JOSEPH NEUVILLE, Appellant, v. **HERTZELL C. KILLEN,** Appellee.

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

Heard: November 21, 1983. Decided: December 22, 1983.

1. Under the law, photo static reproduction of writings are ordinarily regarded as only secondary evidence and not admissible in evidence over the objection of an adverse party unless a basis is laid for their reception by showing that the originals cannot be produced.

2. However, where the documents and/or their contents are not denied by the defendant in any responsive pleading or refuted by cross-examination when they were testified to, identified and marked by court, they, along with the other species of evidence to which no objection was interposed, remain as evidence for the plaintiff.

3. All documentary evidence which is material to the issue of fact raised in the pleadings and which is received and marked by the court, should be presented to the jury.

4. Our Civil Procedure Law does not provide, except on the basis of admissions by a party, for a directed verdict merely because the plaintiff failed to prove his case; it is for the jury to determine that phase.

5. For the court to direct a verdict in the absence of admission does not only invade the province of the jury, but also destroys the very intent for which the jury system was adopted under our form of government, and invades also the rights and privileges of the parties to a trial by jury who are triers of facts. Therefore, in a criminal prosecution the court shall only orders the entry of a judgement of acquittal on motion of the defendant or on its own motion if the evidence presented is insufficient to sustain a conviction of such offense. In that case, the jury will be discharged from the panel without submission of the case to it as a matter of law.

Appellant sought the review of a judgment in an action of damages based upon a directed verdict returned by the trial jury upon instruction of the judge . The Supreme Court found that the directed verdict was illegal, and indicated that the Civil Procedure Law provides that, except on the basis of admissions by a party, there is no provision for a directed verdict merely because the plaintiff failed to prove his case. The Court then held that it is for the jury to determine whether or not the plaintiff had proven his case. The Court also concluded that copies of documents, although not admitted into evidence, should have been presented to the jury. The trial court's judgment was therefore reversed and the case remanded.

Joseph W. Andrews appeared for the appellant. Clarence E. Harmon appeared for the appellee.

MR. JUSTICE SMITH delivered the opinion of the Court.

This damages suit is a result of an automobile accident that occurred on June 1, 1979, in which the defendant/appellee was alleged to have damaged plaintiff/appellant's 1200 Daihatsu sedan car bearing license plate TX-3220, bought on the 12t h day of January of the same year, 1979. Trial of the case was had during the September Term of the Civil Law Court for the Sixth Judicial Circuit, Montserrado County, 1980, after disposition of the legal issues raised in the pleadings. Upon a directed verdict prayed for by appellee's counsel and the trial judge's charge, the jury returned a verdict to the effect that the appellee was not liable in damages.

According to the records on appeal and the arguments of the counsel before us, it is not denied that the accident occurred for which the appellee was charged and held responsible. In fact, the appellee took the damaged car of the appellant for repairs at the garage of Edward Nassars (Liberia) Inc., Monrovia, where the vehicle was declared beyond repairs.

The trial jury having returned a directed verdict in favour of the defendant, and a judgement confirming the verdict having been rendered by the trial judge, the appellant excepted thereto and has appealed to this Forum of last review on a seven-count bill of exceptions.

Among the issues raised in the bill of exceptions, there are two basic issues which, in our opinion, are important to the determination of this case; the other issues are not relevant and material, and, hence, do not warrant our consideration.

Appellant contended in counts 2 and 3 of his bill of exceptions, and his counsel argued strongly in his brief, that the trial judge erred when he denied admissibility into evidence of certain documents pleaded, testified to, identified, marked by court and confirmed, on the ground that they were photostatic copies, the whereabouts of the originals not having been shown. The documents referred to bear court's marks "P/3" which is the vehicle registration certificate, `P/4" which is the bill of sale, and "P/5" which is the letter of appellee addressed to appellant acknowledging responsibility for the damage and agreeing to repair the appellant's car. Appellee contended that "P/5" was not properly identified. There were other instruments to which no objection was interposed and they were admitted in evidence; these documents are: "P/1" which is the garage statement indicating that the vehicle was damaged beyond repair, and "P/2", the judgement of the traffic court adjudging the appellee’s driver guilty of the traffic violation which resulted into the accident in which appellant's vehicle was damaged.

The documents objected to were photo static copies and not the originals or carbon copies; the whereabouts of the originals were not shown during the trial. Under the law, photo static reproduction of writings are ordinarily regarded as only secondary evidence and not admissible in evidence over the objection of an adverse party unless a basis is laid for their reception by showing that the originals cannot be produced. 29 AM. JUR. 2d., Evidence, § 490. It was under this rule that the trial judge denied the admission of the said documents

into evidence. However, in our opinion, these documents, that is, the vehicle registration certificate, "P/3"; the bill of sale, "P/4", and the letter of appellee addressed to appellant acknowledging responsibility for the accident, "P/5", having been pleaded, testified to, identified, marked and confirmed by court, and they and/or their contents not having been denied by the appellee in any responsive pleading or refuted by cross-examination when they were testified to, identified and marked by court, they, along with the other species of evidence to which no objection was interposed, remained as evidence for the appellant unless they were rebutted. It was therefore error on part of the trial judge to have excluded such evidence and directed the jury to return a verdict for the appellee.

The objection to the admission of said documents into evidence was only based on the fact that the whereabouts of the originals were not established, but not that they were fake documents or that they were forged signatures. It is our opinion, therefore, that the objection to their admission was a mere legal technicality intended to defeat the ends of justice and was not made in good faith. In the case Walker v. Morris, 15 LLR 424 (1963), this Court held, at syllabus 3 thereof, that: "All documentary evidence which is material to the issue of fact raised in the pleadings and which is received and marked by the court, should be presented to the jury."

In counts 4 and 5 of the bill of exceptions, appellant has therein contended and argued in his brief that, the trial judge erred when he granted a motion by the appellee for a directed verdict and thereupon charged the jury to return a verdict in favour of the appellee, defendant in the lower court. We had recourse to the records and observed that the judge's instruction had directed the jury to return a verdict for the appellee. It reads, as follows:

"COURT'S CHARGE TO THE JURY Ms. Forelady and members of the empanelled jury:

This is a case of damages brought by Mr. Joseph Neuville against defendant Hartzell C. Killen for damages for injury to personal property, the property in this respect being a taxi cab. Under our law, a plaintiff whose property, like a car in this instance, is damaged by a defendant and would claim any specific amount of money for such car, he must appear before you and prove the said amount dollar by dollar, cent by cent, to convince you that he has suffered such a damage. In the instant case, Mr. Joseph Neuville who is claiming $3,850.00 as days lost when the car had the accident has failed to prove how he arrived at this amount. He also failed to prove how he arrived at the amount of $5,090.00 which he was requesting you to award him as the value of the car at the time of the accident; this also he failed to prove. Further, the said Joseph Neuville failed to show by evidence documentary or otherwise the genuine ownership of the car in question. Under these circum-stances, he has failed to establish a case of damages against the defendant; wherefore, we direct and order you to go and bring a verdict in favour of the defendant. And for so doing, you are charged."

It should be remembered that "P/1" which is the garage statement that appellant's vehicle was damaged beyond repair and "P/2" which is the traffic court's judgement against the appellee were offered by the appellant and admitted in evidence without objection; said documents alone constitute prima facie evidence for the appellant; in that, they show appellee's liability for the accident and the damage of appellant's car. It leads us to think, therefore, that even a motion for judgement during trial as provided in the Civil Procedure Law, Rev. Code 1: 26.2, would have been groundless in face of the two documents admitted in evidence and the testimonies of witnesses for the appellant.

It is very elementary to mention here that our Civil Procedure Law, except on the basis of admissions by a party, does not provide for a directed verdict merely because the appellant failed to prove his case; it is for the jury to determine that phase. Our Criminal Procedure Law neither provides for directed verdict. For the court to direct a verdict in the absence of an admission does not only invade the province of the jury, but also destroys the very intent for which the jury system was adopted under our form of government, and invades also the rights and privileges of the parties to a trial by jury who are triers of facts. Therefore, in a criminal prosecution, the court shall only order the entry of a judgement of acquittal on motion of the defendant or on its own motion if the evidence presented is insufficient to sustain a conviction of such offense. In that case, the jury will be discharged from the panel without submission of the case as a matter of law which is for the court. Criminal Procedure Law, Rev. Code 2: 20.10.

Equally so in a civil trial, except on the basis of an admission, the trial judge can order no directed verdict simply on the basis that plaintiff failed to prove his case. The Civil Procedure Law, Rev. Code 1: 26.2 provides that:

"After the close of evidence presented by all opposing party with respect to a claim or issue, or at any time on the basis of admissions, any party may move for judgement with respect to such claim or issue upon the ground that the moving party is entitled to judgement as a matter of law. The motion does not waive the right to trial by jury or to present further evidence even where it is made by all parties. If the court grants such a motion in an action tried by jury, it shall direct the jury what verdict to render, and if the jury disregards the direction, the court may in its discretion grant a new trial...."

And therefore a directed verdict, as provided above, must be based on admissions, and where a motion for judgement during trial is made either by the plaintiff or the defendant on the basis of an admission, the trial judge may direct the jury as to what verdict it should return; otherwise, the jury should be allowed to exercise its function without restriction and dictation of the court. In our opinion, therefore, the trial judge invaded the province of the jury when he directed them as to what verdict to return.

Where the trial in the lower court was irregular and the jurors were not permitted to exercise their rights to reach a conclusion from the dictates of their own consciences, this Court ought to reverse the judgement and remand the case for a new trial.

In view of the foregoing, it is therefore our considered opinion that the judgement in this case should be, and the same is hereby reversed and the case remanded for new trial. The Clerk of this Court is hereby instructed to send a mandate to the trial court commanding the judge presiding therein to resume jurisdiction over this case and to proceed with the matter pursuant to this opinion. And it is hereby so ordered.

Judgment reversed; case remanded.