MOBIL OIL, INCORPORATED, by and through its manager, R. J. EMICH, Appellant, *v.* SEKU SANO, Appellee.

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

Argued March 14, 1968. Decided June 14, 1968.

1. A party, under a general denial, is not barred from cross-examination of his adversary's witnesses so long as he does not introduce matters of an affirmative defensive nature.
2. Under a general denial, a party may rebut the evidence produced by his adversary, which need not be restricted merely to contradiction of a witness' testimony, but can be evidence in denial of some affirmative fact advanced by the other side.

In an action for damages to personal property, the defendant failed to file an answer, and was, therefore, deemed to have entered a general denial. At the trial, he made an application for suspension of the proceedings to enable a witness to be properly summoned to rebut testimony. The application was denied, the jury found for the plaintiff, and judgment was entered, from which defendant appealed. The *judgment* was *reversed* and a new trial was ordered.

O. Natty B. Davies and *Lawrence A. Morgan* for appellant. *Samuel B. Cole* for appellee.

MR. JUSTICE MITCHELL delivered the opinion of the court.

In accord with the record in the case certified by the court below, Mobil Oil (Liberia) Incorporated, by and through its manager, R. J. Emich, is appellant, and Seku Sano, of Ganta, is the appellee.

The records shows the background of this case. Seku Sano, the appellee, sued out an action of damages for

injury to personal property in the Circuit Court, Sixth Judicial Circuit, Montserrado County, December 1965 Term, for $1,880.00. Defendant appeared, and filed his answer, which necessitated the withdrawal of the complaint, with the reservation by the plaintiff of his right to refile.

Plaintiff again filed in the March Term of the same court. This refiling of the complaint was done on February 23, 1966, but for some reason the defendant below, now appellant, failed to file an answer to this second complaint. Hence, his inaction amounted to a general denial and barred him from presenting any affirmative matter. The case was subsequently heard in the lower court and the verdict of the jury awarded plaintiff damages in the sum of money sued for. A motion for a new trial was filed, heard, and denied, after judgment affirming the verdict. Defendant excepted thereto and moved the court for an appeal, which has brought the case before this appellate court for a review.

Appellant's bill of exceptions contains four counts, and counts one and two we shall set forth in this opinion because they appear to be germane to the grounds of the appeal.

> "1. Because your Honor overruled defendant's application to suspend the proceedings in order to allow him an opportunity to make search for witnesses H. M. Hassan and G. Blowa Dunbar, whom defendant subpoenaed to rebut certain material evidence and testimony given by the plaintiff's witnesses. To which defendant then and there excepted.
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> "2. And also, because in the absence of these witnesses and the denial to the defendant of an opportunity of bringing the real facts to the jury, which conduct of the court was performed in the presence of the jury itself, the said jury on the 16th day of May, 1966, returned a verdict against the defendant. To which defendant then and there excepted."

When this case was reached on our trial docket and called for hearing, counsel for both parties being present, appellant's counsel in his argument strenuously maintained that the court below erred by denying the defendant his right to introduce his witnesses to rebut the testimony of the plaintiff and his witness, Alhaji Sandi, the driver of his Renault bus. Especially so, since the usual notice had been given during the trial that witnesses would be introduced to rebut said testimony.

Appellee's counsel contended that the defendant at the trial could only offer proof in denial of plaintiff's allegations, and had adequately been allowed to do so by the court.

Before considering the grounds of the bill of exceptions, we shall first direct our attention to the records and ascertain how far they go in support of the arguments advanced on either side. Found on sheet one of the 39th day's sitting of the Court, May 16, 1966, is this record made by the trial judge.

> "The Court: During the trial of this cause, defendant's counsel gave notice to court that they would rebut certain testimony which was brought out in answer to questions propounded. Since a witness can only testify to specific questions as a rebuttal, the defense is hereby given that privilege to introduce his witnesses to rebut only that species of evidence to which he gave notice. And it is hereby so ordered."

To this ruling of the court, the defendant excepted, and thereafter witness S. B. Mensah was brought to the witness stand, but because of objections from the plaintiff's counsel, which the court sustained, he was discharged without the privilege of rebutting any testimony, for which purpose he had been brought as a witness. As the trial of the case continued, just at this point, the record shows the following,

> "The Court: After witness S. B. Mensah had testified as a rebuttal witness in this case, the defendant

brought to our attention that earlier they had requested a subpoena to be issued on witnesses H. M. Hassan and J. Blowa Dunbar, to rebut certain species of evidence which had been brought us during the trial of this case.

"According to the return of the Sheriff, H. M. Hassan is without the Republic of Liberia and, hence, he could not serve the writ on him, but as to J. Blowa Dunbar, according to the return of the Sheriff, he was without the County of Nimba. In view of this, defense counsel has the following to say: 'Defense counsel wishes to observe that the witnesses which he considered to be brought to testify on his behalf and for whom the machinery of the court has been put into operation, are rebutting witnesses who could not be subpoenaed before the said case came on for trial and the witnesses for the plaintiff commenced testifying. Defendant submits further that the rule requiring witnesses to be subpoenaed before the case is ready for trial can, therefore, not apply, because he was limited to denial only of evidence introduced by plaintiff. The witnesses subpoenaed are to rebut certain material testimony given by the plaintiff's witnesses. In order that a fair and impartial trial be meted out and the defendant have an opportunity to put in his defense, the defendant is requesting that the matter be suspended so as to afford the court the time to make another subpoena for the witness who is within the Republic of Liberia, thereby giving the defendant his right under due process of law.' Plaintiff opposed this argument.

"The Court: Any application or motion that is not made in good faith shall be denied. Although the defendant's counsel gave notice that they would rebut certain testimony of one of the plaintiff's witnesses in this case, witness S. B. Mensah having already testified to this point, it is the opinion of this court that the

> objection to the application made by the defendant's counsel being cogent, said objection is, therefore, sustained and the trial of this case is hereby ordered to proceed. And it is hereby so ordered."

Having closely examined all the record in this case, we cannot harmonize our opinion with that of the trial judge insofar as it relates to his ruling above, because, in substance, it appears to be biased.

It is a fact that the defendant negligently restricted himself to denial of the facts in the case and thereby deprived himself of the exercise of any legal right to introduce any affirmative matter during the trial, but he should not have been denied the right of producing rebutting witnesses so long as he was kept within his bounds according to law.

From the records before us it does not appear that defendant's counsel gave notice of his intention to rebut any particular portion of the testimony of witnesses Seku Sano and Alhaji Sandi, but rather the whole, and the trial judge did err, in our opinion, when he ruled as such. Besides that, we cannot forget that one being placed under a general denial is not barred from cross-examination of his adversary's witness so long as he does not introduce affirmative matters, nor does a bare denial restrict the party against whom it operates to his right to rebut.

In *Bryant* v. *Bryant,* 4 L.L.R. 328 (1935), at p. 344, the Court said:

> "Rebutting evidence means not merely evidence which contradicts the witness on the opposite side and corroborates those of the party who began, but evidence in denial of some affirmative fact which the answering party has endeavored to prove. Where the evidence is clearly rebuttal, the one offering it is entitled to have it admitted, and its exclusion is error. Hence, we are of the opinion that the judge should have permitted the defendant to give evidence contradicting the testimony of the plaintiff, both for the purpose of . . . as

well as to allow him to argue the principle contained in the legal maxim: *falsus in uno falsus in omnibus.*"

This principle on rebutting evidence also has support in Bouvier's and Black's LAW DICTIONARIES. Witness Blowa Dunbar not being without the confines of the Republic, according to the return of the Sheriff to the court, the defendant's application for him to appear and testify as a rebutting witness should not have been denied, and the trial judge's denial of this application was error. Therefore, counts two and one of the bill of exceptions are hereby sustained.

Therefore, the judgment is hereby reversed and the case remanded for a new trial on the same complaint of the plaintiff, with costs against the appellee. And it is hereby so ordered.

Reversed and remanded.