GALLINA BLANCA, S.A., et al., Appellants, *v.* NESTLE PRODUCTS, LTD., et al., Appellees.

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

Argued March 30 and 31, 1976. Decided April 23, 1976.

1. Courts cannot raise issues, but are bound to decide them only when raised in the pleadings.
2. Where a party to a proceeding, whether served with process or not, admits by some act or conduct the jurisdiction of the court, he may not thereafter deny its jurisdiction because his interest has changed.
3. The Supreme Court only takes cognizance of matters found in the certified record of the proceedings in the lower court.
4. The trial judge must first pass upon all issues of law raised in the pleadings, deciding all material issues.
5. Neither the parties to an action or either of them can reach an understanding with the judge not to rule upon issues of law, and when they are not ruled upon, the case will be remanded.

Appellees commenced an action for damages as a result of infringement of trademark. A judgment was recovered by appellees, and an appeal was taken by defendants. The principal contention of appellants was that the trial court had not ruled on the issues of law.

The Supreme Court examined the record and held that even though the parties seemed to have assented to the judge's ruling that no issues of law were raised by the pleadings, it did not change the rule which requires disposition of issues of law before the trial. The judgment was *reversed,* and the case was *remanded.*

The Dennis law firm, by *Julia Gibson,* of counsel, *Toye C. Barnard* and *Moses K. Yangbe,* for the Henries law firm, for appellants. *Joseph Findley* for appellees.

MR. JUSTICE HENRIES delivered the opinion of the Court.

The appellees, Nestle Products, Ltd., makers of "Maggi" bouillon cubes, brought an action of damages in the Civil Law Court for the Sixth Judicial Circuit, Montserrado County, against Gallina Blanca, S.A., manufacturers of "Mammy" bouillon cubes, for infringement of the "Maggi" trademark No. 14862/101032, of August 14, 1972, and No. 20270/847 of February 20, 1970.

The appellees alleged that appellants flooded the Liberian market with "Mammy" cubes in wrappers and cans, with a graphic layout and color scheme of the packings strikingly similar to "Maggi"; that the matter was brought to the attention of the Ministry of Justice, and the County Attorney wrote the Attorney General that "Mammy" packings are an unlawful imitation of the "Maggi" bouillon cube packings; that after this determination by the County Attorney, the appellants resumed imports and sales of "Mammy" cubes in the same wrappers but with a slight modification in the layout and shade of the colors red and yellow, without eliminating the overall similarity to "Maggi" cubes; that appellants subsequently applied to the Ministry of Foreign Affairs for registration of the trademark of their packings, and appellees objected to the registration on the ground of similarity, but contend that such objections do not sufficiently protect their interest; that as a result of this infringement appellants encouraged retailers of "Mammy" cubes to palm off those cubes as "Maggi" cubes, thus seriously affecting "Maggi" sales so that imports of approximately $75,000 in 1970, were reduced to $65,000 in 1971; and that under the principle of *idem sonans* consumers easily confuse the sound "Mammy" with "Maggi," and thus buyers in retail stores take one for the other.

Appellants denied any infringement of the "Maggi" trademark, and averred that the appellees only registered the trade name "Maggi" and not the design of the container; that what is attached to the appellees' certificate of registration of trademark and appears to be a label of a

container for the product, bears no resemblance to the can design used to marked "Maggi" cubes nor to the "Mammy" can design; that the exact wrapper banderole schematic design and colors registered by appellees differs substantially from appellees' banderole presently in use and appellants' banderole; that even if appellees' "Maggi" can design and banderole presently in use had been properly registered, the "Mammy" can design and banderole are sufficiently different so as not to constitute any infringement; that the County Attorney never ruled that appellants' "Mammy" packings are unlawful imitations of the "Maggi" packings; and that because there are vast differences in the wrapping, price, size, and quality of the two products, the action should be dismissed.

A motion to dismiss was denied and an action for a preliminary injunction filed by the appellees was not upheld. The case was tried and the jury brought in a verdict of $75,000 in favor of appellees, and judgment was rendered accordingly. It is from this judgment that appellants appealed to this Court.

The appellants filed a 28-count bill of exceptions, but we find that only four of these counts warrant our attention at this time. We shall deal with the first two counts now, and they read in part as follows:

> "(1) that defendants filed a motion to dismiss for lack of personal jurisdiction in that the writ of summons was served on C. Cecil Dennis, Jr., who is not an officer of the corporation nor was he authorized to receive process on behalf of the defendants. The court sustained the resistance and overruled the motion on the ground that the defendants failed to give a better writ, and without deciding the issue of whether C. Cecil Dennis, Jr. was authorized to receive said process.
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> "(2) that according to the records in this case there are two separate parties defendants, Gallina Blanca and Helou Brothers, and according to the returns of

the sheriff, the manager was not present, therefore, the summons was served on the assistant manager without any indication whatsoever as to the assistant manager of which of the defendants' corporations. Gallina Blanca having filed a motion for lack of jurisdiction over its person because C. Cecil Dennis, Jr. is not any officer of the corporation nor is he authorized to receive process on behalf of the corporation, the judge should have investigated to ascertain which assistant manager the summons was served on."

Recourse to the motion to dismiss shows that only one issue was raised therein, and that was the issue stated in the first count of the bill of exceptions. Under these circumstances, count 2 must fall because the trial judge could not have instituted an investigation into an issue not raised, since courts cannot raise issues, but are bound to decide them only when raised in the pleadings. *William* v. *John,* 1 LLR 259 (1894), *Clark* v. *Barbour,* 2 LLR 15 (1909), *Pratt* v. *Phillips,* 9 LLR 446, 453 (1947). And that issues not having been raised in due time and form in the trial court cannot be considered on appeal. *Johns* v. *Republic,* 13 LLR 143, 152 (1958).

As to count 1 of the bill of exceptions we observe that the issue was properly raised in the motion to dismiss which was filed simultaneously with the answer. The Civil Procedure Law provides that "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 any of the following grounds . . . that the court has no jurisdiction of the person." Rev. Code 1:11.2 (1)(b). And that "a party waives any defense enumerated in paragraph 1 of this section which he does not present either by motion as hereinbefore provided or in his answer or reply." *Id.,* 11.2(6).

Given the proper raising of the issue, let us determine whether it has any merit. The motion requested the dismissal of Gallina Blanca, S.A., as a party defendant be-

cause the corporation was not properly brought under the court's jurisdiction through service of process on Mr. Dennis, who is not an officer of the corporation and who is not authorized to received service of process. We observe that Gallina Blanca, S.A., by and through C. Cecil Dennis, Jr., was a party to the preliminary injunction suit, but in their answer to this action, filed on the same day as the motion to dismiss, this issue was never raised; and that Gallina Blanca, S.A. has not denied that they are the manufacturers of "Mammy" cubes. Since Gallina Blanca, S.A. opted to appear and defend, through C. Cecil Dennis, Jr., in both the case at bar and the injunction action which was ancillary to the main action, never denying their interest in "Mammy" cubes, we must conclude that they were properly brought under the jurisdiction of the court. Their every act pointed to the inescapable conclusion of jurisdiction over their person. Assuming that C. Cecil Dennis, Jr., had no authority to receive process on their behalf, they did not leave Mr. Dennis to his own devices, rather they accepted the process, retained the Dennis law firm, and filed an answer, pleading to the merits of the complaint, thus voluntarily appearing. Where a party to a judicial proceeding admits by some act or conduct the jurisdiction of the court, he may not thereafter deny the jurisdiction simply because his interest has changed. Likewise, where a defendant, though not served with process, takes the course as is consistent only with the proposition that the court has jurisdiction of the cause and of the person, he thereby submits himself to the court's jurisdiction. *King* v. *Williams,* 2 LLR 523 (1925); *Lloyd's Insurance Co.* v. *African Trading Co.,* 24 LLR 70 (1975). A party defendant is one who has been served with process commanding his appearance or who, having notice that process has been issued or ordered issued, voluntarily appears and submits to the jurisdiction of the court. *Tubman* v. *Murdoch,* 4 LLR 179 (1934). Neither misnomer nor misjoinder

of parties is ground for dismissal of an action. Names of parties may be corrected at any time; and parties may be dropped at any stage of the action on any terms that are just. Rev. Code 1:5.4, 5.56. In view of the law cited above, the trial judge did not err in denying the appellants' motion to dismiss and, therefore, count 1 of the bill is legally untenable.

The third count of the bill of exceptions raised the issue that the trial judge did not properly dispose of the issues of law raised in the answer and reply. According to the certified records in this case, the trial judge made the following record with respect to the legal issues: "From a careful perusal of the pleading in his case, which progressed as far as the reply, counsel for both parties concede, and the court is also satisfied from a perusal of the written pleadings, that there are no controversial issues of law. The case being one which admits of jury trial is hereby ruled to trial by a jury on the complaint comprising seven counts, and the reply comprising nine counts, and the answer comprising eleven counts and it is so ordered."

The appellants argued that the issues of law were never passed upon, and that they never made such a concession. If this is true, we cannot understand why exceptions were not taken to this ruling, for exceptions are necessary for appellate review, and this Court takes cognizance only of matters found in the certified record of the proceedings had in the lower court. Rev. Code 1:21.3, 51.7, 51.15(2); *Anderson* v. *McLain,* 1 LLR 44 (1868); *Elliott* v. *Dent,* 3 LLR 111 (1929); *Blamo* v. *Republic,* 17 LLR 232 (1966). In view of the law just cited, ordinarily we would be estopped from considering this issue, but we deem it of great import that we pursue it further, because the trial judge's comment could have a serious effect upon the law and practice in this jurisdiction. The trial judge must first pass upon all issues of law raised in the pleadings. This principle of law, first enunciated in *Williams*

v. *Allen,* 1 LLR 259 (1894), has been followed consistently by this Court through the years. See *Claratown Engineers Inc.* v. *Tucker,* 23 LLR 211 (1974). Not only has the Court repeatedly espoused this principle, it has gone further to declare that the trial court in ruling on legal issues must make its ruling so comprehensive as to embrace all the material issues raised by the pleadings. *Zakaria Bros.* v. *Pannell, Fitzpatrick,* 19 LLR 170 (1969).

Having said this, let us see whether any issues of law were raised in the pleadings. The appellants referred to count 4 of their answer which states that the complaint failed to state any grounds upon which Food Specialties Liberia, Inc., was made a party-plaintiff in the action, or why it should be entitled to the relief sought in the complaint. See also count 2 of the reply. They also argued that count 6 of the answer alleged that the plaintiffs submitted a tradename "Maggi" for registration, and not a design for the container; and in count 5 that the trademark "Maggi" layout had not been properly registered in keeping with law.

In count 3 of the reply appellees denied any improper registration of their trademark, and alleged that the defendants have failed to give color as to what constitutes proper registration of the trademark "Maggi." It is clear to us that the issues of joinder of parties and what constitutes proper registration of trademark are all issues of law which must be ruled upon by the trial judge, and in a manner which complies with the several decisions of this Court. These issues were never passed upon and as a result they were raised again in the form of questions put to witnesses. In one instance, the appellants asked a witness the following question: "According to your Exhibit 'C,' which is the trademark certificate of Nestle marked by the court P/4, you have shown what was actually registered by Nestle, which is the word 'Maggi' with a bowl below said word. In keeping with your Exhibit 'A,' marked by court P/1, and which you pres-

ently have on the market for sale, same is entirely different from what you said certificate authorizes you to produce and/or offer for sale. Please explain this or harmonize the two." The appellees objected on the ground that it involves an obvious legal issue, and the objection was sustained by the court. This question alludes to counts 6 of the answer and 3 of the reply.

In the other instance, appellants asked the question, "From every indication Nestle are the producers of 'Maggi.' Please explain how Food Specialties became a party to this action." Again the appellees objected, on the ground that the question involved a legal issue, and the court sustained the objection. Perhaps this question would not have been necessary had the court passed on the same issue in count 4 of the answer.

It is mandatory that the trial court pass upon issues of law before ruling the case to trial on the facts. Therefore, neither the parties to an action nor either one of them can reach an understanding with a judge not to rule upon legal issues, and where they are not ruled upon, the case will be remanded. To hold otherwise would violate a settled principle of law, and create chaos in the trial of cases in our courts.

In view of the foregoing, the judgment is reversed and the case remanded for a new trial, beginning with a proper disposition of the issues of law. Costs to abide final determination of this action. And it is hereby so ordered.

Reversed and remanded.