SIMON ATTIA, Appellant, vs. **ROBERT T. SHERMAN**, Appellee.

LRSC 1; 1 LLR 222 (1889)

[January Term, A. D. 1889.]

Appeal from the Court of Quarter Sessions and Common Pleas, Montserrado County.

Damages.

1. In an action for damages, evidence of debt or fraud arising from some business transaction or book accounts, is irrelevant; the proof must conform with the action chosen.

2. Where an agent is given power to sell goods at such prices as may become necessary, from the fluctuations of the market, he cannot afterwards be charged with violating the original contract with respect to prices, unless it appears that he acted fraudulently.
3. Where account books are intended to be used in evidence they must be identified as the books of the party or firm introducing them.

This is an appeal from the proceedings and judgment of the Court of Quarter Sessions, Montserrado County, at its September term, 1887. The action was brought by the appellant, plaintiff below, for the violation of a contract. At the trial, defendant below (now the appellee) obtained judgment, the same being based upon the verdict of a jury unto whom the facts were submitted; from which judgment and other proceedings, exceptions were taken by the plaintiff below, and upon the exceptions thus taken the case is brought up for review. The exceptions taken are: 1, Because the court refused to allow witness S. E. F. Cadogan to answer the question, "What did the defendant charge you for the plank?" upon the objection of the defendant below that the question was irrelevant to the issue. 2, Because the court allowed witness T. W. Haynes to answer the question, "Will you explain to the court what is this overplus?" (of which witness had spoken,) upon the ground that such an answer would be an opinion and not evidence in this case. 3, Because the court admitted as evidence a letter marked number 28, the same, in the opinion of the plaintiff

below, had no tendency to establish the allegations and denials of the parties. 4, Because the court overruled a motion for a new trial, when prayed for by the plaintiff below, upon the ground that the verdict was contrary to the evidence and the legal instructions of the court. 5, And because the jury were outside only fifteen minutes, and could not in that time well and truly try the issue joined in the case.

These points have had the careful consideration of the court, and in order to arrive at a just conclusion it is of the highest importance to strip the case of all irrelevant matters, which we have done. This being an action of damages, all evidence to prove debt or fraud by a surplus arising from business transactions or book accounts, is irrelevant, as in all trials the proof should be in conformity to the form of the action chosen.

We find R. T. Sherman, defendant below, is charged with violating a contract entered into between himself and the plaintiff below, in consequence of which the plaintiff instituted this action, claiming the sum of ten thousand dollars as the damages he sustained by reason of the defendant's misconduct. We remark that allegations in pleadings are intended only to set forth in a clear and logical manner the points constituting the injury complained of, to support which, however, it is required that they be made clear to the mind of the court and jury by evidence. Allegations and averments in no case amount to proof, but evidence is the essential means which demonstrates, makes clear, or presents, the truth of the facts constituting the issue. This enables the court to pronounce with certainty concerning the matter in dispute, or enables the jury to decide upon the question submitted to them.

It is a general rule both in civil and criminal cases, that the evidence must prove the allegation of the plaintiff. Overlooking the contract upon which this action is brought, it is clear to the mind of the court that the defendant below did contract with the appellant to sell certain goods of his at invoice prices, but the evidence discloses the fact that this stipulation was altered by the appellant, in that he did, subsequent to the execution of said contract, in a letter marked number io, instruct the defendant below to dispose of his

goods, raising or lowering the prices as the market fluctuate ; hence we fail to see a violation such as would render the defendant below liable, allowing that he did sell the goods above the invoice price. Referring to the first count in the bill of exceptions, we must say, if the books filed in this case were intended to be used as evidence they should have been identified and proved as the books of the business transaction, as kept by the defendant below; and the evidence should sustain the fact that they were not properly kept. In the absence of such proof a jury could not have legally returned a verdict for the plaintiff below.

And further, if the books in no way show that they are the books of the appellant, the jury could not have legally considered them as evidence upon which to found a verdict. Special damage is the actual loss or inconvenience sustained by a plaintiff which may be traced to the conduct of a defendant, the amount of which should be fixed by the plaintiff in his complaint, and proved. It does not appear from the evidence that during the trial proof of any damage done to the plaintiff by the defendant below was presented; hence the court did not commit any error in not allowing a new trial. It is within the province of the jury, in a case under their consideration, to come to such verdict as the law and evidence supports, without reference to the length of time they had to deliberate, the verdict being only the agreement of the jury.

Considering the whole case, this court is of the opinion that the judgment of the court below is such a judgment as the law warrants. Therefore, by this court it is adjudged that the judgment of the court below is affirmed, with legal costs.