WILLIAM A. JOHNS, Heir of the Late Honorable J. J. W. JOHNS, Appellant, v. **WILLIAM N. WITHERSPOON**, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT, SINOE COUNTY.

Argued November 20, 1944. Decided December 15, 1944.

1. Affidavits in common law pleadings are unnecessary and, if attached and defective, should be rejected as surplusage.

2. It is a fundamental rule of law as well as of pleading and practice that issue must be joined before a cause can be legally tried, and it is an equally basic rule of law that all issues of law must first be disposed of by the court before considering issues of fact.

On appeal from dismissal of action of ejectment, *judgment reversed and remanded.*

William A. Johns for himself. *H. Layfayette Harmon* and *A. B. Ricks* for appellee.

MR. JUSTICE RUSSELL delivered the opinion of the Court.

This case has come up before us on appeal from the final judgment of His Honor Jerry J. Witherspoon while presiding over the August term, 1943 of the Circuit Court for the Third Judicial Circuit, Sinoe County, upon a bill of exceptions containing twenty-six counts.

Although there are several very interesting points embodied in said exceptions, the complaints contained in the first three counts are of such a fundamental character that their resolution must preclude the consideration of any others in this opinion. The said first three submissions of the bill of exceptions are as follows :

"1. Because appellant is of the opinion that when His Honour the judge ruled, 'that the affidavit in his opinion not containing the term of court to which the action therein is filed so as to make it clear that no other action of the same tenor if filed could be mistaken for it is not framed with that certainty which the law requires so as to constitute a legal one, and the affidavit not being considered a legal affidavit, the complaint to which it is attached, must to all intents and purposes be dismissed.' Appellant says that the affidavit contains all the legal essential requisites; see affidavit

to appellant's complaint. As such the complaint should not be dismissed. His Honour the judge erred.

"2. And also because when His Honour the Judge ruled 'that for want of exact commencing words in the appellant's Reply, said Reply must in keeping with law be rejected and is therefore dismissed.' Appellant is of the opinion same being a matter of form and not of substance in the Reply said Reply should . . . in keeping with pleadings and practice not be dismissed. His Honour the Judge erred.

"3. And also because appellant is of the opinion though His Honour the Judge ruled that 'the complaint to which it [affidavit] is attached must to all intents and purposes be dismissed,' yet His Honour ruled further 'the Court desiring the case to have its full course in order that it *might* be forwarded to the court of *dernier ressort* where it can be fully settled whether or not the plaintiff in this action can recover under the title which he claims, rules the case to issue in order that it might be tried by a jury'; said rulings as shall be discovered in the several exceptions taken to [them] by the appellant in the subsequent proceedings of this case are contradictory and ambiguous, and prejudice appellant's legal right of action. His Honour the Judge erred." (Emphasis added.) First of all this Court interpreting the Revised Statutes decided on April 22, 1938, in the case *Zogai and Gijey v. Gemayel Bros.,* 6 L.L.R. 238, that affidavits in common law pleadings are unnecessary and, if attached and defective, should be rejected as surplusage. Hence whether the affidavit were perfect or imperfect, it was error for the trial court to dismiss the complaint upon that ground.

The records further show that said bill of exceptions was duly approved by his honor the trial judge without any reservation whatsoever, thereby in fact substantiating *in toto* the allegations which the appellant had placed in his said exceptions. Thus we find that although the complaint because of an alleged defect in the affidavit thereto and the reply for "want of exact commencing words," were dismissed by the trial judge, yet he immediately thereafter ruled the case to trial for reasons given. To quote his own words : "The court desiring the case to have its full course in order that it might be forwarded to the court of *dernier ressort* where it can be fully settled whether or not the plaintiff in this action can recover under the title which he claims, rules the case to issue in order that it might be tried by a jury. . . ." See count three of appellant's bill of exceptions, *supra.*

It is one of the fundamental rules of law as well as of pleading and practice that issue must be joined before a cause can be legally tried, and it is an equally basic rule of law that all issues of law must first be disposed of by the court before considering the

issues of facts. What therefore could have possessed the trial judge to violate this fundamental rule is beyond the power of this Court to divine, for, after having ruled out the legal pleading which in this case was the complaint upon proof of which the action should stand or fall, the cause was thereby vitiated and issue could not be joined. As such, the court no longer had any cause before it for disposition. It was therefore error for the trial judge to have tried the case under the circumstances, for there are no exceptions to the legal maxim that that which is not legally done is not done at all.

This Court has no alternative therefore, but, for the want of a triable issue, to reverse the judgment of the court below and to remand the case to be tried *de* novo, with instructions that said judge again docket the cause, reverse the ruling he gave on the issues raised against the complaint and reply, and proceed from that point to a regular and legal trial of the cause. The costs of the appeal should be paid by the appellee and all other costs should abide the final determination of the case; and it is hereby so ordered.

Reversed.