NATIONAL PORT AUTHORITY, represented by its Managing Director, Appellant, v. **JAMES KIMAH,** Appellee.

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

Heard: November 16, 1983. Decided: December 21, 1983.

1. Only such matters that were interposed in the lower court and appeared in the bill of exceptions can be taken cognizance of in the appellate tribunal.

2. Without an objection, no issue of disagreement or controversy is raised and in the absence of exception an objection is lost no matter what its intrinsic merits may be.

3. Where the bill of exceptions and other parts of the records in an appeal fail to show that exceptions were taken in the lower court to some ruling of the presiding judge, the appellate court will not take cognizance of such exceptions on appeal.

4. A motion for new trial is controlled by statute and is granted only when there is showing that the verdict is contrary to the weight of evidence or the interest of justice will be served thereby.

5. The mere averments of contributory negligence laid in the answer does not ipso facto establish proof of said averment.

6. Proof is the perfection of evidence and, where proof is lacking, evidence is bound to crumble and allegations vanish into oblivion.

Appellee's car was hit by appellant's trailer causing damage to appellee's car and injuries to appellee. The police report and witnesses who saw the accident stated that the appellant was responsible for the accident. Appellant thereafter issued a promissory note assuming responsibility for the repair the car and agreeing to provide transportation for appellee while the car underwent repairs. When negotiations between the appellant and the appellee as to compensation for the damage to appellee's car and injuries to appellee broke down, appellee commenced an action of damages in the Sixth judicial Circuit Court for Montserrado County. After a trial was duly conducted, the jury brought a verdict in favour of the appellee and adjudging appellant liable. Upon denial of a motion for new trial by the lower court, appellant excepted thereto and announced an appeal to the Honourable Supreme Court. The Supreme Court affirmed the lower court's judgment, holding that the evidence produced by the appellee, including the police report and the eye witness account of the accident, clearly supported the verdict of the jury, and that responsibility for the accident was in fact admitted by the appellant in its letter to the appellee. The Court noted that under the circumstances the trial judge was correct in denying the motion for a new trial and in affirming the verdict of the jury.

John T. Teewia appeared for the appellant. J Emmanuel R. Berry appeared for the appellee.

MR. JUSTICE KOROMA delivered the opinion of the Court.

The history of this case, as culled from the records certified to this Court, revealed the following sequence of facts.

That in 1973, one Mr. Claude Walker of Morgan, Harmon, Otto Associates, Inc., sold to one Joseph Tate a Ford Sedan Car which was subsequently sold by Joseph Tate to James Kimah, the appellee in this case. On April 6, 1974, Mr. Kimah's car was involved in a traffic accident with a trailer owned by the appellant. In a promissory note dated April 8, 1974, Mr. Edwin Philips, Director, General Services, National Port Authority, acknowledged responsibility for the accident and the damage to Mr. James Kimah's car and obligated that the NPA will undertake, at its own expense, the necessary repairs at the garage of its choice. Further, that pending the completion of the repair, NPA would be responsible for all transportation expenses which Mr. Kimah may incur up to the total of $10.00 per day. On April 11, 1974, Mr. Kimah addressed the below quoted letter to Mr. Edwin Philips, Director, General Services, National Port Authority:

"Mesurado Group of Companies P. 0. Box 142 Monrovia, Liberia April 11, 1974 Hon. Edwin L. Philips Director National Port Authority General Services Monrovia, Liberia Dear Sir:

With reference to your promissory note of April 8, 1974, regarding the repairing of my car, Falcon P-4423, I have decided that you take the car and pay me the value of it which I have put to be $1,500.00 (Fifteen Hundred Dollars).

I have taken the decision due to the fact that my job necessitates me having a car and I do not want you people to go through the expense of spending about the amount I'm claiming or more, according to the estimate received from two garages just for repairs plus an additional amount which you have promised to give me per day for the number of days the car will be undergoing repairs. So to finish up everything and save one another further embarrassment and unnecessary expenses, I shall try to handle things the best way I can if this suggestion suits you.

Very truly yours, James Kimah, Jr."

Ten days following the receipt of Mr. Kimah's letter, Mr. Edwin L. Philips addressed the below quoted letter to Mr. Kimah.

"2-DGS/41/'74 April 23, 1974 Mr. James Kimah Mesurado Group of Companies P. 0. Box 142 Monrovia, Liberia

Dear Mr. Kimah:

We acknowledge receipt of your letter dated April 11, 1974 in counter proposal to our promissory note dated April 8, 1974, concerning your car which collided with ours on April 6, 1974.

Since you do not accept our promissory note, we hereby regard it as null and void ab initio and agree to suggest that we negotiate on the basis of your letter proposing the sale of your car to us. We would like to propose payment by us to yOu of the actual price of the car less depreciation.

Very truly yours,

Edwin L. Philips

DIRECTOR, GENERAL SERVICES"

It appears that when this letter was received by the appellee, negotiation broke down and to the court they proceeded to iron out their differences. Hence, on May 3, 1974, Mr. Kimah instituted this action of damages for injury to personal property. Pleading having been exchanged, Her Honour Emma Shannon Walser passed upon the law issues ruling the case to trial by a jury. Under the direction of His Honour John A. Dennis, a jury trial was duly held wherein the trial jury returned a verdict in favour of the appellee awarding him the amount of $2,147.30 as damages. Upon the denial of the motion for new trial, the court entered judgement against the appellant and from which an appeal to this Forum was announced and granted. This case is therefore before us for review and final determination on a four-count bill of exceptions.

For our purpose in fairly and impartially determining this case, we shall give judicial cognizance to counts 2, 3 & 4 of the bill of exceptions which we consider germane to the case.

The appellant has argued in the bill of exceptions and strongly contended in his brief that the trial court erred when it admitted court's mark P/2 which is a copy of a traffic charge sheet and also a power of attorney which are copies when the whereabouts of the originals had not been established. While this is a very sound legal argument well supported by the statute, the Civil Procedure Law, Rev. Code 1: 25.6 and several opinions of this Court, yet, in order for one to benefit from said argument at an appellate hearing, he must have properly raised the same in the trial court and except to whatever ruling was made adverse to his interest. In the instant case when the plaintiff rested oral testimony on the 34 th day's session, Friday, October 24, 1975, he offered for admission into evidence P/1 through P/4 to form a part of the evidence in support of plaintiff's case. In the four-count objection to the plaintiff's application for the admissibility of these documents, the defendant objected to the admissibility of P/2 but not on the ground that it was a copy and that the whereabouts of the original had not been established. The issue of P/2 being a copy and could not be

admitted under the rules of practice and procedure, especially so when the whereabout of the originals had not been established, was raised for the first time in the bill of exceptions and argued in his brief. Under the law, this Court can not take cognizance of this argument at this stage of the hearing of this case. For, it has been held that only such rulings that are objected to in the lower court and are contained in the bill of exceptions can be taken cognizance of in the appellate tribunal. Bryant v. African Produce Company, 7 LLR 93 (1940). In order to legally exercise the right of appeal from a matter passed upon by an inferior tribunal and to afford the appellate court an opportunity to hear and decide such issue or matter, a party must have properly availed himself by first raising an objection and when overruled, to register an exception. An objection precedes a ruling while an exception immediately follows it. An exception is the second step of the proceedings taken to obtain a review of error committed by the trial court, and is the method by which an objection is saved. Without an objection, no issue of disagreement or controversy is raised, and in the absence of an exception, an objection is lost no matter what its intrinsic merits may be. Where the bill of exceptions and other parts of the records in an appeal fail to show that exceptions were taken in the lower court to some ruling of the lower judge, the appellate court will not take cognizance of such exceptions upon an appeal. Anderson v. McLain, 1 LLR 44 (1868). Count two (2) of the bill of exceptions and count two (2) of the brief are therefore overruled.

In count three (3) of the bill of exceptions, the appellant contended that the trial court erred when it overruled its motion for new trial and sustained the resistance. While this count has stated no ground why the motion should have been granted so as to give this Court some insight as to how the trial court had erred, yet, this Court being obligated to review the entire records in this case, will now take recourse to the motion, the resistance and the ruling thereon.

A motion for new trial is controlled by statute and is granted only when there is a showing that the verdict is contrary to the weight of evidence or doing so would be in the interest of justice. Civil Procedure Law, Rev. Code 1: 26.4.

Looking at the motion for new trial from this angle of the provision of the statute, we observe that only count 4 of the six-count motion for new trial laid down a proper ground for the consideration of the trial court. This ground stressed that the verdict of the jury is not in harmony with the weight of evidence adduced at the trial. The plaintiff resisted this count in count 2 of his resistance and the trial court passed upon these contentions with such degrees of legal soundness that we are in full agreement with the said ruling which we herein quote for the benefit of this opinion:

"In substance, the motion goes to the insufficiency of evidence adduced at the trial in proof of the allegation made and contained in the complaint. A resume of the evidence is that the

plaintiff being the owner of a vehicle which was damaged by the defendant and as a result of which it became necessary for the plaintiff to have the same taken to a garage for the needed repairs. The operator of the garage testified as to the amount to be incurred for the repairs thereof. It is the considered opinion of the court that the allegation contained in the complaint was testified to by the witnesses for the plaintiff as against the denial of the defendant, and in keeping with law controlling a party may recover damages, being compensation to either repair the vehicle, if it can be repaired, or have it replaced. In view of which, the motion for new trial be and the same is hereby denied, and is so ordered."

This ruling on the motion for new trial is well supported by the trial records in this case. In that, the damage which plaintiff suffered was not only traceable to the defendant by testimony of witnesses and the police report on the accident, but was also admitted by the defendant in its letter or promissory note of April 8, 1974. The revocation of this letter on April 23, 1974 by the defendant did not vitiate or destroy the fact of the admission or shift the responsibility for the damage to plaintiff's car. In addition, the plaintiff pleaded special damages which he proved at the trial. That is, the car in question had not been damaged beyond repair as evidenced by the estimate for repairs presented to the plaintiff by the Auto Service Garage. This estimate was testified to by a witness from said garage. From the date of the accident up to the institution of the action, being 27 days total, the plaintiff held the defendant to pay $10.00 per day for transportation expenses, an amount which this Court considers most reasonable. That total of these two special claims making up the damage of $2,147.30 was well proven during the trial. The motion therefore for new trial was properly denied.

The argument of contributory negligence and fraud in count 3 of the brief is neither laid in any count in the bill of exceptions, nor is there any evidence in the entire records to support contributory negligence and fraud on the part of the plaintiff in this case. Allegations are not facts or established proofs. The mere averments of contributory negligence laid in the answer did not ipso facto establish proof of said averment. For, the driver of the defendant's trailer that collided with the plaintiff's car and caused the accident was not competent to have determined that the plaintiff's driver was drunk at the time of the accident. His testimony in this respect not having been corroborated by an competent witness, did not establish the minimum evidence and proof to support the plead of contributory negligence. Proof is the perfection of evidence and where proof is lacking, evidence is bound to crumble and allegation vanishes into oblivion. So also are the contentions of the defendant with regard to fraud and contributory negligence in this case.

Wherefore and in view of all the facts, legal support cited and the circumstances surrounding this case, it is our holding that damages were well established against the defendant, the trial regular and the judgement legally and judicially entered. The said judgement is therefore confirmed and affirmed with cost against the defendant/appellant. The Clerk of this Court is

hereby instructed to send a mandate to the judge presiding in the lower court to resume jurisdiction over this case and enforce its judgment. And it is hereby so ordered.

Judgment affirmed.