**WILLIAM H. WASHINGTON** and **JAMES WASHINGTON**, Appellants, v. **PHILIP S.C. SACKEY**, for his wife, ELFRIDA SACKEY, Appellee.

APPEAL FROM THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Heard November 18, 1987. Decided February 25, 1988.

1. To recover real property by means of an action of ejectment, the plaintiff must have either title to the property with a present right of continued possession, or must have had actual bona fide possession of the property with a right to maintain a continued possession when ousted by the defendant and a present right to possession when the action began.

2. A plaintiff in an action of ejectment can recover only on the strength of his own title as being good either against all the world or as against the defendant by estoppel, and not on the weakness of his adversary; and if that title fails, it is immaterial what wrong the defendant may have committed.

3. A plaintiff in an action of ejectment cannot recover against one without a title unless the plaintiff proves title or prior possession in himself.

4. Where a plaintiff recovers by virtue of a prior possession, he may be said to have recovered as much upon the strength of his own title as if he had shown good title to the property.

5. The pleas of the statute of limitations is an affirmative defense and the principle of adverse possession being involved, the party making such a plea must clearly aver that he has been in open and notorious possession of the property for twenty or more years without hindrance or molestation from the party claiming ownership or from anyone else.

6. Every defense in law or fact to a claim for relief, whether it be a claim or counterclaim, shall be asserted in the responsive pleading if a responsive pleading is required.

7. Averments in a pleading to which a responsive pleading is required are admitted when not denied in the responsive pleading; but averments in a pleading to which not responsive pleading is required shall be taken as denied or avoided.

8. A plea specifically pleading the statute of limitations in bar to a suit is a question purely of law and by statute must be determined by the court, independent of a jury.

9. The statute of limitations constitutes an affirmative defense which must be pleaded affirmatively and not hypothetically.

10. An affirmative defense must be specifically pleaded in the answer or the defendant will not usually be permitted to take proof, or if proof is taken, he cannot have the benefit of it.

11. Where a defendant fails to set forth in his answer constituting an affirmative defense, he must, at the hearing, if not sooner, seek and obtain leave of court to file a supplementary or amended answer; and this concession can be granted only upon payment of costs.

12. The failure to pay accrued costs before filing of an amended answer renders the amended answer dismissible.

13. Any statement that is a narration of a past event of a person who is not a witness in a case is hearsay, and therefore is inadmissible unless it comes under some exception to the hearsay rule.

14. The court will not ordinarily review the testimony of a witness as to what some other person told him, as evidence of the existence of the fact asserted; nor will a witness be permitted to testify to facts where his knowledge thereof is derived, in whole or in part, from the unsworn statements of others.

15. Hearsay evidence, as a general rule, is not admissible to establish any specific facts which in its nature is capable of being proved by witnesses who speak from their own knowledge.

Appellee Elfrida Sackey, daughter and legal heir of the late Daniel Cooper Barclay, acting through her husband Philip S. C. Sackey, instituted an action of ejectment against William and James Washington to have them ejected from a parcel of land to which her late father was said to have died seized. The defendants, who had filed a one-count answer of denial, withdrew the said answer, with reservations to file an amended answer. However, only co-defendant/appellant filed an amended answer, in which the only defense set forth was the statute of limitations. The trial court dismissed the amended answer on the ground that the returned costs had not been paid by the defend-ant and that the statute of limitations had not been pleaded squarely. The defendant was therefore ruled to a bare denial.

At the trial, the defendant did not testify in his own defense. Instead, William Washington, who had withdrawn his answer without filing an amended answer, took the witness stand and testified. At the close of the evidence, a judgment was returned in favour of the plaintiff. A motion for a new trial having been denied, judgment was entered confirming the verdict.

In an appeal to the Supreme Court, the Court affirmed the judgment of the trial court, holding that the evidence introduced by the appellant was hearsay, and therefore insufficient to refute the plaintiffs claim and evidence. The Court agreed with the dismissal of the appellant's answer because of the failure by the appellant to pay the returned costs as required by law. The Court also upheld the further ground used by the trial court for dismissing the answer, noting that as the defense of the statute of limitations was an affirmative defense, the defendant should have clearly averred affirmatively that he had been in open and notorious possession of the property for twenty or more years without hindrance or molestation, rather than raise the plea hypothetically. The Court observed that the defense of the statute of limitations, being one in bar to a suit, was a question purely of law to be determined by the court independent of a jury, the trial court did not err in ruling as it did. Accordingly, the Court affirmed the judgment of the trial court.

*Moses Abadge* appeared for the appellants. *S. Raymond Horace, Sr.* appeared for the appellee.

MR. JUSTICE AZANGO delivered the opinion of the Court.

The records before us reveal that on the 7 th day of May, A. D. 1979, plaintiff/appellee instituted the above entitled cause of action against defendant/appellant alleging:

1. That plaintiffs wife, Elfrida Sackey, was the daughter and legal heir of the late Daniel Cooper Barclay who died possessed of a ten (10) acres block of land, situated, lying and being in the Township of Virginia, Montserrado County, Republic of Liberia bought from one C. H. Christopher, legal heir of the late William E. Christopher.

2. That William E. Christopher, during his life time, bought from one Paul **H.** Bailey, legal heir of one George R. Bailey, twenty-five (25) acres block of land on the 16th day of May, A. **D.** 1908, evidenced by photocopy of the title deed executed to him hereto annexed and marked Exhibit "B" to form part of his complaint. That it was from this twenty-five (25) acres of land the late Daniel Cooper Barclay bought the aforesaid ten (10) acres of land on the 27th day of September, A. D. 1937.

3. That his wife, Elfrida Sackey aforesaid, was the lawful owner of the said ten (10) acres of land by descent, that is to say, acquired the property by right of representation as heir of the late Daniel Cooper Barclay upon his death, through whom it was derived, she being the daughter and legal heir of the late Daniel Cooper Barclay, which piece of property defendants encroached upon and had been withholding notwithstanding plaintiffs demands of them to vacate and surrender said property.

As it is a well established principle of law that to recover possession of real property by means of an action of ejectment, the plaintiff must have either a title to the property with a present right of continued possession, or has had actual bona fide possession of the property with a right to maintain a continued possession when ousted by the defendant and a present right to the possession when the action was begun, and that the plaintiff in ejectment can recover only on the strength of his own title, and not on the weakness of his adversary's as being good either against all the world or as against the defendant by estoppel and if that title fails, it is immaterial what wrong the defendant may have committed; that in any case a plaintiff in ejectment cannot recover as against one without a title unless he proves title or prior possession in himself, and if he recovers by virtue of prior possession, he may be said to recover as much upon the strength of his own title as if he had shown a good title to the premises. 18 AM. JUR., *Ejectment,* § 20. Plaintiff elected to support his allegations by making profert of the following instruments:

1. WARRANTY DEED FROM PAUL B. BAILEY, legal heir of George H. Bailey to William E. Christopher both of the Settlement of Virginia, Montserrado County, Republic of Liberia, recorded in volume 35, page 441, of the records of Montserrado County, filed in the archives of the Department of State (now Ministry of Foreign Affairs).

2. WARRANTY DEED FROM C. H. CHRISTOPHER to Daniel Cooper Barclay, probated and registered on the 24th day of January, A. D. 1938 and recorded in Volume 69, pages 692-694, Montserrado County, Republic of Liberia.

3. WARRANTY DEED FROM PAUL H. BAILEY legal heir of George H. Bailey to William E. Christopher probated on the 3rd day of June, A. D. 1912 and registered on June 4, 1912.

4. ADMINISTRATOR'S DEED FROM MAGDELANE COOPER of the City of Monrovia, Montserrado County to Elfrida Cooper Sackey.

Defendants William H. Washington and James Washington appeared and denied the right of plaintiff to recover against them by filing a one count answer, stating that:

1. Because defendants deny all the singular the allegations of both law and facts as are set forth and contained in the plaintiffs complaint but not made subject of special traverse.

On the 28th day of May, A.D. 1979, plaintiff filed a reply in which she denied the legal sufficiency of defendants' answer on the ground that said answer was a sham plea, intended only to delay and baffle justice; in that said answer raised no traversable issue in law or in

fact and therefore was untenable hence should be dismissed and defendants ruled to bare denial with cost against defendants.

On the 28th day of June, A. D. 1979, defendants entered a Notice of withdrawal of their answer with the right of re-filing. And on the very same day June, 1979, Co-defendant James Washington filed an amended answer averring that:

"1. Because, co-defendant says that whilst it is true that the plaintiffs title is genuine as made in the complaint, yet plaintiff is barred and estopped because of laches. That is to say, in keeping with law, the plaintiffs should have filed their action within twenty years since the year, 1937, being the year which they acquired title as appears from their deeds exhibits "A" and "B" attached to the complaint. Plaintiff and their privy not having instituted this action within statutory time, they are forever barred by the statute of limitations."

2. In view of the fact that Co-defendant James Washington, and his mother and uncle had lived on the premises in question openly without any disturbance from the plaintiff and their privy the action should be dismissed with cost against plaintiff'.

To this, co-defendant James Washington's amended answer, plaintiff filed an amended reply in which he averred that the said answer should be dismissed and be ruled to trial on the bare denial of the facts on the following grounds:

"1. That Co-defendant James Washington's amended answer should be dismissed because he, as a prerequisite had failed to pay plaintiff s cost incurred in filing_ and serving pleadings subsequent to the withdrawn pleadings. Because of this legal blunder, plaintiff prayed for the dismissal of the entire amended answer.

2. That co-defendant, James Washington's amended answer strived to plead *"statute of limitations"* but failed to state the year he entered upon plaintiffs said piece of realty and how many years he occupied and possessed the same, which constituted the statute of limitations according to him. Hence, said plea was indistinct, hypothetical and lacked the notice required by such plea; and so, should be dismissed.

3. That to plead *"statute of limitations,* the party so pleading said statute must first set out squarely the time, date and the year of his entering upon, occupying and possessing said realty to cover a period of twenty (2) calendar years or more with certainty and proof. But not in the evasive, hypothetical and illegal manner as was done by the defendant herein.

4. That as to that part of count one (1) of defendant's answer which said that plaintiff is

barred and estopped because of laches; that is to say, in keeping with law, the plaintiff should have filed their complaint within twenty (20) years, since the year 1937, being the year which they acquired title as appears from their deeds exhibits "A" and "B" attached to the complaint". Continuing said count one, defendant says that plaintiffs and her privy not having instituted this suit within statutory time, they are forever barred by statute of limitations". Plaintiff maintains that in the year 1937, at which time plaintiff acquired title to the subject property, defendants had not then encroached upon said piece of property; at the time when they encroached, plaintiff immediately demanded them to vacate and surrender said property to plaintiff, but said defendants failed, refused and neglected to vacate from plaintiffs said property. Hence this suit.

After resting of pleadings, law issues were heard and disposed of by His Honour E.S. Koroma then presiding over the March 1980 Term of the Civil Law Court for the Sixth Judicial Circuit Court who dismissed the amended answer and ruled defendants to a bare denial because the Plea of statute of limitations, being an affirmative plea or defense, had not been made in keeping with the law controlling; that is to say it had not been raised fairly and squarely, as well as in violation of the statute on refiling. During the hearing of the law issues, Codefendant William Washington in the court below, who had with Co-defendant James Washington, withdrawn their answer on the 2nd day of July A. D. 1979, and had not joined in filing the amended answer, sought to participate further in the case when there was no basis for his further participation. The trial judge rightly considered him a stranger to the action in face of his withdrawal of his answer and not refiling.

As aforesaid, law issues having been disposed of, the case came up for trial at the December 1980 Term of the Civil Law Court with His Honour Frank W. Smith presiding on the 15th day of January, A. D. 1981.

The facts as brought out during the trial may be succinctly stated as follows: That in 1908, one Paul H. Bailey sold a twenty five (25) acre parcel of land in Virginia, Montserrado County, to one William E. Christopher. Apparently after the death of William Christopher, one Charles H. Christopher, as heir of William E. Christopher, sold ten (10) acres of land out of the twenty-five (25) acre block to Daniel Cooper Barclay, father of Elfrida Cooper Sackey, wife of plaintiff in 1937. After Daniel Cooper Barclay died, his intestate estate was administered by the late Magdalene Cooper who executed an administratrix deed to Elfrida Cooper Sackey. At this time one Serena Washington, mother of appellees was living on the subject property. When Philip J. Sackey on behalf of his wife asserted the right to the property and Serena Washington refused to vacate same, the appellee instituted an action for recovery, but according to the records before the Court, Mrs. Magdalene Cooper and her sister, Anna E. Cooper, intervened and told appellees that they had given permission to

Serena Washington because she was a poor woman. After the death of Serena Washington, appellee again asserted her right to the property to appellants who were living thereon but they refused to vacate same. The result of their refusal resulted in the present action.

Further, according to the records of the trial, even though James Washington was the one person then before the court by virtue of his amended answer, he did not appear during the trial to testify in his own behalf. Rather, William H. Washington who had withdrawn his defense, as stated *supra,* and one William Christopher undertook to testify to affirmative matter which they never pleaded in their answer in keeping with the principle of a notice.

They only undertook in the first place to plead a general denial in the first answer and in the second place the statute of limitations in the amended answer.

It is amazing that in all the testimonies of the defense witnesses no effort was made to show title, especially so when defendants' witness William Christopher attempted to show that defendants were occupying the property at the instance of one Jacob Christopher, purported son of William Christopher who was the original owner of a 25 acre parcel of land from which appellee's 10-acre block was carved.

After both sides had rested evidence and argued, the Court made its charge to the empanelled jury which after due deliberation brought into a verdict in favour of appellee on the 19th day of January, A. D. 1981. (See Verdict). A motion for new trial was filed and resisted and the court after denying the motion for new trial on the 27th day of January, A. D. 1981, rendered final judgment in the case. It is from that final judgment that appellants are before us on a four-count bill of exceptions. This in brief is the history of the case

In count one (1) of the bill of exceptions, although ascribed for William Washington and James Washington as appellants but is intended for James Washington who filed the amended answer, he contends that the trial jury was influenced by the trial judge's charge which was based on the erroneous ruling on the law issues to the effect that: "the defendant, in the case in pleading the statute of limitations, did not say that he had gone on the place and was in possession for twenty (20) years or more, but he simply said that the plaintiff should have brought the suit before twenty (20) years passed and since he did not do it , he is guilty of laches so the court ruled out the answer, because it did not comply with the law and therefore defendants rested on bare denial of the fact. Therefore in this case the question of being on that place for twenty (20 years or more, is not before you". We hold the view that the trial judge did not err in the instructions do the jury on the issue of the statute of limitations because his instructions were strictly in keeping both with the amended answer of co-defendant James Washington, the ruling of His Honour E. S. Koroma on the law

issues. In that, the plea of statute of limitations is an affirmative defense and the principle of adverse possession being involved, the party making such plea must clearly aver that he has been—in open and notorious possession of said property for twenty years or more without hindrance or molestation from the party claiming ownership or anyone else. This the appellant failed to clearly state in the amended answer; and therefore was fatal to the doctrine of the statute of limitations. Consequently neither the judge who ruled on the law issues nor the trial judge who instructed the trial jury on the principle erred. Every defense in law or fact to claim for relief in any pleadings whether a claim or counterclaim, shall be asserted in the responsive pleading thereto if one is required.... Civil Procedure Law, Rev. Code 1:9.8 (presentation of defense in responsive pleading). Averments in a pleading to which a responsive pleading is required are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required shall be taken as denied or avoided.

Moreover, this Court has held that a plea specially pleading the statute of limitations in bar to a suit is a question purely of law and by statute must be determined by the Court, independent of a jury. *Cassell v. Richardson,* 1 LLR 89 (1876). That the statue of limitations constitutes an affirmative defense which must be pleaded affirmatively and cannot be pleaded hypothetically. That is, "if a bill states a good cause of action and the defendant finds that he cannot safely rely on the certainty of disproving its allegations, his only recourse is to set up an affirmative defense; and it is when he is confronted by this necessity that the problem of framing the answer as a pleading assumes its greatest importance". Among the affirmative defenses available to a defendant when specially set forth in the answer are such as these, fraud, account stated, payment, release, reward, statute of limitations, rescission, innocent purchaser, usury, infancy and former judgment. These and all other affirmative defense, must be specially pleaded in the answer. Otherwise, the defendant cannot usually take proof in reference to them or, if the proof is taken, he cannot have the benefit of it. It is not an uncommon thing for a defendant to suffer from his failure to set forth in his answer facts constituting an affirmative defense. One who finds himself in this predicament must, at the hearing, if not sooner, get leave to file a supplement or amended answer, and this concession will of course be granted only on the payment of costs.

The appellant's amended answer, without specifically pleading the statute of limitations and then state other facts, sufficient if true, has defeated his case, more especially when he failed to pay plaintiffs costs, after withdrawal, before refiling. In other words, the trial judge in disposing of the law issues, did not err when he ruled that defendants' failure to pay accrued costs before filing of the amended answer rendered said amended answer dismissible and was therefore right to assign this act of the failure of defendants to pay the accrued costs before refiling as one of the grounds for dismissing the amended answer.

Count two (2) of appellant's bill of exceptions asserts that defendant's parents first entered on the premises in question in the year 1937 which was testified to by witness William Washington and William Christopher under oath. Appellant states that this testimony thereby established the plea of statute of limitation as interposed by the defendant's amended answer, and therefore the verdict of the jury was contrary to the evidence adduced at the trial and the law controlling action of ejectment since title for real property may be obtained by prescription defendants and their ancestors having had opened notorious possession of the premises in question for over thirty (30) years. The plaintiff must recover on the strength of his title, plaintiff could not recover in this action, since the law and the fact have vested defendants legal title of prescription or adverse possession.

Recourse to the records show that the averments therein contained to the effect that defendant' parents first entered the premises in 1937 aside from seeking to assert affirmative matter which under the principle of bare denial, they could not do, the testimony of William Washington was mere hearsay. This was his testimony in that respect. "We would like to spread on the record of this Honourable Court an information to that of the jurors that as far as we can explain when we reached the age of maturity our late mother, Serena Washington told us that in the year 1937, she and my late uncle. Jacob Christopher and my late mother. Serena Washington removed and occupied a twenty five acres block of land."

The testimony of William Washington, should be compared with the positive testimony of the plaintiff and his wife that when Mrs. Sackey came into ownership of the land in question, they attempted to oust defendant's mother but were prevented from doing so upon advice of the late Magdalene L. Cooper, who has issued the administratrix deed to Mrs. Sackey, that it was she who has permitted defendant's mother to reside on the property because she was a poor woman. According to records, the testimony stands uncontradicted. The testimony of William Washington and William Christopher was the defendants are occupying the property by inheritance, which is quite contrary to the plea of statute of limitations raised in the amended answer. We maintain that the testimony of William Washington is hearsay. Because the evidence does not derive its value solely from the credit to be given to the witness, William Washington himself, but also in part of the veracity and competence of his parents in general and particularly his mother. It is rather hearsay evidence because it is evidence of what someone else said. It is not proof of the truth of what is claimed to have been said. The essential right of cross examination is absent. The evidence is supposedly oral evidence of a supposedly extra-judicial narration to a witness judicially delivered viva voce to the judicially deposing witness. It has been established by law that:

"Any statement that is a narration of a past event 'of a person who is not a witness in a case

is hearsay, and inadmissible, unless it comes under some exception of the rule.

The Courts will not ordinarily receive the testimony of a witness as to what some other person told him, as evidence of the existence of the fact asserted, nor will a witness be permitted to testify to facts where his knowledge thereof is derived, in whole or in part, from the unsworn statements of other.

It is a general rule that hearsay evidence is not admissible to establish any specific fact which in its nature, is capable of being proved by witnesses who speak from their own knowledge; or, in other words, that evidence whether written or spoken, which does not derive its credibility solely from the credit due to the witness himself, but rests in part upon the veracity and competency of some other person from whom the witness received the information, is not admissible to establish a substantive fact. And this is the rule, although the matter sought to be proved was at the time it was made against the interest of the person making it and although no other evidence can possibly be obtained, as where it is the declaration of a person who was the only eyewitness, and who keeps out of the way to avoid being subpoenaed. The reason of the rule is that such evidence requires credit to be given to the statement of a person who is not under the obligation of an oath, or any of the ordinary tests for ascertaining the truth of the statement". 1 WHARTON'S CRIMINAL EVIDENCE 671 -674, fn. 1, 2, and 3.

Under the prevailing law, facts and circumstances, the jurors were therefore justified not to have given fait and credit to the testimony of William Washington and James Washington to dispose appellee Philip J. Sackey for his wife, Elfrida Sackey of their property. The testimonies of James and William Washington not being admissible, the trial judge did not err.

In counts three and four of appellant's bill of exception, they have contended that in spite of their clear, cogent and legally sound ground in their motion for new trial yet the trial judge adversely overruled and denied said motion, and rendered final judgment confirming and affirming the erroneous verdict of the trial jury which was contrary to the weight of evidence adduced thereby adjudging defendants liable in the cause of action.

We hold that recourse to the records having revealed that the verdict of the trial jury was in conformity with the evidence produced at the trial, the final judgment affirming and confirming said verdict was not erroneous and same should not be disturbed, especially so when the said trial was fair and regular.

Therefore, in view of the foregoing facts, circumstances and the law controlling, it is our

considered opinion that the trial being regular, clear and cogent, the final judgment confirming and affirming the verdict of the empanelled jury unanimously agreeing that after careful consideration of the evidence adduced at the trial of the case, the plaintiff is entitled to recover her land and to an award of general damages in the amount of one thousand ($1,000.00) dollars be and the same is hereby upheld to all intents and purposes. And it is hereby so ordered.

The Clerk of this Court is ordered to send a mandate to the court below informing it of this judgment. Cost against appellants.

*Judgment affirmed.*