A. BENT, Agent for C. F. Wilhelm Jantzen, a German Merchant transacting business in Monrovia, Appellant, v**. JOANNA E. COLEMAN**, Appellee.

ARGUED MAY 6, 1915. DECIDED MAY 10, 1915.

Dossen, C. J., Johnson and Witherspoon, JJ.

1.When the evidence inferentially proves that a notice, which is required to be given by one of the parties to a suit, has been sent to the other party, and the latter fails to prove that he has not received same, a copy of said notice will be admitted in evidence.

2. A merchant is not bound to supply factors with goods, when the conditions of the business and the accounts are unsatisfactory, owing to the neglect or fraudulent acts of the factor.

3. He who is silent when he should speak, assents. Mr. Justice Johnson delivered the opinion of the court:

Damages for Violation of Contract—Appeal from Judgment.

This case originated in the Circuit Court of the first judicial circuit, Montserrado County, where it was tried before a jury, and a verdict returned, and judgment entered for the plaintiff in the court below, now appellee, in this court. The defendant in the court below, now appellant, excepted to said judgment, and has brought the case up to this court on appeal.

The records in the case exhibit the following state of facts:

Appellant, who is a merchant, transacting business in the City of Monrovia, and elsewhere in the Republic, contracted with appellee in a written agreement of the following tenor:

1. Appellant agreed to furnish appellee with goods and merchandise at reasonable cash rates; to pay the expenses of said goods to the factory at Brewerville, and of produce given to said firm from Brewerville to Monrovia;

and to pay her ten per cent commission.

2. Appellee, in consideration of the conditions mentioned above, agreed to serve appellant as his factory keeper, to become responsible for all shortages in the stock, and not to give out any of the said goods or produce on credit, and if she did, it would be upon her own responsibility; and to be responsible for the transportation of all goods and produce, to and from the waterside to the business premises.

3. It was also agreed that the agreement should be binding upon both parties for one calendar year certain; "except if either party becomes dissatisfied, in which case a notice of thirty days will be given, either to the other;" and that appellant should rent the store of appellee for the time of said agreement at the rate of one hundred dollars per annum.

It further appears from the records that in accordance with the terms of said agreement, appellant supplied appellee in the month of June with goods to the value of eleven hundred dollars, more or less, and that appellee opened the factory in Brewerville; and that additional amounts of cash and merchandise were supplied by appellant to appellee who in return remitted produce, etc., to appellant.

That on the 11th day of August, 1911, appellant closed the business, and terminated the agreement, turning over the goods that were then in stock to one Garnet a factor in the employment of appellant and that appellee acquiesced in the arrangement, uttering no protest and making no objections thereto.

That on being informed by appellant that the shortage in her stock amounted to $579.92, appellee promised to call at appellant's business place and adjust the account.

As appellee neglected to call with her books, etc., to adjust the account, appellant entered an action of debt for the recovery of the amount claimed as shortage ; whereupon appellee entered an action of damages against appellant claiming that he had violated said contract; (a) by fraudulently refusing on the 29th of June, 1911 to supply her with goods, said contract

being in force but two months, for the remainder of the stipulated time, without assigning any just or real reason based upon said contract; (b) by refusing to pay for one year's rent of her store; and (c) by refusing and neglecting to give to appellee the notice of thirty days as stipulated in said contract.

Appellant sets up the following defense to the action:

1. That the goods asked for were not in stock.

2. That appellee had, prior to the said 29th day of June, violated her part of the contract.

3. That appellant duly gave notice in writing to produce at the trial, appellant's letter of the 7th of July, containing said notice.

These are the undisputed facts in the case. We come now to a consideration of the essential points raised in the bill of exceptions.

The defendant below excepted to the verdict of the jury and the judgment of the court.

1. Because the said court sustained the objection offered by the plaintiff to the admission of book No. IV, containing copy of letter, notice of the termination of the contract sent plaintiff.

2. Because the jury returned a verdict against defendant to the effect that plaintiff should recover $150.00 damages, and

3. Because the court rendered final judgment against defendant for said sum.

Other exceptions were taken at the trial and are embraced within the bill of exceptions filed in the case, but we deem them unimportant. We shall therefore, only notice the points above mentioned.

In the first place, we are of the opinion that the court below erred in not admitting as evidence, that portion of the book marked No. IV, which

contained a copy of the notice alleged by appellant to have been sent to appellee, expressing his intention to terminate the agreement.

The evidence of witness Holland, produced at the trial of the case by plaintiff below to prove that she had received no such notice, shows that a letter was given him for plaintiff below about the time above mentioned; and that subsequently he sent said letter to plaintiff, who meeting him afterwards asked him why he had kept the letter so long, saying that it was from said defendant, and that on his return to Monrovia, Mr. Bent, defendant's agent, asked him if he had given the letter to plaintiff.

There is also the evidence of the said Bent who testified that the only letter sent to plaintiff by the witness Holland, during the year 1911, was that containing the notice in question.

We are of the opinion that the evidence inferentially proved that the said notice had been given by defendant, and that on her failure to produce said letter or to prove that she had not received same, defendant had a legal right to offer a copy of said letter in evidence. (See Lib. Stat., ch. XI, sec. 29.)

We come now to a consideration of the question raised by appellant with regard to the verdict and judgment, and to the evidence in the case.

It cannot be denied that factors are too often in the habit of giving out credit, even when it is against the stipulations of their contract, or the instructions of their employers. Such amounts being seldom or never recovered by the factor or his principal— and this has been the exeprience of most mercantile businesses in Liberia.

It was undoubtedly, then, the intention of appellant when he inserted in the agreement, the clause with regard to credits—a clause which is almost invariably inserted in all agreements of a similar nature throughout the country, to protect himself against such losses, and yet we find about a month after the commencement of the business in Brewerville there was a deficit of about $150.00 in the stock of appellee which appellee admitted, when her attention was called to the shortage by appellant, was due to her crediting nearly the whole of the amount to some of her friends.

It was argued by counsel for appellee that appellee was not prohibited by the terms of the agreement to give credit provided it was done on her own responsibility. We are, however, of the opinion that the spirit and intent of the proviso contained in the fifth clause of the agreement was to forbid appellee from giving credit.

It was also ingeniously and forcibly argued by the learned counsel that appellant could not terminate the agreement before the expiration of a year, unless he informed appellant of the cause of his dissatisfaction, and that during the whole of that time his client must be supplied with goods whenever she applied for them, and be paid a year's rent for her store.

We cannot follow the learned counsel in his train of reasoning to the conclusion at which he arrived, as such a conclusion is not in accordance with the principles of law.

The language of the agreement is plain, and, in our opinion admits of but one construction—if the business were satisfactory to both parties, it was to be carried on for one year and appellee's store would be rented for that period of time. If, on the other hand either party became dissatisfied, the agreement could be terminated by either giving thirty days' notice to the other, the rent of the store terminating with the agreement.

We cannot accede to the proposition advanced by the counsel for appellee that a merchant must supply factors with goods whenever application is made for them, without reference to the condition of the business, the acts of the factor or state of the accounts.

Passing by all other questions that were raised in the case, we are of the opinion that the verdict was manifestly against the weight of evidence and the law.

The evidence does not sustain the charge that appellant fraudulently refused to supply appellee with goods. It is held that in equity, fraud may be presumed, but in law it must be proved. (Bouv. L. D. Fraud.)

The evidence clearly showed that appellee had received the greater portion of the rent in money and that the remainder together with the commission had been placed to her credit, and that no objection to this course had been made by her. He who is silent when he should speak, assents (Law Maxim). In the case *Tubman v. Westphal, Stavenow & Co.* (I Lib. L. R. 367) it appeared that appellant opened an account business with appellee to a large amount, and was then indebted to appellee, in the sum of twenty-five hundred dollars; appellees at the time being in possession of appellant's store at the rental of three hundred dollars per year. Appellant applied to appellee for his lease money—three hundred dollars, whereupon appellee informed him that they had placed the said sum to his credit on their books; appellant dissented and gave notice to appellees to vacate the premises in question within fifteen days or he would eject them by law. Appellee to prevent the ejectment sued out an injunction which was brought up on appeal to this court. In giving judgment for appellee the court remarked, "the court knows no north, no south; no rich, no poor; no Liberian, no foreigner; and it can guarantee no rights or privileges than what the Constitution and the laws of the land guarantee; and the court will not lend its aid to men who seek to take advantage of others by evading a righteous and equitable course of conduct, however adroitly they may endeavor to cover their intention, for equity is righteousness."

We are therefore of the opinion that the judgment of the court below should be reversed, with costs, and it is so ordered.

L. A. Grimes, for appellant.

Arthur Barclay, for appellee.