter-claim as much as possible from the remaining part of the Statement of Defence and to arrange them in numbered paragraphs with the word "Counter-Claim"

- B prefixed to it as a heading, so as to distinguish it from what is pleaded simply as a matter of defence to the plaintiff's claim. However the mere absence of such heading would not invalidate a counter-claim which otherwise is properly pleaded. Material facts but not the evidence relied upon in proof of the counter-claim must be pleaded. However, such facts, where appropriate, must
- C as a rule in the settlement of pleadings, be divided into paragraphs numbered consecutively. Where the defendant pleads both a defence and a counter-claim, the paragraphs of the counter-claim are usually numbered as a continuation of the paragraphs of the Statement of Defence. (p. 1843 G)

#### D REPRESENTATION

A. O. Eghobamien Esq. S.A.N., Mr. Dele Oye for the appellant.  
Respondent absent and unrepresented.

#### CASES REFERRED TO

- E Eguamwense v. Amaghizemwen (1994) 1 KLR 1  
Lahan v. A.G. of Western Region (1963) 1 ALL N.L.R. 226  
Bronik Motors Ltd. v. Wema Bank Ltd. (1983) 6 S.C. 158  
Amanambu v. Okafor (1966) 1 ALL N.L.R. 205  
Rotimi v. McGregor (1974) 11 S.C. 113 at 152
- F Warner v. Simpson (1952) 2 W.L.R. 109  
Odumosu v. A.C.B. Ltd. (1976) 11 S.C. 55 at 65  
Ordia v. Piedmont (Nig) Ltd. (1995) 2 N.W.L.R. (Part 379) 516

#### G STATUTES AND RULES REFERRED TO

- Supreme Court Rules O. 2 r. (1), O. 6 r. 8(6)  
Co-operative Societies Law, Cap. 45, Laws of Bendel State of Nigeria 1979. S. 51(1) (a) (b) (c) s. 51(2) (a) - (b) ss. 51 (b), 51 (5)(a)-(o) 51(6)  
Constitution of the Federal Republic of Nigeria 1979. ss. 6 (6) (b), 236, 274.
- H High Court (Civil Procedure) Rules of Bendel State 1976. O. 13 r. 14



**LEAD JUDGMENT BY IGU HJSC**

In the Benin Judicial Division of the High Court of former Bendel State of Nigeria, the plaintiff instituted an action against the 1st defendant claiming a declaration that the vehicle No. BD 803 B in the defendant's possession is the property of the plaintiff, return of the said vehicle and N80.00 damages per day for 85 days commencing from the 15th day of March, 1984 for detainee and/or loss of use of the vehicle. By the order of the trial court, the 2nd defendant was, on its application, joined as the 2nd defendant in the suit.

Following various amendments, the plaintiff's final claims against the defendants jointly and severally are as follows -

*"1. A declaration that vehicle with registration No. BD 803 B in the defendants' possession and or control is the property of the plaintiff.*

*2. The return of the said vehicle with registration No. BD 803 B and.*

*3. N80.00 damages per day for 85 days commencing 15th day of March, 1984 when the plaintiff requested for the return of the said vehicle i.e. N6,800.00 for detainee and loss of use by the plaintiff and in addition N80.00 per day from the date of the issue of the writ of summons until judgment."*

Pleadings were ordered in the suit and were duly settled filed and exchanged. The 2nd defendant in its Statement of Defence counter-claimed against the plaintiff as follows -

*"31. WHEREOF the 2nd defendant counter-claims against the plaintiff as follows -*

*(a) A declaration that the purported sale of the Benin Rubber producers Co-operative Marketing Union Ltd., Mercedes benz Lorry Registration No. BD 803 B to the plaintiff on 20/1/84 at Benin City in Benin Judicial Division is null and void and of no effect.*

*(b) A declaration that the Benin Rubber producers Co-operative marketing Union Ltd., is the lawful owner of the said vehicle registration No. BD 803 B.*

*(c) To set aside receipt dated 20/2/84 issued to the plaintiff purporting to be evidence of sale of vehicle No. BD 803 B by one of his collaborators because of irregularities and fraudulent practices perpetuated by them."*

The said counter-claim was however not repeated either in the 2nd defendant's amended Statement of Defence or in its further amended Statement of defence. There will be need for me to say more on this counter-claim in the course of this judgment.

The case for the plaintiff as pleaded and testified to is that he was re-

electd as the president of the 2nd defendant Union on the 15th December, 1983. The Union had a Mercedes Benz lorry with registration number BD 803 B which its executive committee had decided to sell as it had become too expensive to maintain. Tenders were called for the proposed sale of this vehicle. On the 17th November, 1983 a sub-committee of the Union to evaluate the vehicle recommended that the price should be N6,000.00. Plaintiff, himself, offered to buy the vehicle and at a meeting of the executive committee on the 20th January, 1984, the lorry was sold to him at the price of N2,500.00. He duly paid this price and subsequently effected repairs to the vehicle to the tune of N2,132.00. He also effected the change of ownership of the vehicle per Exhibit F.

On the 16th February, 1984, the 1st defendant wrote a letter to the plaintiff, charging him with illegal removal of the vehicle and inviting him to return the same to the Union pending full investigations on the report. This advice the plaintiff promptly obeyed. He also appeared before the 1st defendant as directed and attended the inquiry instituted in connection with the sale of the vehicle. Prior to this inquiry, he had hired out the vehicle to P.W.3 on the 17th and 18th February, 1984 at the rate of N80.00 per day.

At the conclusion of the inquiry, the panel submitted its report which was dated the 16th March, 1984. It recommended that the vehicle be returned to the plaintiff. The 1st defendant after a study of this report rejected the panel's recommendation and communicated his decision to the Union on the 6th April, 1984. This decision was to the effect that the sale was irregular and that the vehicle was not to be returned to the plaintiff. Consequently the 2nd defendant held on to the vehicle and refused to return the same to the plaintiff. It was as a result of this development that the plaintiff instituted this action.

The defendants in their own defence stated that although it was recommended that the vehicle be sold for N6,000.00, they later got to know that the plaintiff who was the president of the 2nd defendant Union bought it for only N2,500.00. Following petitions in respect of alleged irregularities in the sale of the lorry, the 1st defendant, as he was by law entitled to do, constituted a panel of inquiry to examine the allegations. At the conclusion of the said exercise, the 1st defendant, again in the exercise of his statutory powers, rejected the panel's report and directed that the vehicle in issue be returned to the Union on the ground of irregularities in the alleged sale. Accordingly the 2nd defendant by its registered letter of the 8th June, 1984 returned to the plaintiff a cheque for N2, 500.00. This letter was returned unclaimed by the plaintiff. The defendants, in particular, pleaded that the plaintiff's action against the 1st defendant was statute barred by virtue of the provisions of section 2 of the public officers protection Law, Cap. 137, Laws of Bendel State of Nigeria,

1976 in that the cause of action arose on the 16th February, 1984 whilst this action was not filed until the 11th June, 1984, more than 3 months after the said cause of action arose.

At the conclusion of hearing, the learned trial Judge Omo-Agege, J. (as he then was), after a careful review of the evidence on the 8th March, 1989 entered judgment for the plaintiff against the defendants jointly and severally as follows -

"Now to the reliefs claimed. I think the plaintiff is entitled to the declaration he is seeking; he is also entitled to the return of the vehicle but I do not think that he is entitled on the facts to a claim for loss of use. I will disallow that head of claim.

In view of the foregoing I enter judgment for the plaintiff as against the Defendants' jointly and severally as follows -

(1) It is declared that vehicle registration Number BD 803 B in the Defendants' possession and control is the property of the plaintiff; and

(2) The said vehicle to be returned to the plaintiff forthwith."

Dissatisfied with this decision of the trial court, both defendants respectively lodged appeals against the same to the Court of Appeal, Benin Division. The plaintiff also cross-appealed against the said judgment on damages. The Court of Appeal in a unanimous judgment on the 12th day of March, 1993 allowed the appeal of the 1st defendant with no order as to costs. The appeal of the 2nd defendant was dismissed whilst the cross-appeal of the plaintiff was allowed as against the 2nd defendant. The court below concluded as follows -

*"In sum, the appeal of the 1st appellant succeeds and is allowed, but there will be no order as to costs. The appeal of the 2nd appellant is dismissed with N500.00 costs in favour of the plaintiff/respondent. The cross appeal of the plaintiff succeeds against the 2nd appellant. The said lorry shall be returned to the plaintiff with damages for loss of use to the tune of N6,800.00 as claimed with N500.00 costs against the 2nd appellant."*

Aggrieved by this decision of the Court of Appeal, the 2nd defendant and the plaintiff have now appealed to this court. I shall hereinafter refer to the 2nd defendant and the plaintiff in this judgment as the appellant and the respondent respectively.

The parties pursuant to the Rules of this court filed and exchanged their written briefs of argument.

The five issues distilled from the appellant's grounds of appeal set out for the determination of this court are as follows -

*"01. Whether the trial Court had jurisdiction to entertain and grant the reliefs claimed by the plaintiff/respondent in this action.*

02. *Whether the appellants were given fair hearing by the Court of Appeal.*

03. *When is a notice of appeal said to be incompetent?*

04. *Whether the appellants acting on the order and authority of the first defendant, a Public Officer can take advantage of the statute of limitation which protects him.*

05. *Having regard to the totality of the evidence before the Court of Appeal, were the Justices of the Court of Appeal, right in dismissing appellants' appeal?"*

The respondent/cross-appellant, for his own part, submitted five C issues as arising for the determination of the court. These are as follows

"(1) *Whether there was a sale of the vehicle No. BD 803 B by the appellant to the cross Appellant?*

(2) *Whether the Public Officers protection Law of the defunct Ben-del State Will enure in favour of the appellant?*

D (3) *Whether the Public Officers Protection Law will only began to run after the Commissioner in charge of co-operatives has pronounced on the dispute between the appellant and the Respondent/cross Appellant?*

E (4) *Whether the Notice of Appeal of the Appellant before the Court of Appeal was competent in all respects having regard to the notice which indicated that the appeal was against part of the judgment?*

*Whether there was a proper counter claim before the trial court?"*

I have closely examined the two sets of issues identified by the parties in their respective briefs and it seems to me that the issues raised on behalf of the appellant in the main appeal are enough for the determination F thereof. Accordingly I shall deal with them in my determination of the main appeal.

On the cross-appeal, the sole issue identified by the cross-appellant for the determination of this court runs thus -

G *"Whether the Court of Appeal was right in making an order which fell short of the final amended 3rd relief sought by the plaintiff/respondent/cross-appellant?"*

The defendant/respondent in the cross-appeal, on the other hand, formulated one issue for the determination of the cross appeal. This is as follows -

H *"Whether the cross-appeal is competent having regard to the Notice of Appeal".*

It is clear to me that the question set out by the cross-appellant in his brief of argument is more consistent with the issue raised in his cross-appeal than the one raised by the defendant/respondent I shall therefore adopt the question

as formulated by the cross-appellant for my determination of the cross-ap-  
 peal.

At the oral hearing of the appeal, learned leading counsel for the  
 appellant A.O. Eghobamien Esq., S.A.N. proffered arguments in further eluci-  
 dation of the submissions contained in his written briefs of argument. Both  
 the respondent and his learned counsel were absent in court although served B  
 with the hearing notice in respect of the appeal. Accordingly the court pro-  
 ceeded with the hearing of the appeal ex parte pursuant to the provisions of  
 order 2 Rule 11(1) and order 6 Rule 8(6) of the Rules of this court on the briefs  
 filed by the parties.

The main argument of learned counsel for the appellant with regard C  
 to the first issue rested on the issue of jurisdiction. The contention is that  
 where the law prescribed a machinery for the settlement of any class of dis-  
 putes, such machinery must be exhausted before an action is instituted in  
 respect of such disputes. It was then argued that the respondent failed to  
 comply with or exhaust all the remedies prescribed by Section 51 (1) (c) of the D  
 Co-operative Societies Law, Cap. 45, Laws of Bendel State of Nigeria, 1976  
 before filling his action against the appellant and its servant in the suit. Learned  
 Senior Advocate, relying on the decision of this court in Eguamwense V.  
Amaghizemwen (1993) 9 N.W.L.R. (part 315) at 7 submitted that the court had  
 no jurisdiction to entertain the suit and that the whole proceeding was a E  
 nullity for want of jurisdiction as the condition precedent for bringing the  
 action was not complied with.

On the second issue, it was contended that it was a violation of the  
 right to fair hearing for both courts below to have failed to consider the Counter-  
 Claim filed by the appellant in the suit. In the absence of any reply to the F  
 appellant's Counter-Claim, the same must, in law, be deemed established. It  
 was therefore an error of law for the two courts below to have failed to con-  
 sider and enter judgment for the appellant against the respondent in respect  
 of the said Counter-Claim.

On issue 4, it was submitted that the 1st defendant who authorized G  
 the seizure of the vehicle in dispute was, as a public officer, covered by the  
 provisions of section 2(a) of the Public Officers protection Law, Cap. 137,  
 Laws of Bendel State of Nigeria, 1976. The contention is that the appellant  
 who acted on the authority and order of the said 1st defendant would be  
 equally covered by the provisions of the Public Officers protection Law. H

Learned Senior Advocate finally submitted on issue 5 that having  
 regard to the totality of the evidence before the trial court, the Court of Appeal  
 was in error in dismissing the appellant's appeal.

Learned counsel for the respondent in his brief had submitted that

there was ample jurisdiction in the trial court to entertain the respondent's claims. He stressed that there was no question of the action being premature as there was no laid down condition precedent to the filing of the action which the respondent failed to comply with.

On the issue of fair hearing, it was submitted that the purported counter-claim was rightly discountenanced by the two courts below as the same was abandoned by the appellant in its amended Statement of Defence. No question of want of fair hearing therefore arose.

Learned counsel further submitted that the respondent's action was filed in under 3 months from the time the cause of action in the suit arose. He argued that the appellant's submissions to the contrary lacked substance and ought to be dismissed. It was pointed out that both courts below found that there was a sale of the vehicle in issue, that the same was wrongfully detained by the appellant in spite of demands and that the hire rate of the vehicle was N80.00 per diem. It was therefore submitted that the court below was right in dismissing the appellant's appeal.

On the cross - appeal, the issue raised was whether the Court of Appeal was right in making an order which fell short of the amended 3rd relief the cross - appellant claimed. It was the submission of learned counsel for the cross - appellant that the Court below having upheld the cross-appeal, was in error by failing to award the full amount claimed in respect of loss of use of the vehicle in issue up to the 7th March, 1989 on which date judgment in the suit was delivered. For the appellant, however, the contention is that the cross - appellant's claim was not maintainable as the issue was not raised before the Court of Appeal.

Turning now to issue 1, there can be no doubt that **where special statutory provisions are made for the filing of a claim, the procedure so laid down ought to be followed in making such a claim.** See Sunday Eguamwense v. James Amaghizemwen (1993) 9 N.W.L.R. (part 315) 1 at 25. **So, too, where some statutory conditions precedent are prescribed before a particular relief or remedy is claimed by Court action, the aggrieved party must comply with and exhaust the prescribed conditions before the institution of a Court action in respect of such a relief or remedy.** See Gbadamosi Lahan v. A.G. of Western Region (1963) 1 All N.L.R. 226. Learned appellant's counsel has however contended that a condition precedent to the filing of this action was not complied with by the respondent and that this action is therefore not properly before the Court. It was argued that the cause of action was a dispute which under section 51 (1) (c) of the Co-operative Societies Law, Cap. 45, Laws of the Bendel State of Nigeria, 1976 ought to have been referred to an arbitration before the institution of an action in respect thereof. The dispute

not having been referred to an arbitration rendered the action incompetent.

Section 51 (1) (c) of the Co-operative Societies Law, Cap. 45, Laws of the Bendel state of Nigeria provides as follows -

*"51 (1) If any dispute touching the business of a registered society arises -*

*(a) ..... B*

*(b) .....*

*(c) between the society or its committee and any officer, agent or servant of the society; or*

*(d) ..... such dispute shall be referred to the registrar for decision. Without prejudice to ..... " C*

But section 51 (2) of the same law went on to provide as follows -

*"51 (2) The registrar shall on receipt of such reference -*

*(a) decide the dispute; or subject to the provisions of any regulations, refer it for disposal to an arbitrator."*

*Of relevance also are the provisions of sections 51 (4), 51(5) (a) and 51 (6) D of the said law which provide thus -*

*"51 (4) The registrar may of his own motion or on the application of a party to a reference revise any decision thereon by an arbitrator to whom it was referred.*

*51(5) (a) Any decision given by the registrar under sub-section (2) E or under sub-section (4) shall, save as otherwise provided in subsection (6), be final and shall not be called in question in any Court.*

*(b) .....*

*(c) .....*

*(6) Any party aggrieved by any order of the registrar made under sub-sections (4) and (5) may appeal to the appropriate authority within 21 F days from the date of such order and the decision of the appropriate authority shall be final and conclusive."*

**It is not in dispute that the appellant is a Co-operative society, a Co-operative Marketing Union registered under section 7 (1) of the Co-operative societies Law, Cap. 45, Laws of Bendel State of Nigeria, 1976. It is also clear, pursuant to section 51 (1) (c) of the said Law, that where a dispute arises between a society, its committee or any officer, agent or servant of the society, as in the present case, such dispute shall be referred to the Registrar of the Co-operative Society, in this case, the 1st defendant, for decision. H Section 51 (5) provides that the decision of the Registrar under sub-section (2) or sub-section (4) shall, save as otherwise provided in sub-section (6), be final and shall not be called to question in any Court. Section 51 (6) on the other hand, provides that any person aggrieved by any order of the Registrar**

**may appeal to the appropriate authority, in this case the Commissioner for Trade and Industry, within 21 days from the date of such order and the decision of the appropriate authority shall be final and conclusive.**

I have given a close consideration to the submission of the learned Senior Advocate of Nigeria and, with profound respect, find it difficult to accept that this is a dispute in which it was mandatory that the same must firstly be referred to an arbitration before the respondent would be entitled to seek whatever reliefs that were open to him by action. Sections 51 (1) and (2) of the co-operative Societies Law, Cap. 45 empower the Registrar to decide such disputes himself or, subject to the provisions of any regulations, refer them for disposal by an arbitrator. It seems to me plain that the decision to refer a dispute to an arbitrator is entirely that of the Registrar who, by the letters of the law, is under no compulsion to refer all disputes to an arbitrator for disposal.

**In the present case the Registrar on the dispute being referred to him decided, as he was entitled to do, to look into the matter and decide the same himself. I entirely agree with the trial court that to the extent that the matter arising from the sale of the appellant's vehicle amounted to a dispute, the law imposed no responsibility on the respondent to have the dispute determined firstly by an arbitrator as a condition precedent to seeking any remedies which may be open to him in respect of the vehicle by action. I also endorse the view of the court below on the same issue when in effect, it affirmed the said opinion of the trial court. In my view, the appellant's contention that failure by the respondent to have the dispute referred to an arbitrator before the present suit was filed is fatal to the action is clearly not backed up by the law and cannot be sustained.** Accordingly, the decision of this court in Eguamwense v. Amaghizemwen, supra heavily relied upon by the appellant seems to me irrelevant and inapplicable to the facts of the present case.

There is next the further submission on behalf of the appellant that another condition precedent to the filing of the appellant's action was another condition precedent to the filing of the present action which the respondent failed to comply with which was failure to wait for the findings of the Commissioner for Trade and Industry before he filed this action. The evidence before the court is that the respondent duly appealed to the Commissioner as required by law. However, because the Commissioner advised him to wait for three months, he had no option but to go to court, having regard to the provisions of the Public Officers' Protection Law of the defunct Bendel State of Nigeria. Under that Law the respondent was only allowed three months within which to file his action against the 1st defendant, a public officer, from the date his cause of action arose. On the evidence, the stage at which he was advised to wait for



another three months before the appropriate authority would be disposed to look into his grievance virtually coincided with the dying days of the period of three months within which he was entitled to institute his action pursuant to the provisions of the said Public Officers Protection Law.

**More importantly however, there are the provisions of section 6(6) (b), 236 and 274 of the Constitution of the Federal Republic of Nigeria, 1979. B The combined effect of these sections of the 1979 Constitution is, subject to the other provisions of the said Constitution, to confer unlimited jurisdiction on the High court of a State and all existing law and/or any provisions in a State Law which are not in conformity with the provisions of the Constitution or tend to derogate from the powers of such Courts shall, to the extent of such inconsistency, be void. State Law or any provision of a State Law which C purports to oust the Jurisdiction of the State High Court is void as being inconsistent with the Constitution of the federal Republic of Nigeria, 1979. See Bronik Motors Ltd. and Another V. Wema Bank Ltd. (1983) 6 S.C. 158, Military Governor of Ondo State and Another v. Victor Adewunmi (1988) 3 D N.W.L.R. (part 82) 280. In my view, therefore, the provisions of sections 51 (1) (a), 51 (1) (b) and 51 (6) of the Co-operative Societies Law, Cap. 45, Laws of the former Bendel State of Nigeria, 1976 which are state enactments must be regarded as void in so far as they purport to limit or oust the jurisdiction of the High Courts as therein provided contrary to the express provisions of the E 1979 Constitution. Issue 1 is therefore resolved against the appellant.**

Issue 2 questions whether or not there was a valid counter-claim before the Court. If, in fact, there was a competent counter-claim before the Court, the appellant's complaint is that the same was not considered in whatever form and that he was not therefore given a fair hearing by the two Courts F below.

In this regard, attention must be drawn to the provisions of Order 13 Rule 14 of the High Court (Civil Procedure) Rules of Bendel State, 1976 which state as follows -

*"Where any Defendant seeks to rely upon any facts, as supporting a right of set-off or counter-claim he shall, in his statement of defence, state specifically that he does so by way of set-off or counter-claim, and the particulars of such set off or counter-claim shall be given."*

Accordingly where a defendant seeks to rely upon any facts as supporting a right of set-off or counter-claim, he must in his Statement of Defence state H specifically that he does so by way of set-off or counter-claim. He shall proceed therein to give particulars of such set-off or counter-claim.

The recognized practice is to separate the facts relied upon to sustain the counter-claim as much as possible from the remaining part of the

Statement of Defence and to arrange them in numbered paragraphs with the word "Counter-Claim" prefixed to it as a heading, so as to distinguish it from what is pleaded simply as a matter of defence to the plaintiff's claim. However the mere absence of such heading would not invalidate a counter-claim which otherwise is properly pleaded. See Lees v. Patterson (1878) 7 Ch.D. 866. Material facts but not the evidence relied upon in proof of the counter-claim must be pleaded. However, such facts, where appropriate, must as a rule in the settlement of pleadings, be divided into paragraphs numbered consecutively. Where the defendant pleads both a defence and a counter-claim, the paragraphs of the counter-claim are usually numbered as a continuation of the paragraphs of the Statement of Defence.

It is significant that the appellant's counter-claim was properly embodied in its original Statement of Defence of 31 paragraphs dated the 5th October, 1984. Paragraphs 1 to 24 of the said Statement of Defence comprised of the appellant's defence to the respondent's Statement of Claim whilst paragraphs 25 to 31 set out its counter-claim. However, following an amendment to the original Statement of Defence, a new appellant's amended statement of Defence dated the 9th February, 1985 was filed. This time, the said amended Statement of Defence only contained 25 paragraphs but with no counter-claim. A further amended Statement of Defence dated the 4th February, 1987 was by the order of court subsequently filed by the appellant. This, again, contained no counter-claim. The real question is the legal position of this state of affairs in so far as the appellant's counter-claim was concerned.

As already indicated, **where the defendant, as in the present case, pleads both a defence and his counter-claim, the counter-claim shall be set out in the Statement of Defence with the particulars thereof, numbered serially paragraph by paragraph and as a continuation of the paragraphs of the material facts relied upon and pleaded by the defence. The law is well settled that once ordered, what stood before an amendment of pleadings is no longer material before the Court and no longer defines the issues to be tried in a suit.** See Grace Amanambu v. Alexander Okafor and Anor. (1966) 1 All N.L.R. 205, Col. Rotimi v. MCGregor (1974) 11 S.C. 113 at 152, Warner v. Simpson (1952) 2 W.L.R. 109 etc. **The operative Statement of Defence before the Court dated the 4th February, 1987 clearly contained no counter-claim. It seems to me that the obvious result must be that the counter-claim earlier set out in the appellant's original Statement of Defence shall be deemed abandoned.**

*"As each amended or further amended Statement of Defence replaced the previous one, it goes without saying that the further amended Statement of Defence of 2nd defendant replaced the original which had a counter claim, thus eliminating the counterclaim aforesaid. It would have*

*been otherwise if the amendments were done in the classical manner, to wit, by the deletion of some, or the addition of new paragraphs. There was therefore no counter-claim before the lower Court, and it was right not to comment on it."*

I agree entirely with the above observation of the Court below. Consequently there was no counter-claim before the trial Court in this action to which the respondent could make any defence. The original counter-claim, having been deemed abandoned or withdrawn, was properly struck out by the trial Court as affirmed by the Court below. Issue 2 must again be resolved against the appellant.

Issue 4 concerns the Statute of Limitation. The two questions which arise therefrom is whether the respondent's claims are statute-barred by virtue of the provisions of the Public Officers Protection Law, Cap. 137, Laws of Bendel State of Nigeria 1976 and if the answer is in the affirmative, whether the appellant, a Co-operative Society is entitled to take advantage of the said Law to protect itself in this action. In this regard, the Court of Appeal concluded as follows -

*"In this case as the vehicle was seized, notwithstanding the fact that the plaintiff was forced to deliver it to the Union, on 24th February 1984, the plaintiff's cause of action in detinue arose a day after on 25th February, 1984. A plaintiff who wishes to sue a public officer on that account must commence his action on or before the 25th day of May 1984. The plaintiff brought his action on 11th June 1984 and was therefore caught by the provisions of Section 2(a) of the Public Officers Protection Law of Bendel State 1976."*

The above finding is as against that of the learned trial Judge to the effect that the respondent's action was not statute-barred. Said the learned trial Judge -

*"The evidence from the plaintiff which was not challenged was that he returned the vehicle on 20/2/84 but on that same day the Chief Registrar set up a panel with terms of reference which included investigation into "the alleged shady transaction in the Union". The report of the panel is Exhibit N and it shows that the Panel made specific findings and recommendations as regards the sale of the vehicle. The Panel's report was dated 16/3/84. It is clear that the plaintiff could not have considered the seizure to be complete until the Panel had concluded its work and the Chief Registrar taken action on the report. As it happened, the panel recommended at pages 46/47 of the report that the vehicle be returned to the plaintiff but according to the Chief Registrar he rejected the recommendations and that he made his decision known to the Union on 6/4/84. On these facts, the plaintiff's cause*

*of action arose from the time the Chief Registrar let it be known on 6/4/84 that the vehicle was not to be returned to the plaintiff. As already noted, the suit was filed on 11/6/84 and so it was still within the statutory period of 3 months under section 2 of the Public Officers Protection Law."*

Section 2(a) of the Public Officers Protection Law, Cap. 137, Laws of B Bendel State of Nigeria 1976 provides thus -

*"2. Where any action; prosecution, or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any law or of any of any public duty or authority or in respect of any alleged neglect or default in the execution of such Law, duty C or authority, the following provisions shall have effect:-*

*(a) The action; prosecution or proceeding shall not lie or be instituted unless it is commenced within three months next after the act, neglect or default complained of....."*

It is clear that for the present proceedings to lie against the respon- D dents, the action ought to have been commenced within three months next after the act, neglect or default complained of. The present claim is on detinue and it is trite that the gist of liability in detinue is the wrongful detention of the plaintiff's chattel. The next question that must now be asked is the time the respondent's cause of action in the dispute arose.

E On the evidence accepted by the court, the respondent who was the president of the appellant Union bought the Union's vehicle No. BD 803 B for N2,500.00 as against the recommended price of N6,000.00 earlier placed on it by a sub-committee of the appellant Union. He duly paid the said purchase price of N2,500.00 and removed the vehicle.

F Following protests and petitions from the Manager and some members of the union alleging irregularities in the sale, the 1st defendant on the 16th February, 1984 addressed Exhibit G to the respondent inviting him to attend the panel of inquiry he instituted in respect of the sale. The respondent was also advised to return the vehicle to the Union premises pending the G conclusion of the inquiry. This advise was promptly complied with by the respondent.

The panel's report dated the 16th March, 1984 recommended the return of the vehicle to the respondent. This report, however, was rejected by the 1st defendant. This rejection was duly communicated to the respondent H and the Union by his letter of the 6th April 1984 indicating that the vehicle was no longer going to be returned to the respondent. As a result, the respondent was obliged to file this action on the 11th day of June, 1984.

On the above facts, I think the learned trial Judge was entirely right when he held that the respondent's cause of action in this case arose on the

16th day of April, 1984 on which date the 1st defendant ruled that the vehicle would not be returned to the respondent and duly communicated his decision to both the respondent and the Union. **An action in detinue is based upon a wrongful detention of the plaintiff's chattel by the defendant, evidenced by the refusal of such a defendant or his agent to deliver it up on demand.** The detention of a chattel cannot be wrongful unless, of course, the defendant's B possession thereof is adverse.

**In the present case, it is plain that the appellant's possession of the vehicle in issue was not in any way adverse to the respondent's claim originally.** The appellant merely directed the respondent to return the vehicle to the Union pending the conclusion of the inquiry the 1st defendant had instituted in respect of the sale in controversy. This direction was promptly and wisely accepted by the respondent out of his free will and with no compulsion whatever. The vehicle was thus returned to the appellant by mutual consent. **In these circumstances, no question of detinue arose until the appellant, through its agent, the 1st defendant, ruled on the 6th April, 1984 after considering the report of the inquiry that the vehicle would no longer be returned to the respondent. It seems to me that it was from that date that the appellant's possession of the vehicle turned adverse. The respondent's court action was instituted on the 11th June, 1984, well under three months from the date the cause of action arose. I think, with respect, that the Court of Appeal was in error when it held that the respondent's cause of action in detinue arose on the 24th February, 1984 on which date he originally delivered the vehicle to the appellant pending the conclusion of investigations in respect of its sale. In my view, the respondent's action against the 1st defendant and the 2nd defendant/respondent is clearly not statute-barred and no question of whether or not section 2(a) of the Public Officers protection Law, Cap. 137, Laws of Bendel State of Nigeria enures to the appellant arises in the present case. Accordingly issue 4 must be resolved against the appellant.** D E F

There is next issue 5 which questions whether the Court of Appeal was right in dismissing the main appeal. In this regard, the appellant was quite G unable to identify any substantial error in the decision of the Court of Appeal on the question of the appellant's liability in detinue. The onus is on the appellant to establish that the court below was in error in resolving the issue of liability against the appellant. This onus it has failed to discharge.

There is finally issue 3 which clearly has no substance. All the H issues having been resolved against the appellant, the main appeal fails. I will now turn to the cross-appeal.

The single issue for determination in the respondent's cross-appeal is whether the Court of Appeal was not in error by failing to award to the

respondent his full claims in damages for the loss of use of his vehicle at the rate of N80.00 per diem from the date of the seizure of the vehicle to the date of the delivery of judgment in the suit. The Court of Appeal had in its judgment ordered the return of the vehicle to the respondent with damages for loss of use to the tune of N6,800.00 from the date of the seizure of the vehicle to the date of the institution of the action with N500.00 costs against the appellant. It made no award in respect of loss of use of the vehicle from the date of issue of the writ of summons in the suit on the 11th June, 1984 until the delivery of judgment on the 7th March, 1989. The period involved, as calculated by the respondent in the notice and grounds of his cross-appeal, is indicated as 1725 days or approximately 5 years.

I think it ought to be observed that the 3rd relief originally claimed by the respondent ran thus -

*"3. N80.00 damages per day for 85 days commencing 15th day of March, 1984 when the plaintiff requested for the return of the said vehicle i.e. N6,800.00 for detinue and loss of use by the plaintiff."*

This claim was on the application of the respondent amended by the order of court as follows -

*"3. N80.00 damages per day for 85 days commencing 15th day of March, 1984 when the plaintiff requested for the return of the said vehicle i.e. N6,800.00 for detinue and loss of use by the plaintiff and in addition N80.00 per day from the date of the issue of the writ of summons until judgment."*

Without doubt, the trial court took full cognizance of this amendment of the respondent's claim. It fully considered the same but arrived at the following conclusion-

*"Now to the reliefs claimed. I think the plaintiff is entitled to the declaration he is seeking; he is also entitled to the return of the vehicle but I do not think that he is entitled on the facts to a claim for loss of use. I will disallow that head of claim. In view of the foregoing I enter judgment for the plaintiff as against the Defendants jointly and severally as follows -*

- (1) "It is declared that vehicle registration Number BD 803 B in the Defendants' possession and control is the property of the plaintiff; and*
- (2) The said vehicle to be returned to the plaintiff forthwith."*

The Court of Appeal, for its own part, in allowing the appeal of the respondent against the appellant stated as follows -

*"The said lorry shall be returned to the plaintiff with damages for loss of use to the tune of N6,800.00 as claimed with N500.00 costs against the 2nd appellant."*

In making the said award of N6,800.00 the court below would appear, to have

based the same on the 3rd relief as originally claimed by the respondent before its amendment. This seems to be the case as the respondent's claims set out by the Court of Appeal in its judgment were the original reliefs before their amendment. No where in its judgment did the court below advert to the amendment of the respondent's claims set out by the Court of Appeal in its judgment were the original reliefs before their amendment. No where in its judgment did the court below advert to the amendment of the respondent's 3rd relief to include loss of use at N80.00 per diem from the date of filing the suit until the date of judgment. There can be no doubt that the Court of Appeal was clearly in error by failing to consider the respondent's claims as amended and I will now proceed to examine the cross-appellant's complaint on this issue. B C

It is necessary to point out that **in an action for detainee, such as the present case, the claim, primarily, is not for damages but for the return of the specific chattel wrongfully detained or its value as assessed. Damages, however, if any is proved to have been sustained as a result of the detention of the chattel, will, in addition to an order for delivery of the chattel be awarded.** See Odumisu v. A.C.B. Ltd (1976) 11 S.C. 55 at 65. **The claim in issue in the present case is that of loss of use from the date the writ of summons was issued until the delivery of judgment. Strictly speaking, any claim for loss of earnings is a claim in special damages in the sense that full particulars must be given by the plaintiff in his pleadings of his rate of earning and of such other facts as may be necessary to enable the court to calculate as best and as accurately as it can, the actual amount of the plaintiff's loss.** See Iikiw v. Samuels and ors. (1963) 1 W.L.R. 991. D E

In the present case, the respondent did plead and gave evidence that he earned N80.00 per day for two days that he hired out the vehicle to P.W.3. This evidence was not seriously challenged. It seems to me that it was on this basis that the court below made an award of N6,800.00 to the respondent as loss of use in respect of the vehicle for 85 days up to the date of filing the writ of summons in the suit. The real question is whether, as contended by the cross -appellant, he ought to have received a further award at N80.00 per diem for the 5 years the case was pending in court. F G

In resolving this issue, it is necessary to bear in mind, on the evidence before the court, that the lorry No. BD 803 B in issue was a second hand vehicle which the appellant had purchased for N4040.00. The appellant had also used it for 4 years when it was discovered to be getting too expensive for the appellant to maintain. It was on this ground that the appellant decided to sell it. It should also be noted that the book value of the lorry at the time of sale was N1,393.75. On the evidence of cross-appellant, the vehicle at the time H

of sale was unserviceable. Although the cross-appellant gave evidence that he repaired the vehicle for N2132.00 after he purchased it, there was no concrete evidence as to the nature of this repair and, in particular, as to the general condition of the lorry. There was also no evidence as to the approximate remaining balance of the commercial life span of the vehicle as a profit earning B lorry on a daily basis, having regard to its acknowledged high costs of maintenance on account of old age. **All the above seem to me issues of considerable importance in cases where special damages are claimed in circumstances such as exist in the present case as the onus is on a plaintiff to prove his entitlement to special damages strictly by credible evidence of such a C character as would suggest that he is indeed entitled to an award under that head of damage.** See Dumez (Nig.) Ltd. v. Ogboli (1972) 1 All N.L.R. 241, Jaber v. Basua 14 W.A.C.A. 140, Odunmosu v. A.C.B. LTD., supra. **This onus he does not discharge where he makes a claim for loss of use in respect of a vehicle at a given rate over a particularly long period of time, running into D several years, when in the face of the evidence, the remaining commercial life span of the vehicle may only be a matter of months if not weeks.**

In the second place, it is a recognized principle of law that no person is answerable indefinitely for each and every consequence that flows from his conduct. As Lord Wright aptly put it -

E *"The law cannot take account of every thing that follows a wrongful act; it regards some subsequent matters as outside the scope of its selection, because "it were infinite for the law to judge the cause of causes, or consequences of consequences".*

See Liesbosch dredger (owners) v. SS Edison (owners) (1933) A.C. F 449 (H.L.) at 460. In a case, such as the present one, therefore, it cannot in my opinion be right to make and award in respect of the loss of use of a chattel up to eternity unless, of course, and depending on the circumstances of the case and the nature of the chattel, there is enough evidence in strict proof of such a special damage. Somewhere, a line has to be drawn between the consequences for which a wrong-doer is liable and those for which he cannot conceivably be liable. But as Blackburn, J. put it -

H *"It is something like having to draw a line between night and day; there is a great duration of twilight when it is neither night nor day; but though you cannot draw the precise line, you can say on which side of the H line the case is."*

See Hobbs v. London and S.W. Railway (1875) L.R. 10 Q.B. 111 at 121.

**In the third place there is the question of the mitigation of damages in which the most important rule is that a plaintiff must take all reasonable steps to mitigate the loss to him consequent upon the defendant's wrong and**



cannot recover damages for any such loss which he could thus have avoided but has failed, through unreasonable action or inaction, to avoid. Accordingly it is the plaintiff's duty to minimize his damage as far as possible, and therefore anything which must be ascribed to his failure to do so is not recoverable from the defendant. See British Westinghouse Co. Ltd. v. Underground Railways Ltd. (1912) A.C. 673, Jamal v. Morilla Dawood and Co. (1916) B 1 A.C. 175 at 179, Bellingham v. Dillon and Another 1973 1 Q.B. 304. **Persons against whom wrongs have been committed are not entitled to sit back and suffer more loss which could be avoided by reasonable efforts. The duty is imposed on a plaintiff of taking all reasonable steps to mitigate the loss consequent on the wrong and debars him from claiming any part of the damage which is due to his neglect to take such steps.** See British Westinghouse Co. Ltd. v. Underground Railways, supra at 689. C

So, therefore, if a seller fails to deliver the goods contracted for, the buyer cannot sit back on a rising market but must return to the market with all reasonable speed and buy equivalent goods there. See Mayne and Mc Gregor on Damages, 12th Edition, Art. 150, at page 137. The vital question in this case therefore must be whether this particularly old, decrepit and one time unserviceable vehicle with only N1,393,75 as its book value was established to be a day to day profit earning vehicle with an indefinite balance of commercial life span, whether the appellant in the circumstances of this case is answerable E indefinitely for his wrongful conduct by the detention of the said vehicle and whether the respondent/cross-appellant by his inaction or sitting back indefinitely for years on end as he suffered his mounting losses took all reasonable steps to mitigate the loss to him consequent upon the appellant's wrongful act. I think not. F

In Chief Paul Ordia v. Piedmont (Nig.) Ltd. (1995) 2 N.W.L.R. (part 379) 516, a claim in detinue, the plaintiff claimed the return of the two barges and loss of use in respect of the said barges from the date of detention on 10th April, 1976 to the date of judgment in the suit, a period of almost ten years. Both the trial court and the court below were ad idem that the reasonable G hiring charge of each barge per day was N500.00. Judgment was entered for the plaintiff against the defendant for the value of the two barges with N4000.00 damages for loss of use of the barges for four days only at N500.00 per day per barge. The appeal against this judgment by the plaintiff was dismissed by the Court of Appeal. On further appeal, this court was unable to award to the H plaintiff the loss of use of the two barges for the ten years ten years claimed. This was based on the ground that it was the plaintiff's duty in law to minimize his loss as far as possible and that anything which must be ascribed to his failure to do so was not recoverable from the defendant. The duty was on the

plaintiff as a reasonable prudent business man to replace his two barges as soon as possible after his cause of action arose. However having regard to the fact that barges were not readily available for quick replacement, this court endorsed a period of six months as not unreasonable as a fair length of time within which the plaintiff could have replaced his barges with a view to mitigating his loss. Accordingly the sum of N90,000.00 was awarded by this court to the plaintiff for loss of use of his two barges for a period of six months or 180 days from the 10th April to the 6th October, 1976 at the rate of N500.00 per barge per day.

Delivering the leading judgment of this court in the Paul Ordia case, (supra), Belgore, J.S.C. dealt with this aspect of the law as follows -

*"In all civil matters where damages have been suffered, the complainant must try in earnest to mitigate his loss. Once the plaintiff discovered he could not recover the barges ..... he ought to have taken steps to mitigate his loss. It is in the light of this that I find 180 days (six months) as reasonable period for the plaintiff to have adjusted himself to the fact that the barge could not be returned to him and for him to mitigate his loss."*

Bello, C.J.N. in his own contribution agreed entirely with the above observations of Belgore, J.S.C. but stressed as follows -

*"In his lead judgment, Belgore, J.S.C. has fully considered the evidence relating to the cost of replacement of the two barges established by P.W.1 and Exhibit P1. I am satisfied the plaintiff/appellant proved the cost to be N631,060.00. I also endorse the reasons stated by him that the plaintiff/appellant is entitled to N90,000.00 for the loss of use of the two barges for a period of six months which, under the circumstances of the case is a reasonable period within which the plaintiff/appellant could have replaced them from the time the defendant/respondent failed to comply with the consent judgment."*

For my own part, while fully endorsing the leading judgment of my learned brother, Belgore, J.S.C. I was obliged in the same case to comment thus -

*"The period of detention of the barges from the 10th April, 1976 to the date of judgment in the case covered a period of ten years. It seems to me however that the plaintiff cannot be allowed to recover damages for loss of use for the whole length of time involved. This is because it is the plaintiff's duty in law to minimize his damage as far as possible, and therefore, anything which must be ascribed to his failure to do so is not recoverable from the defendant. See British Westinghouse Co. Ltd. v. Underground Railways Ltd (1912) A.C. 673 and Dutton v. Bognor Regis Urban District Council*

(1972) 1 Q.B. 373 at 412 - 413.

*In this regard, I ask myself how long it will take reasonably prudent business man to replace the plaintiff's two barges from the date his cause of action arose on the 10th April, 1976. There is unfortunately no evidence on the point. However, having regard to the fact that this class of chattel is not readily available for quick replacement, I am prepared to hold that a period of 6 months, that is to say, 180 days may not unreasonably be held to be a fair length of time for the plaintiff to replace the barges. Accordingly, I will set aside the four days loss of use granted to the plaintiff by the trial court as affirmed by the court below as this was erroneously computed on the basis of an award in conversion. I will award to the plaintiff the sum of N90,000.00 for loss of use of the two barges for a period of six months or 180 days from the 10th April, 1976 to 6th October, 1976 at the rate of N500.00 per barge per day."*

The above principle of law applied by this court in the case of Chief Paul Ordia v. Piedmont (Nigeria) Ltd., supra, appears to me of significant relevance to the main issue in the cross-appeal under consideration. **The Court of Appeal was, quite clearly, in error to have failed to consider the cross-appellant's claim for loss of use as fully set out in his further amended Statement of Claim. To that extent, it seems to me plain that this cross-appeal is liable to be allowed. I cannot however accept that the cross-appellant is entitled to his claim for loss of use for the period of 5 years now in issue. This is mainly because of his total failure to take reasonable steps to mitigate the loss to him consequent upon the appellant's wrongful act. There was also the failure by the cross-appellant to establish that the vehicle in issue, having regard to its antecedents and old age was in a position to be profit earning for the period of five years claimed. But the cross-appellant is clearly entitled to some award in respect of loss of use of his vehicle for some part of the period in question. In this regard, I ask myself, as I did in the Paul Ordia case, how long it will take a reasonably prudent business man to replace an old third hand vehicle from the 6th April, 1984 when the cause of action arose. In the Paul Ordia case which involved two barges which were not readily available in the market for quick replacement, this court found a period of six months as not unreasonable as a fair length of time for the plaintiff to replace the barges and mitigate his loss. In the present case, it is merely an old lorry that is involved. Although this, without doubt, is easily replaceable in the markets, I am prepared ex abundanti cautela to hold that a period of three months, that is to say, ninety days is reasonable as a fair length of time within which the respondent could have replaced his vehicle with a view to mitigating his loss. Accordingly I will award to the respondent the sum of N7,200.00 as loss in**

respect of the use of his vehicle in issue for a period of ninety days (three months) from the 11th June, 1984 to 9th September, 1984 at the rate of N80.00 per day being a reasonable period within which the cross-appellant ought to have replaced his vehicle in issue in mitigation of his losses. The lone issue in the cross-appeal is accordingly resolved in favour of the cross-

B appellant.

In the final result, the main appeal fails and it is hereby dismissed with costs to the respondent against the appellant which are assessed and fixed at N1,000.00. The cross-appeal succeeds and it is hereby allowed. Judgment is hereby entered for the respondent against the appellant as follows -

C 1. A declaration that the Mercedes Benz vehicle No. BD 803 B in issue is the property of the respondent.

2. An order for the return of the said vehicle by the appellant to the respondent.

3. The loss of use of N6,800.00 awarded to the appellant by the court D below in respect of the detention of the said vehicle is hereby amended to read N14,000.00 being loss of earnings in respect of the said vehicle for the total period of the unlawful detention of the vehicle at the rate of N80.00 per diem. It is further ordered that the above shall be the judgment of both courts below. There will be no order as to costs in respect of the cross appeal.

E \_\_\_\_\_

### UWAISCJN

I have had the opportunity of reading in draft the judgment read by my learned brother Iguh, J.S.C. I entirely agree that the main appeal lacks merit F and that it should be dismissed for the reasons contained in the judgment. I also agree that the cross-appeal by the Respondent succeeds and it is hereby allowed.

I adopt as mine the consequential order and the award of costs contained in the lead judgment.

G \_\_\_\_\_

### BELGOREJSC

I read in advance the judgment of my learned brother Iguh, J.S.C., which I had the opportunity of discussing fully at Conference. I agree that the H main appeal has no merit and ought to be dismissed and that the cross-appeal succeeds. I adopt the reasons in that judgment as mine in dismissing the main appeal and allowing the cross-appeal. I make the same consequential orders as made by my learned brother, Iguh, J.S.C.

**KUTIGI, JSC**

I read in advance the judgment just delivered by my learned brother, Iguh, JSC. I agree with him that the main appeal fails and it is accordingly dismissed. The cross-appeal fails and it is accordingly dismissed. The cross-appeal on the other hand succeeds and it is allowed. I endorse the orders proposed in the said judgment.

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**OGUNDARE, JSC**

C

I have read in draft the judgment of my learned brother Iguh, JSC just delivered. For the reasons given in the said judgment with which I am in complete agreement and which I adopt as mine, I find no substance in the main appeal of the 2nd Defendant which I hereby dismiss with costs as assessed by my learned brother Iguh, JSC.

D

I, too, like my learned brother, allow the cross-appeal of the plaintiff for the reasons given by Iguh JSC in the said judgment. I award damages to the plaintiff as assessed by my learned brother Iguh JSC.

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