SALEEBY BROTHERS, by and through S. G. SALEEBY, Appellants, *v.* ELI HAIKAL, Appellee.

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

Argued April 20, 1961. Decided May 18, 1961.

1. In an action of debt where the defendant pleads a setoff or counterclaim, issues of fact with respect to the set-off or counterclaim must be referred to the jury.
2. An appellant's exceptions to the trial court's instructions to the jury are not nullified by the clerk's failure to record the exceptions when the record shows that such exceptions were in fact made at the proper time.
3. A motion for new trial is deemed a pleading for purposes of amendment.

On appeal from a judgment in an action of debt, *reversed* and *remanded for new trial.*

E. Winfred Smallwood for appellant. *C. L. Simpson* and *Peter A. George* for appellees.

MR. JUSTICE WARDSWORTH delivered the opinion of the Court.

The above-entitled action was instituted by Eli Haikal against Saleeby Brothers, by and through S. G. Saleeby, in the Circuit Court of the Sixth Judicial Circuit, Montserrado County.

The facts and circumstances underlying these proceedings as culled from the records before us may succinctly be stated as follows. Appellee, plaintiff in the court below, was an employee of Saleeby Brothers for nine years, that is to say, from 1948 to 1957, when he resigned or terminated his services with the said business house. Thereupon the accounts of Eli Haikal as well as of his brother, Richard Haikal, were checked and adjusted, and after deducting all withdrawals made by them during their

tenure of service, they had a credit balance of $58,000, for the payment of which sum a promissory note was issued in favor of the two Haikal brothers by S. G. Saleeby, to be paid within a given period. The said promissory note reads as follows:

"September 1, 1957

"On or before the expiration of one (1) calendar year from date hereof, Messrs. Saleeby Brothers, represented by S. G. Saleeby, Manager, do hereby promise to pay Mr. Eli G. Haikal and Mr. Richard G. Haikal, both of Lebanese nationality, the sum of fifty-eight thousand dollars ($58,000) account balance of unpaid wages up to the execution of this note.

"[Sgd.] S. G. SALEEBY

"Witness:
W. KITSON."

The promissory note was duly probated and registered according to law. This was undoubtedly done for no other purpose than to secure the parties against loss or destruction of the said document.

In discharging this claim, it is alleged that Richard Haikal received his full share in cash, whilst on the other hand, Eli Haikal, the appellee, having established a business for himself, elected to draw sundry merchandise and cash from the firm of Saleeby Brothers against his share. Discovering that appellant was charging him a higher rate than he was charging to others, appellee decided to demand his balance to be paid in cash rather than continue taking merchandise in settlement of appellant's indebtedness to him. Upon doing so, appellant sent appellee a statement of account showing an amount of $70,359.39, thereby stating that appellee had overdrawn his account in the sum of $12,359.39.

Upon receipt of the statement of account referred to, *supra,* the appellee addressed a letter to the appellant charging him with fraud, which letter we quote hereunder, word for word, as follows:

"MONROVIA, LIBERIA
6th February, 1959

"THE MANAGER
SALEEBY BROTHERS
MONROVIA, LIBERIA
"SIR,

"1. We have to acknowledge receipt of your account statement submitted to us, claiming some indebtedness against us in your favor, which we beg to denounce in substance.

"2. Further, we here register our surprise at your actions in trying to create some claim against us in the fact of our mutual conference had, whereby we balanced and proved our claim with you which was accepted by you and mutually agreed upon, and in keeping with the understanding, you executed a promissory note in our favor, committing yourselves to make satisfactory settlement, a year later after the date of the issuance of the said note. You are already five months in arrears of making payment to us of the said promissory note.

"3. Without argument, merchandise and cash drawn from your store after the issuance of this said note in question, for which we have invoices in our possession covering a certain amount, will be deducted from this relative claim on its day of settlement by you; but under no circumstances will your fictitious claim form part of your obligation now pending; neither would we be such type of characters as to accept and incorporate your fictitious claim in our deal for which we have your note. Now, therefore, in observing your activities in submitting such a false and fictitious claim as a means of misleading, corrupting and confusing our legitimate claim against you, you leave us no other alternative but to pass your name over with your activities to our counsel for court proceedings against you, both for collecting our claim from you, and for redressing your activities under the color of fraud, at-

tempting to receive money under false pretense, or under such legal title as the law will deem same punishable, unless you pay this claim immediately.

"Please take due notice accordingly and immediately.

"Yours very truly,
[Sgd.] RICHARD HAIKAL,
[Sgd.] ELI HAIKAL."

Appellant, being annoyed and aggrieved at the charge of fraud placed against him by appellee in the letter under reference herein, fled to the Lebanese legation and laid his grievance before the minister for his intervention, to bring some adjustment in the premises, appellee being his nephew. The minister having heard the matter from both parties, insisted on appellee apologizing to appellant, his uncle, withdrawing said letter. Accordingly, a letter of apology was written by appellee, which letter we quote hereunder as follows:

"MONROVIA
4th June, 1959

"MESSRS. SALEEBY BROTHERS,

"We, the undersigned Eli and Richard Haikal, are pleased to convey to you through this letter our immense thanks for all the good you have done to us during the time we were working for your company, and in which we are under your good care and kindness.

"We wish to apologize for all the shortcomings we have done to the business; also for the mismanagement, misconduct or carelessness we committed during our employ in your business. Also, we wish to apologize to you for the spirit as well as the content of our letter dated the 6th February, 1959, which we consider void and as it never was.

"Again begging you to accept our apologies, and with our best wishes.

[Sgd.] ELI HAIKAL,
[Sgd.] RICHARD HAIKAL.

"The above translation from Arabic is true and correct, and it is legalized by the Legation of Lebanon in Monrovia, dated, 6-6-59.

[Sgd.] ALBERT NASSIF,
Minister of Lebanon."

The letter of apology having been tendered by appellee as a result of the Lebanese minister's intervention, which was invoked by the appellant, appellee demanded the settlement of his alleged claim, against which appellant submitted the statement of account showing appellee to be indebted to Saleeby Brothers, in the sum of $12,359.39, being the amount allegedly overdrawn by appellee in the course of drawing merchandise and cash against the credit balance, in keeping with the promissory note issued by appellant.

The matter having been submitted to a jury who returned a verdict in favor of Eli Haikal, appellee, awarding him $16,738.01, and upon which verdict final judgment was rendered by the trial judge, affirming the verdict of the petty jury in this case, defendant, being dissatisfied with the said verdict and final judgment, appealed his cause before this Court for review and final determination upon a bill of exceptions containing five counts.

We deem Counts "1," "2" and "4" worthy of this Court's consideration for the determination of this cause. In Count "1" of the said bill, appellant complains as follows:

"1. Because on September 22, 1960, Your Honor, having heard arguments *pro et con* on the law issues in this case, ruled the case to trial on the ground that 'if at the trial it is established that the counterclaim was not accepted by plaintiff in keeping with the letters made profert by defendant in his answer, which letters show some suspicion of this fact to be cleared away by evidence at the trial, then the court will have to find for plaintiff and ignore the counterclaim'; to which defendant excepted.

Set-off is defined by Blackstone as follows:

"To this head may also be referred the practice of what is called a *set-off:* whereby the defendant acknowledges the justice of the plaintiff's demand on the one hand; but on the other sets up a demand of his own, to counterbalance that of the plaintiff, either in the whole or in part. . . ." Bl. Comm., Bk III, Ch. XX.

It was the province of the jury to ignore the set-off or counterclaim of appellant which, according to the evidence adduced at the trial of this case, may or may not have warranted a favorable consideration being given said counterclaim by the court. Therefore it is our opinion that the trial judge erred in reaching the conclusion he did, prior to submitting said issue to the jury for their reaction thereon in keeping with law.

In Count "2" of the bill of exceptions defendant complains of the trial judge as follows:

"And also because when, on October 3, 1960, defendant excepted to the charge, the clerk inadvertently did not record said exception, and this fact was not made known to defendant until after the jury had brought in its verdict, it having happened that the sheet on which the exception was to have been recorded was still on the typewriter and was not taken off and handed to defendant until the verdict had been brought; and immediately upon copy being handed to him he observed this omission and made application to the court to order the exception recorded, which application the court denied, and to which denial the defendant excepted."

The trial judge's ruling on the issue raised in this count of appellant's bill of exceptions is based upon an application of appellant praying for an order to the clerk of court to record his exception to the judge's charge delivered to the jury. On this application the judge ruled as follows:

"The court remembers very well and vividly recalls

the attorney for the defendant in this case making some gesture and indicating something from a piece of paper after the charge. Not having heard the lawyer making an exception, the application is hereby denied."

Our statute controlling provides:

"No party may assign as error the giving or failure to give an instruction unless before the jury retires to consider its verdict he excepts to the instruction, stating distinctly the matter to which he objects and the grounds of his objection." 1956 Code, tit. 6, § 627.

It is contended by appellant in his bill of exceptions, supported by the judge's ruling, that he did except to the judge's charge before the jury returned to consider its verdict, but inadvertently same was not entered, and that this did not come to his knowledge until the sheet of paper which was on the clerk's typewriter at the time was released, at which time the jury had retired. The judge in his ruling on the application of appellant, in referring to appellant's counsel making some gesture from a piece of paper after the charge, thereby admitted the fact of hearing appellant's attorney making a statement from a piece of paper. It is obvious that appellant must have excepted to the judge's charge or instruction to jury at the proper time, and it is the opinion of this Court that the trial judge was in error to prevent the appellant from having his charge open for review in these proceedings. We therefore sustain Count "2" of appellant's bill of exceptions, thereby deprecating the act complained of as being prejudicial to appellant's legal interest.

We now pass to Count "4" of the bill of exceptions, which reads as follows:

"And also because, after the verdict was brought by the jury on October 3, 1960, defendant filed his motion for new trial on the October 5, and on October 6 withdrew said motion, reserving to himself the right to refile; and on the same day, that is, October 6, filed his amended motion which was dismissed and defendant excepted."

Before passing on this count of the bill, we shall quote the amended motion for new trial and the resistance thereto, which read respectively, as follows:

Defendant submitted the following amended motion for new trial:

"1. Because defendant says that the verdict of the petty jury is manifestly against the weight of evidence adduced at the trial and the law controlling, in that defendant, having been sued by plaintiff in an action of debt in an amount of $16,738.01, and defendant having pleaded a counterclaim by the production of a statement of account showing that plaintiff is indebted to defendant in the amount of $70,359.39, which was admitted into evidence and submitted to the jury, it should have been given consideration in arriving at their verdict."

Plaintiff submitted the following resistance to amended motion for new trial:

"1. Because plaintiff avers that, according to the statute laws of Liberia, a losing party in any given case must, within two days after the entry of verdict, file his motion for new trial if he intends to appeal, if the verdict is manifestly against the evidence and the law controlling. Plaintiff submits that defendant, having elected to file said motion three days after the verdict was entered, has waived his right in this regard.

"2. And also because plaintiff avers that the verdict was not manifestly against the weight of the evidence, in that the court admitted into evidence the purported counterclaim of the defendant, and the jury after considering both the counterclaim and the date of the promissory note issued to plaintiff, and deducting therefrom the amount plaintiff received from defendant, arrived at the conclusion that defendant was justly indebted to plaintiff, and were therefore correct in bringing the verdict which they did."

Taking recourse to the statute providing for new trial, we observe certain legal features controlling the said motion for new trial to the effect that, unlike ordinary motions to obtain some order of court, which may be made in writing or verbally, a motion for new trial shall be (a) in writing; (b) filed within a specified time; and (c) filed with the clerk of the court.

The statute controlling motions for new trials provides as follows:

> "When an action has been tried by jury, a new trial may be granted to any or all of the parties on all or part of the issues on any or all of the following grounds:
>
> "(a) Whenever it is proved that any juror (1) has received a bribe; (2) or after being sworn or affirmed has conversed otherwise than openly in the presence of the court with any party to the action or with any agent of any party on the subject of the trial; or (3) was guilty of giving false answers to material questions when examined as to his competency to serve as a juror in the action; or
>
> "(b) If the verdict is manifestly against the evidence, the law, or the instructions of the court; or
>
> "(c) If the debt or damages found by the jury is greatly too much or too little when compared with the evidence in the case;
>
> "(d) On the basis of newly discovered evidence which by due diligence could not have been discovered in time for introduction at the trial." 1956 Code, tit. 6, § 820.

The motion for new trial, being expressly provided for by statute, is considered a quasi-pleading, and as such may be amended subject to the law controlling amendment of pleadings; and having been filed within statutory time, the withdrawal and amendment thereof may be made at any time before assignment for hearing. Therefore, the

trial judge's ruling dismissing defendant's motion for new trial was erroneous.

We shall turn to the facts as brought out in evidence at the trial in this case. The plaintiff testified as follows on his own behalf:

"I have been in this country for twelve years. I worked with Saleeby Brothers for nine years. After I left in 1957 we sat and made an account. Mr. Saleeby brought all of the accounts up to date. After deducting all of our withdrawals, Mr. Saleeby issued a promissory note for $58,000 for myself and my brother. This promissory note was the amount due us up to that date. The date was September 1, 1957. Mr. Saleeby at the time did not have the money to pay right away. He asked us to wait for one year before he could pay the money. After I left I opened my own business and I thought that at that time I would be taking goods from time to time, and they opened a special account for me, registering what I received from them. They used to send me a monthly statement showing what I was owing them. I wrote them a letter accusing them of fraud. They took this letter and reported the matter the first time to Honorable Robert Taylor. He called me up to his house and told me that the letter was very strong, especially as he was my uncle. I told him that I was forced to write this letter because of the fictitious statement they sent me. I told him that if they paid my money I would withdraw the letter, because Mr. Saleeby was very hurt from the letter, for he even reported this letter also to the Lebanese legation. Our minister called us up at the legation. After the minister reviewed the whole matter he asked me to withdraw the letter because I accused Mr. Saleeby of fraud, and he asked Mr. Saleeby to pay my money. Both of us stood in the legation. The minister said: 'Then Mr. Saleeby will pay the money.' I wrote him the first letter in

English. He said it should be put in a different way. I went up to the minister again, and he dictated the letter in Arabic. I wrote the letter and sent it to Mr. Saleeby. Now that is the letter he took to fight me with."

William Edward Kitson, testifying for the plaintiff, made the following statement:

"All I know in this case is that, during 1957, Mr. Haikal resigned from Saleeby Brothers, and after about one month Mr. Haikal came to the general manager, and Mr. Haikal's accounts were brought up by the general manager and thoroughly checked, and he deducted all the withdrawings from the time of his employment up to the time he resigned, and thereafter the general manager gave Mr. Haikal a promissory note of $58,000 to be paid within a year's time. After that, Mr. Saleeby asked me to open a ledger, which I did. And Mr. Haikal started taking goods and cash against his account, and he signed the notes and invoices."

Defendant testified as follows in his own behalf:

"Mr. Eli Haikal worked for us from October, 1949, until August, 1957. In 1957 he left the work. When he left the work I issued a promissory note in Mr. Haikal's favor as well in favor of Mr. Richard Haikal who worked for us in Cape Palmas. When Mr. Haikal left us he started drawing goods as well as cash against this promissory note. Also Mr. Richard Haikal drew only cash against the same promissory note. At the end of 1958 Mr. Eli Haikal asked for a statement of his account which we submitted to him on January 31, 1959. The statement of account came to an amount of $70,359.39, and the promissory note of $58,000. One week later Mr. Haikal wrote us a letter protesting against this statement."

To a jury question propounded to defendant, he made the following answer:

"The plaintiff did not give us any receipt; however, all his drawings and withdrawals of goods were recorded in our books."

Witness William Gibson testified for defendant as follows:

"This signature is for Mr. S. G. Saleeby, and this is one of my reasons for resigning from them; the document is a statement of account. Because Mr. S. G. Saleeby wanted documents after he had given Mr. Haikal good notes for $58,000, and when he brought these documents to me I questioned him and said: 'S. G. Saleeby, do not forget that you have already given a note to Mr. Haikal for all of these accounts.' After this he told me: 'You prepare it.' I had to abide by it, for the business is for him, and I prepared it."

From a careful survey of all the surrounding circumstances it is obvious that there are some missing links in the chain of evidence on either side in this case. Although appellee claims that appellant is still indebted to him in the sum of $16,000, notwithstanding he was furnished invoices for all he drew from Saleeby Brothers, yet he failed to make profert of an itemized statement of account in support of his action of debt instituted against appellant. On the other hand, appellant failed to make clear his counterclaim by attaching a statement of account showing the date of the first and all subsequent withdrawals made by appellee against the promissory note, which would have established the difference between the amount for which the promissory note was issued in favor of appellee and the amount constituting the alleged counterclaim, same being controlled by dates.

In view of the fact that the trial judge erred in dismissing appellant's motion for new trial, and also denying the said appellant the opportunity to record his exception taken to the judge's instructions to the jury in this case, we have no alternative but to reverse the final judgment of the lower court in these proceedings and remand the case

for a new trial to be tried at the next term of the Circuit Court of the Sixth Judicial Circuit, Montserrado County, immediately following the receipt of the mandate from this Court; costs to abide final determination. And it is hereby so ordered.

Reversed and remanded.