UNITED STATES TRADING COMPANY, by and through the General Manager of its Branch in Monrovia, Liberia, A. G. LUND, Appellant, *v.* CHARLES B. KING, Appellee.

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

Argued October 31, 1961. Decided December 15, 1961.

1. A pleading may be amended once at any time before trial if no unreasonable delay is caused by such amendment. 1956 Code, tit. 6, § 320.
2. A reply, and pleadings subsequent thereto, must contain matter not previously pleaded.
3. Special damages must be specifically pleaded and proved. 1956 Code, tit. 6, § 11.

On appeal from a judgment in an action for damages to real property, *reversed and remanded.*

CHIEF JUSTICE WILSON delivered the opinion of the Court.

The record of this case discloses that, on the right side of Lynch Street, in the City of Monrovia, adjacent to the area where a garage was erected by appellant, is a swamp with a pond that flows into another pond during the rainy season. Appellant considered it necessary for the security of its establishment to construct a regular drainage system from the second pond to the ocean.

It was disclosed that, somewhere in the neighborhood, is the house of appellee which he claims was damaged beyond repair because of the increase in the flow of water toward and around his house caused by the drainage constructed by the appellant. Appellee claimed that, as a result thereof, his house had been cracked in three places and was in imminent danger of being totally destroyed; hence his demand on appellant for compensation in the

sum of $15,000 which he claimed to be the value of said house.

Appellant engaged the Stanley Engineering Company to make a survey and check into whether the drainage system could have caused the excess flow of water in the direction of appellee's house, thereby causing the damage complained of. Said engineering company reported that the natural drainage pattern had not been changed by the filling construction; that the water had always drained toward the ocean; and that the appellant could not be held liable for any damage claimed to have been done to appellee's house as a result of high waters during the rainy season.

On the strength of this expert report of the Stanley Engineering Company, appellant disclaimed responsibility and refused to make settlement of the amount claimed by appellee as compensation for damage allegedly done to his premises.

Appellee, maintaining that the responsibility was that of appellant, rejected his disclaimer, and resorted to the courts of justice for redress. This case having been determined by the court below in favor of the appellee the appellant has removed same for review before this Court for the correction of errors claimed to have been committed at the trial in the court below.

Pleadings in the case progressed as far as the rejoinder. Upon the assignment by the trial court for the disposition of the issues of law, appellant's counsel protested against passing upon the law issues at that time, claiming that it was premature since ten days had not expired following the filing of the rejoinder, which was not the last and final pleading provided by statute. He contended that he still had the right to amend his rejoinder, but was being denied this benefit because of the premature action of the trial court. The court, however, rejecting the said protest of appellant, made ruling disposing of the issues of law, and ruled the case to trial on plaintiff's complaint, Count "3"

of the answer, Count "5" of the reply and Count "5" of the rejoinder. To which ruling appellant duly excepted.

We will now review the first important point raised by appellant, which concerns the trial court's disposal of law issues in the case before pleadings had been exhausted, and where ten days had not elapsed after the filing of appellant's rejoinder, in view of the right still reserved to him to amend said rejoinder, if the necessity arose, before a subsequent pleading was filed.

> "Every reply and subsequent pleading (including a reply to a cross-claim) shall be filed and served not later than ten days after service of the pleading to which it is responsible unless additional time therefore is granted in accordance with the provisions of section 33 above." 1956 Code, tit. 6, § 311.
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> "At any time before trial any party may, insofar as it does not unreasonably delay trial, once amend any particular pleading made by him by:
>
> (a) Withdrawing it and all subsequent pleadings made by him;
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> (b) Paying all costs incurred by the opposing party in filing and serving pleadings subsequent to the withdrawn pleading; and
>
> (c) Substituting an amended pleading, to which the opposing party may make a responsive pleading in the same manner as he did to the withdrawn pleading." 1956 Code, tit. 6, §320.

The criterion, therefore, which controls the right reserved to a pleader to amend a pleading at his option is whether unreasonable delay to the trial is caused by an amendment.

It is our considered opinion that the question of undue delay could possibly apply if, after all of the pleadings under the statutes had been exhausted, the ten days allowed for filing a responsive pleading to the one last filed had expired. The party intending to amend would be claiming an extraordinary right if the period of time

allowed by him to amend had passed or lapsed, in which case the enjoyment of such a right could only be available by leave of court. Ordinarily, the right remains that of the party intending to amend; and no undue delay could be claimed where the time allowed him to amend had not expired, and his adversary had not filed a responsive pleading, as in the instant case.

The action, therefore, of the trial judge in proceeding to dispose of the issues of law raised in the pleadings within three days after the filing of appellant's rejoinder, with no indication given of appellant's intention not to amend said pleading, was erroneous. Count "1" of appellant's bill of exceptions is therefore sustained.

Appellant further contended that the trial court, in its ruling on the law issues, disposed of issues of law raised in the rejoinder in the absence of a responsive pleading by appellee. Appellant contended that this could not properly be done, since failure on the part of appellee to file a surrejoinder was tantamount to admission of the law issues therein raised.

This contention of appellant, would seem to be well taken if the law issues raised in the said rejoinder constituted new issues that had not already been raised in the preceding pleadings. But, when questioned from the bench as to whether the law issues to which he referred had not already been raised and traversed in the preceding pleadings, appellant was not in a position to say that they had not been previously raised.

Our statutes on this point provide that the points permitted to be raised in a reply, or subsequent pleadings, are new facts pertinent to the action. From an inspection of the record certified to us, we are not convinced that this was done with respect to the rejoinder in this case.

We will now address ourselves to the main issues of fact involved in the case. They may be summarized as follows:

1. Whether the construction of a drainage system by

appellant within its leasehold adjoining that of appellee caused an extraordinary flow of water during the rainy season, which did irreparable damage to the house of appellee.

2. Whether appellee's house was damaged as a result of such an overflow of water; and if so, whether it was damaged to the extent of the amount claimed and awarded by the empanelled jury.

During argument before this Court, appellee was questioned as to the kind of damages he was claiming for the alleged wrongful act of appellant. He was not certain as to the nature and kind of damages; however, he contended that the common law permitted him to recover special damages under a plea of general damages.

On the point of proving special damages under a general declaration, we quote the following:

> "Proof of special damages cannot be given in evidence under a general allegation in the declaration." *Dennis* v. *Bowser,* 1 L.L.R. 5 (1861), Syllabus 2.

We therefore admit no proof to establish special damages claimed under a general allegation in a declaration.

We will now see to what extent the damages claimed by appellee were established as far as the record before us discloses.

On the request of appellant, the Stanley Engineering Company, claimed by appellant to be a reputable engineering firm, declared as follows in its report:

> "The land-fill project has not changed the natural drainage pattern, since, in the entire area south of the Fair Ground Road, the water has always drained towards the ocean; hence the construction of said drainage was not responsible for the damage to appellee's property."

Countering this expert testimony, appellee engaged the services of George Galestin, Project Engineer, Municipal Division of the Public Works Department, who, reporting on his inspection of the area, stated the following:

"During an inspection of the above-mentioned site, it has been observed that there are two ponds in the area, one exactly at the end of Lynch Street, and the other at the right side before the end. In the rainy season the waters from the latter run through a channel joining the two ponds. It seems that the second mentioned pond has been partly filled, thus reducing its capacity to such an extent that the water it formerly collected goes through the channel and overflows the first mentioned pond. This situation endangers the houses surrounding that pond."

The reports of these experts would seem to conflict, one with the other, although neither was sufficiently specific as to the cause of damage to the house of appellee. In the doubt and uncertainty created by these two reports, the trial court took into careful consideration the testimony of witnesses, especially that of the two expert witnesses, giving special attention to the answers made to questions on cross-examination.

Witness George Galestin, when pressed on cross-examination as to his certain knowledge of the construction of said drainage as the probable cause of the damage claimed to have been done to appellee's premises by the construction of the drainage by appellant, testified as follows:

"Q. As a technical man, please say, for the benefit of the court and jury, whether or not the home can be cracked from the foundation being badly laid?

"A. Yes; but this is not the only reason to prove a bad foundation; an investigation has to be made."

Because this answer created uncertainty as to the cause of the damage claimed to have been done to this particular house, appellant's counsel proceeded on cross-examination to question the witness in the following manner:

"Q. So you cannot swear, nor do you have certain knowledge as to the cause of the damage to the house as being attributed to the flow of water; not so?"

Strangely, and most surprisingly, the trial judge sustained appellee's objections to the above-quoted question on the grounds of its being vague, indistinct, and not the best evidence. We wonder why the appellee elected to object to such an important question, which tended to clarify and remove the uncertainty as to the cause of damage to said house as being due to the overflow of water resulting from the drainage that had been constructed by appellant, when the said witness, in his expert capacity, had examined the area and the house claimed to be damaged, and had reported that such an overflow of water could have put said house in danger. On this particular point, the court inquired from appellee's counsel, during argument, why he did not seize the opportunity and privilege which was available on the re-direct examination, this being his witness, to show with certainty that the claimed damages to said house were not due to bad foundation, since he had investigated the condition of said house, before making his report.

The learned counsel strangely and surprisingly contended that it was the responsibility of appellant, and not his.

There were several questions asked and answers made on both sides, and rulings made by the trial judge, to which exceptions were noted. But because these were not salient and pertinent, except for the two main issues involved in the case, we have not thought it necessary to comment on them. However, to continue, we deem it necessary to quote the definition of special damages as contained in our Liberian Code of Laws:

> "Special damages are any losses or inconveniences accruing to the plaintiff which can be specially traced to the conduct of the defendant. When special damages are relied on, they must be stated in the complaint and proven." 1956 Code, tit. 6, § 11.

Appellee, through the witnesses at the trial, endeavored to establish that the extent of damages done to his premises was so great that the house was no longer habitable, and

that its replacement would cost the sum of $15,000, which was corroborated by Aaron P. Milton and Winston Richards, architects, plus the value of the land, between $600 and $1,000. Still it was not established whether the extent of the damage necessitated the replacement of said building and whether the cracks, three in one instance, and seven in another, were of sufficient magnitude to warrant the reconstruction of the building to the extent of the amount declared by these two architects. There is no showing in the record that an investigation and examination which were made by Mr. Galestin, Project Engineer of the Public Works Department, conclusively established the extent of damages so as to have warranted the verdict of $5,000 awarded by the jury.

Summarizing the basic issues, we find that the evidence has not been sufficient to establish that the drainage of appellant caused damage to appellee's property, as stated in his complaint; nor did appellee establish at the trial the absence of any other contributory cause to the damage, if any, of his premises; especially since his technical witness, Galestin, testified that damages to a building may be caused by a faulty foundation.

We find in Count "5" of the complaint a claim for recovery of the sum of $15,000, which sum was named by architects Milton and Richards as the estimated value of a rebuilt house; yet the jury brings in a verdict in the sum of $5,000, a strange coincidence. If the jury was convinced that said building had been damaged beyond repair, as claimed by appellee, and that the sum of $15,000 was the value of such replacement, we are at a loss to understand how and by what means the jury was able to arrive at the amount of $5,000 awarded in the verdict.

It is therefore our considered opinion that, in the absence of sufficient proof to establish the damage of appellee's premise beyond repair, as alleged in the complaint, or to substantiate the replacement figure of $15,000 testified to by architects Milton and Richards; and in the

absence, also, in the record certified to us, of any proof of the special damages to said premises in the sum of $5,000, awarded by the empanelled jury, or for that matter, proof of any amount in the manner as required by our statutes under special damages when specially laid in a complaint, the verdict of the empanelled jury and the final judgment confirming same be, and they are hereby set aside and reversed with costs against appellee. And it is so ordered.

Reversed.