BORBOR NYUMAH, Appellant, v. **JAMES KEMOKAI**, Appellee.

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

Heard: July 8, 1986. Decided: August 1, 1986.

1. At the time of service of his responsive pleading, a party may move for judgment dismissing one or more claims for relief asserted against him in a complaint or counterclaim on the ground that there is another action pending between the same parties for the same cause in a court in the Republic of Liberia

2. In this jurisdiction, a party is required to give notice of facts which he intends to prove.

3. Every action of ejectment imports the principle of adverse possession, an issue of mixed law and fact, irrespective of whether or not an answer has been filed.

4. A suit in ejectment involves both mixed issues of law and facts which must be tried by a jury under the direction of the judge, unless a party thereto expressly waives jury trial.

5. It is not within the power of the court to determine whether the factual issues raised in an ejectment suit are sufficient or not, for to do so would be usurping the function of the jury.

6. In an action of ejectment, the plaintiff must recover on the strength of his title and not on the

8. The Supreme Court takes cognizance only of matters of record upon the face of certified copies of the proceedings in the lower court. Where the bill of exceptions fails to show on its face that the exceptions taken are supported by the records of the trial, the Supreme Court will not take cognizance of such exceptions

9. Although the dismissal of a defendant's pleadings places him on bare denial of the facts alleged in the complaint, it does not deprive him of the right to cross-examination as to allegations contained in his adversary's pleadings, or as to documents filed with those pleadings, nor does it give the plaintiff exemption from proving all the essential allegations set forth in the complaint. The defendant's restriction to a bare denial does not of itself decide a civil case in favor of the plaintiff.

10. A court may correct its records or judgments during term time. A court may alter its judgment at any time before it is entered or, if it is entered, before it is made final. But it should not be allowed to do so without notice to both parties.

11 . There is no principle of law more firmly established than that the judgment must follow and conform to the verdict, decision or findings in all substantial particulars. A judgment must be supported by verdict or it will be considered as irregular and erroneous although not void or inoperative.

12. The proper remedy in case a judgment does not conform to the verdict is by a motion to modify the judgment, or by appeal, or writ of error.

13. The practice of amending a verdict in matter of form is one of long standing and is based on principles of the soundest protective public policy in furtherance of justice, having nothing to do with the real merits of the case. It is limited, however, strictly to cases where the jury has expressed their

15. Whenever a verdict is sufficiently certain to enable the court to give judgment and the sheriff to deliver possession, it will be sustained. A verdict must, however, sufficiently show what was awarded to plaintiff and must not be so uncertain that a writ of possession cannot be issued upon it, and a verdict which is not in accordance with the contention of either party is erroneous.

Appellee instituted an action of ejectment against the appellant praying that the appellant be evicted from a certain parcel of land. Appellant's answer to the complaint was dismissed by the trial judge who ruled appellant to bare denial. At the end of the trial, the jury returned a verdict that made no reference to the land in dispute, but instead awarded appellee damages in the amount of $25,000.00. Except for a prayer for general damages, no damages were alleged in the complaint. The trial judge, nevertheless, entered judgment in favor of the appellee awarding him both the amount of the verdict and the parcel of land.

Upon appeal, the Supreme Court held, *inter alia,* that the judge's inclusion of the parcel of land, which was not part of the jury's verdict, in the award is a reversible error that affects the substantial right of the appellant. The Court thereupon reversed and remanded to case to the trial court with the instruction that the parties are allowed to re-plead.

J. Emmanuel R. Berry appeared for appellant. *Roland Barnes* appeared for appellee.

MR. JUSTICE BIDDLE delivered the opinion of the Court.

This case has come before us on appeal from the Civil Law Court for the Sixth Judicial Circuit, Montserrado County, on a four-count bill of exceptions. The facts in the case, according to the certified records sent to this Court, are as follows:

Johnny Barbour, Nellie Barbour-Richardson, Josiah Barbour and the late Augusta Barbour-Tarpeh

Barbour family's ancestors acquired the said parcel of land by a public land sale deed from the Republic of Liberia or otherwise is not clear as the trial records sent to this Court is silent on same. Howbeit, the Barbour family continued to enjoy the possession thereof in common, in peace and harmony until sometime in 1966 when, on account of some family quarrel, 20 acres of the said family land was surveyed and carved out of the entire family plot and divided equally among the family members, as follows:

1. Johnny Barbour, head of the family, five acres;
2. Nellie Barbour-Richardson, five acres;
3. Leona Lloyd, daughter of the late Augusta Barbour-Tarpeh, five acres (by inheritance); and
4. Josiah Barbour, five acres.

There remains a portion of the family land yet undivided. But again the quantity of the remaining undivided portion of said parcel of land, still held in common by the family, is unknown. The records are also dehors the metes and bounds of the family land in question.

In 1967, appellee, plaintiff below, is said to have purchased one acre of land from Josiah Barbour, for which a warranty deed was issued by Josiah Barbour to appellee. According to the records, the parcel of land sold to plaintiff by Josiah Barbour was part of Josiah Barbour's five acres of the divided land.

In 1983, according to the record in this case, appellant, defendant below, purchased three lots from the Barbour family and a deed was allegedly issued to appellant, signed by three members of the Barbour family, namely: Johnny Barbour, Nellie Barbour-Richardson and Leona Lloyd, as grantors, except Josiah Barbour who, according to the testimonies of Johnny Barbour and Nellie Barbour-Richardson, was out of town when the said three lots were sold to appellant. Testimonies in the records also show that Josiah Barbour was later informed of the sale to appellant. It is likely that the parcel of land sold to appellant was taken out of the remaining undivided land.

Defendant/appellant filed a two-count answer which, for the benefit of this opinion, we hereunder quote:

"1. Defendant submits that the action be dismissed for the reason that there is another action pending in this Honourable Court between the same parties and involving the same subject matter of which defendant prays this Honourable Court to take judicial notice. Moreover, defendant further gives notice that at the trial of the issues of law, he will produce copies of the said pleadings in further substantiation of the above.

"2. That as to count 2 of the complaint, defendant says that the averments contained therein are false and misleading and he denies that ". . . without any color of right has begun and is still continuing construction work on the portion of plaintiffs said lawful property . . . " Defendant submits that the land he is occupying is his lawful property and he gives notice that at the trial, he will produce his title deed covering said property".

The pleadings progressed as far as the reply and rested.

Even though defendant, in count one of his answer, alleged that the suit could not be maintained on the ground of pendency of suit between the same parties, involving the same subject matter, defendant made no effort to annex to his answer proof of said pendency of suit between the same parties. However, in count 2 of his answer, defendant gave "notice that at the trial he will produce his title deed covering said property".

On January 17, 1985, the court below, with His Honour Eugene L. Hilton presiding over the December Term thereof, disposed of the law issues, We would like to mention here in passing that even though both counsels signed the notice of assignment for the disposition of law issues, Counsellor J. Emmanuel R. Berry, counsel for defendant below, failed to appear and there is no record to show the reason for such failure.

proferted the necessary exhibits, such as defendant's answer in the pending suit, sheriffs returns thereof, etc., so as to give the opposite party the required legal notice. And having failed to do so, count 1 of the reply which attacked count 1 of the answer was sustained and, therefore, count 1 of the answer was dismissed.

(b) That under the same principle of due notice, count 2 of the answer which merely gave notice that defendant will produce his deed during trial (such notice)was insufficient, in that, defendant should have proferted a copy of his deed mentioned in said count 2 of the answer.

The court below went on to say:

"In this jurisdiction a party is required to give notice of facts which he intends to prove . . .

Defendant having failed to give the plaintiff the required notice by making profert of his deed upon which he would rely to establish his ownership as against the claim of ownership by the plaintiff, violates the statute of giving notice to the opposite party . . ."

He thereupon dismissed the answer and placed defendant on "a bare denial of the facts stated in the complaint".

With respect to the court's ruling dismissing count 1 of the answer, we hold that the judge did not err. Such a pleading as contained in count 1 of the said answer is based on a question of law and is a plea in bar. It therefore was incumbent upon the defendant to have proferted copies of the pleadings of such a pending suit involving the same parties and same subject matter. This would have given sufficient notice not only to plaintiff but also to the court to take judicial notice thereof. Had defendant been sincere that there is pending a suit in the same court between the same parties involving the same subject matter, he would have also moved the court to dismiss the complaint on the ground of *lis*

(d) That there is another action pending between the same parties for the same cause in a court in the Republic of Liberia." Rev. Code 1: 11.2(d).

Recourse to the records in the court below certified to us reveals that as a result of the dismissal of defendant's answer, defendant was barred from introducing affirmative matters. *Saleeby Bros. v. Haikal,* [1961] LRSC 35; 14 LLR 537 (1961).

Let us review some of what transpired in the court below:

WITNESS KEMOKAI (PLAINTIFF BELOW) TESTIFIED ON CROSS EXAMINATION

Q. Isn't it a fact that when you originally laid claim to the parcel of land, subject of these proceedings, and on subsequent occasions the defendant, Borbor Nyumah, informed you that he is the bona fide owner of said property by virtue of the title deed which was executed to him by the original legal owner of said property, Mr. Fahnbulleh?

A. The defendant said that someone sold the place to him.

Q. Defendant Borbor Nyumah notified you that he has a title deed covering the said parcel of land and also notified you that he would produce said deed at the trial?

OBJECTION; GROUND: 1) The question is outside the pale of this case. THE COURT: The objection is sustained. To which Defendant excepts. DEFENDANT NYUMAH TESTIFIED ON HIS OWN BEHALF:

Q. Are you acquainted with James Kemokai, the plaintiff in this case?

A. Yes sir.

Q. The same James Kemokai has instituted an action of ejectment against you to have you evicted from the parcel of land which you occupied . . . Please state for the benefit of this Honourable court and jury all you know about this matter and especially in support of your answer?

"OBJECTION: Defendant's answer has dismissed. Raising affirmative matter when defendant has no answer in court. THE COURT: Defendant has no answer before the court and therefore he cannot testify in support of his answer as given by counsel. Objection is sustained. Defendant excepts.

Q. Will you please state for the benefit of this trial all you know about the case at bar?

A. Part of 1983, I went to one Johnny Barbour and I told him that I needed land, he told me to go come after next week, and after one week I went back and he (Johnny Barbour) said 'we have one spot to sell to you but he alone cannot do it. He called his family together and we went to the site. It was three lots. He said 'here is the place we get to sell to you'.. . and I paid the money. They informed a surveyor to survey the place, the surveyor surveyed the place, the deed was signed and probated. I went now to develop the place and one day I saw the plaintiff, Mr. Kemokai,.. who said that the place was for him. . . I told him that I bought this land, here is my deed . . . If you know that the land is for you go to your grantor. . . I then went back to the family, my grantor, and told them the trouble has now come, one Kemokai said that the place is for him. The Oldman in the family said. . . 'who sold the land to this Kemokai', and I told the Oldman that Kemokai said that one Josiah Barbour sold the land to him. The Oldman then said that this land is family land and no individual will sell it. The Oldman went on to say, ".. . the land was divided and the portion we sold to you is owned by us but

OBJECTION; GROUNDS: Introducing affirmative matter; there is no answer in court. THE COURT: As the deed was allegedly pleaded in the answer and referred to it that he will produce it at the trial, which answer has been dismissed by the court, that answer carries away with it all that exist. Therefore, the objection is sustained. To which defendant excepts."

Although defendant's deed could not be admitted for reason already stated supra, plaintiff, now appellee, made no effort to produce his grantor, Josiah Barbour, before court to defend his title in keeping with the warranty clause in plaintiffs deed; nor was there any attempt made by plaintiff to rebut defendant's testimony in chief, as herein above quoted. Other than his own testimony, appellee produced only one witness, a Sylvester Massaquoi, who testified solely to identify Josiah Barbour's signature on plaintiffs deed. Massaquoi is no kin to the Barbours, but a one time office mate of appellee.

Apparently, appellant must have been in possession of a title deed on which he relied and for which he gave notice as stated in count 2 of his answer even though there was no reason stated as to why defendant did not profert copy thereof to his answer to give "sufficient notice" to plaintiff as contended by the latter in his reply. During argument before this Court, appellee contended that the mere mention by defendant in his answer that he does posses a title deed to the disputed land and that same would be produced at the trial was not sufficient in law under the principle of notice. Though plausible this argument may be, we hold a different view.

A suit in ejectment involves both mixed issues of law and facts and as such must be tried by jury under the direction of the judge unless a party thereto expressly waives a jury trial. In such an instance, the judge shall then have the right to determine the factual issues therein raised after he shall have firstly passed on the law issues. It is not within the power of the court to determine whether the factual issues raised in an ejectment suit are sufficient or not, for to do so would be usurping the function of the jury. This Court has held that:

adversary. *Bingham v. Oliver,* [1870] LRSC 1; 1 LLR 47, 49 (1870); *Gibson et al., v. Jones[1929] LRSC 3; ,* 3 LLR 78, 84, (1929).

This Court has also said that "the weakness of the defendant's title will not of itself enable plaintiff to recover." *Birch v. Quinn,* [1897] LRSC 8; 1 LLR 309 (1897);*Horace v. Harris,* [1947] LRSC 14; 9 LLR 372, 375 (1947). Count one of the bill of exceptions is therefore sustained.

Count 2 of the bill of exceptions states:

"And defendant further submits that he excepted to the court's charge wherein the court, among other things, left it to the jury to determine a salient issue of law as to whether any party or co-owner of a joint property can convey title without the consent of the other party.

Recourse to the records, we observed the following from the judge's charge to the jury: "That this case is an interesting one, in that:

1. Two grantors to the parties to this suit belong to the same family.

2. The two deeds, if not for the same tract of land, are for two separate areas within the land that the grantors inherited from their ancestors.

3. The grantors of the defendant's deed told you that, because of the trouble plaintiffs grantor was giving them over the piece of land, they resorted to partitioning 20 acres of their joint property, thus leaving each of them five acres.

Inasmuch as defendant's deed was denied identification and admission by the trial judge, it was improper for said judge in his charge to the jury to have made reference to the defendant's deed and to refer same to the jury to pass upon its credibility. On the other hand, such an important issue as to whether or not a coowner of a tenancy in common can properly sell or dispose of more than his own

exceptions . . . in an appeal fails to show on its face that the exceptions taken and set up in said bill of exceptions. . . conform to and are supported by the records at the trial, the appellate court will not take cognizance of such exception, upon an appeal." *Elliot v. Dent,* [1929] LRSC 8; 3 LLR 111, 113 (1929).

The gist of the complaint was that plaintiff/appellee claims lawful title to a parcel of land said to have been purchased from one Josiah Barbour by appellee and that defendant/appellant was allegedly withholding or occupying same without any color of right. It was therefore incumbent upon plaintiff (appellee) to prove his title conclusively against any semblance of title, or lawful possession by defendant (appellant). Hence, in the case *Salami Bros v. Wahaab,* [1962] LRSC 6; 15 LLR 32, 38 (1962), action of ejectment, this Court, in reversing the judgment of the lower court, held:

"We would like to remark that although the dismissal of a defendant's pleadings places him on bare denial of the facts alleged in the complaint, it does not deprive him of the right to cross-examination as to allegations contained in his adversary's pleadings, or as to documents filed with those pleadings; nor does it give the plaintiff exemption from proving all the essential allegations set forth in the complaint. The defendant's restriction to a bare denial does not necessarily decide a civil case in favor of the Plaintiff."

Count two of the bill of exceptions is sustained insofar as it relates to the trial judge's charge to the jury wherein he injected the issue of seizin or status of the Barbour family's parcel of land.

Counts three and four of the bill of exceptions shall be treated together because both counts deal with the verdict of the empaneled jury and the final judgment thereon rendered by the trial judge.

Count three of the bill of exceptions, stated in brief, avers that the trial jury returned from its room of deliberation with a verdict awarding plaintiff $25,000.00 damages without stating whether plaintiff was, or was not, entitled to the parcel of land subject of the ejectment proceedings, to which defendant

"WE THE PETTY JURORS TO WHOM THE CASE: James P. Kemokai of the City of Monrovia, plaintiff, versus Borbor Nyumah also of the City of Monrovia, defendant, was submitted, after careful consideration of evidence adduced at the trial of the said case, WE DO UNANIMOUSLY AGREE that Plaintiff James P. Kemokai be awarded $25,000.00 IN THE ACTION OF EJECTMENT".

It is important to note that plaintiff, in count two of his complaint, requested the court "to eject defendant from his premises. No damages was alleged in the body of the complaint. It was only in the prayer of the complaint where plaintiff initially prayed to be put in possession of the land, as well as be awarded general damages.

Further perusal of the records also reveals the following in the COURT'S FINAL JUDGMENT:

"At the call of the case for trial, a jury was empaneled and plaintiff with his witnesses were qualified and deposed. Plaintiff had with him a warranty deed and other documents which were admitted into evidence and he resigned the floor. The defendant and his witnesses testified after their qualification. He has no documentary evidence admitted into evidence as his answer with all its exhibits were ruled out. Arguments were entertained and a written charge given the jurors who returned from their room of deliberation with an award of $25,000.00 as general damages for plaintiff. The verdict was recorded at the request of counsel for plaintiff, and defendant registered his exception to it.

"As defendant has made no further move besides his entry of exception to the verdict, we will now proceed to enter this judgment:

"JUDGMENT: The verdict brought in by the trial jury, being in harmony with the evidence adduced at the trial, is hereby affirmed and confirmed. It is to be noted that the verdict is silent on the point that plaintiff is entitled to his premises. Taking the award given the plaintiff by the jury as the given premises, we deduce by implication and inference that plaintiff is entitled to the subject land, for to hold otherwise would stifle the trial and to refuse to enter judgment solely for this silence would be

23rd day of April, A. D., 1985 /s/ Frederick K. Tulay ASSIGNED CIRCUIT JUDGE PRESIDING.

To which judgment of Your Honour, defendant excepts and prays for an appeal to the Honourable the Supreme Court, sitting in its October Term, A. D. 1985. And submits. THE COURT: Appeal noted. MATTER SUSPENDED". From the foregoing, two salient issues are presented before us:

1. Was the verdict of the jury in harmony with the evidence adduced, or conversely, can general damages in dollars and cents be a substitute for a parcel of land sued for in an action of ejectment?

2. Was the trial judge legally correct to award the parcel of land sued for in said ejectment case where the written verdict of the jury is silent on same?

We shall traverse these issues in the reverse order.

As stated *supra,* the verdict of the empaneled jury in this case was silent or did not mention the land in dispute and same was recorded in the minutes of court. Therefore, the awarding of ownership to said parcel of land to plaintiff was in effect a modification or alteration of said verdict. "It is a settled law that a court may correct its records or judgments during term time. A court may alter its judgment at any time before it is entered, or if it is entered, before it is made final. But it should not be allowed without notice to both parties." *Yangah v, Melton[1954] LRSC 37; , 12* LLR 178, 181 (1954), as also cited in *Bonah v. Kandakai,* [1971] LRSC 86; 20 LLR 677, 679 (1971). And in so doing, the Court must take into account at all times that: "There is no principle of law more firmly established than that the judgment must follow and conform to the verdict, decision or findings in all substantial particulars. A judgment must be supported by verdict . . . in the case or it will be irregular and erroneous, although not void or inoperative. . . The proper remedy in case a judgment does not conform to the verdict is by a motion to modify the judgment, or by appeal or writ of error" (33 C.J.S. 1169 (1924), as cited in the case *Cassell et al, v. Cummings[1951] LRSC 4; , 10* LLR 409, 414 (1951). In the latter case cited and the case at bar, there are certain similarities insofar as it relates to the manner in which the trial judge rendered final judgment. Both suits are in ejectment. In the *Cassell* case, the empaneled jury delivered a verdict awarding plaintiff his land as claimed in the complaint and, in addition to this, awarded

merits of the case. It is limited, however, strictly to cases where the jury has expressed its meaning in an informal manner. The court has no power to supply substantial omission and the amendment in all cases must be such as to make the verdict conform to the real intent of the jury. The judge cannot, under the guise of amending the verdict, invade the province of the jury or substitute his verdict for theirs . . ." *Ibid,* 413-414.

In the instant case, the trial judge instead supplied or inserted in the verdict that which the jury omitted, that is, the award of the parcel of land sued for in the ejectment suit.

We therefore hold that the inclusion of the award of the parcel of land in the jury's verdict by the trial judge constitutes a reversible error because it adversely affected a substantial right of the appellant, With respect to the other issue, we here opine that the contention of the parties to the ejectment suit in the case at bar was for the recovery of a piece of property and not for general damages only. For in all ejectment cases, the primary contention as well as the expectation of the plaintiff is to firstly obtain a verdict for the recovery of the land sued for. General damages in ejectment case are secondary. The omission of the parcel of land sued for from the verdict renders such judgment unenforceable. Our position is supported by an opinion of this Court in the case *Duncan v. Perry,* 13 LLR 510, 520 (1960) where this Court held:

"Whenever a verdict is sufficiently certain to enable the court to give judgment and the sheriff to deliver possession it will be sustained. A verdict must, however, sufficiently show what was awarded to Plaintiff, and must not be so uncertain that a writ of possession cannot be issued upon it; and a verdict which is not in accordance with the contention of either party is erroneous." Counts three and four of the bill of exceptions are hereby sustained.

The other similarity in both cases is, in the case *Cassell case supra,* the defendant, Jacob Cummings, who was representing himself, did not appear during the disposition of the law issues, nor did he appear when the trial judge rendered final judgment despite the fact that he signed all notices of assignment in said case. So also did Counsellor J. Emmanuel R. Berry, sole counsel for appellant in this case. Despite the fact that he signed the notice of assignment for the disposition of law issues, he failed to

We seriously frown upon such irresponsible behavior on the part of lawyers before our courts, especially Counsellors of the Supreme Court Bar who, as arm of court, ought to uphold the dignity of the legal profession in keeping with their oath and the code of ethics. Many a time, clients who would have had their cases speedily and professionally disposed of before the courts are often disappointed by irresponsible lawyers. Consequently, clients are abandoned to their detriment by such lawyers who seem not to have any remorse of conscience, or who have no faith in their own competency to face their opponent, and in many cases such clients not only suffer financial losses, but loss of property rights, loss of liberty, and sometimes loss of life. We therefore warn that a repeat of this unfortunate and irresponsible act on the part of any lawyer before our courts will not go unpunished, for in the hands of lawyers lie the fate of clients.

Wherefore, and in view of the foregoing facts and circumstances and the law controlling, the judgment of the court below is hereby reversed and the case remanded with instruction that the parties be allowed to re-plead, commencing from the complaint and in keeping with this opinion. And it is hereby so ordered.

Judgment reversed