WILHELM ZEISER, Agent for J. W. West, Appellant, vs. **JOSEPH G. MONTGOMERY**, Appellee.

[January Term, A. D. 1906.]

Appeal from the Court of Quarter Sessions and Common Pleas,Grand Bassa County.

Debt.

Where the relation of principal and factor or agent is created by written instrument, the principal should not bring an action of debt on such contract; the action brought should be for fraud or embezzlement.

This is a case that has been pending in this court since 1903, emanating from the Court of Quarter Sessions and Common Pleas, Grand Bassa County. At the last session (1905) of the Supreme Court, it was entered on the calendar as one of the cases sent up for review, but owing to many gross irregularities found in the record of the case in the trial below, the Supreme Court found it impossible to give it such judication as would result in justice; consequently it was remanded to the court from which it emanated, to be tried *de* novo. At this session it presents itself purporting to have been tried and concluded, but appellant, not being satisfied that he has received justice, appeals for another review.

From the record of the case, which has been carefully gone over, the Supreme Court finds that there still exist irregularities; but to prevent great expense to the litigants, the court will in the most possible legal and equitable manner endeavor to conclude the matter.

The Supreme Court, the last resort of judication of the country, recognizing its grave responsibilities and obligation to the law as well as to the people, keeps before its eyes, and in its heart, that there cannot be tolerated any partiality or favor to or for any man, whether citizen or alien. The condition of men is never taken into account. In fine, the court knows only law and justice, and it will always, according to its legal lights, conscience and convictions, endeavor to

deal justice to all. And just here it may be in place to enunciate that the Supreme. Court, one of the co-ordinate branches of the Government, is awake to all the interests of the country, and will do no act to impair international amity by taking or allowing advantage to be taken of citizens and subjects of foreign nations, residing in Liberia, who may have business relations, or otherwise, with Liberia.

The Supreme Court, aside from its legal knowledge, has a knowledge of human nature ; it knows that men are selfish and mercenary, to a certain extent, and will take advantage of other men when the opportunities for so doing present themselves. While this enunciation, to the mind of the court, is true, still, the court cannot lend its aid in giving an advantage to aliens over citizens of the country in legal matters, simply to satisfy the prevailing opinion that Liberians seek to rob aliens in their intercourse with them, nor will the court give its aid to Liberians in fraudulent transactions with aliens. The court recognizes that Liberia is a weak nation; but honor is honor, and the court will only move on lines of honor, integrity, law and justice.

Now, then, there comes up before us a case that was once before us, for final review and conclusion. It might appear to the casual observer and the illegal and illogical mind that the case has been properly dealt with by the court below; but a review of the record will show that irregularities still exist in the conduct of the case in the court below, as well as in the several rulings, to wit:

1. Plaintiff, now appellant, brought an action of debt on a written instrument in the court below, to recover three thousand two hundred and thirty-nine dollars and twenty-three cents, as is laid in the declaration. The defendant, now appellee, joined issue by filing an answer of general denial of the truth contained in the declaration, which he said he was ready to prove. In the meantime defendant, now appellee, served on plaintiff, now appellant, a notice to the effect that he desired to put in evidence, at the trial of the case, the contract or agreement made and entered into between them in the month of October, A. D. 19oz, and also notified the plaintiff, now appellant, to produce the original contract before the court at its March term, A. D. 1905. Subsequently, the court below gave a ruling against the appellee's answer, to the effect that it formed no part of the record in the case, upon the grounds that it was not intelligible and distinct, nor was it a sufficient answer to

plaintiff's complaint. In the opinion of this court, the court below erred in its ruling on this point, which ruling is against the statute regulating the form of an answer, which gives defendant the right to answer by general denial any declaration made against him. (Lib. Stat. Chap. 5, secs. I, 2, 3 and 4.)

2. Upon the dismissal of the defendant's (now appellee's) answer, the court proceeded to render an imperfect judgment, upon the ground that the answer was not intelligible or distinct, or a sufficient answer to the complaint, and subsequently submitted the finding of the debt claimed to the jury, in which this court says the court below erred. In the case of an imperfect judgment for the plaintiff in an action of debt, in which there is a written instrument, or instruments, ascertaining the amount of the debt, it shall be the duty of the court to ascertain the debt or the damages to be recovered from defendant. In all other actions of debt or replevin, and in all other contracts or damages it shall be the duty of the court, except as otherwise provided for, to cause the jury to ascertain the debt or damages. (Lib. Stat. Chap. 16, secs. 9 and 10.)

The case as entered, whether legally so or not, as will be shown further on, is debt on an instrument of writing; consequently, no jury had the right to ascertain the amount of debt, even had they brought in a verdict in favor of the plaintiff, now appellant, and the court erred in submitting the ascertainment of the debt to the jury. And if there was not sufficient evidence to sustain the cause in favor of the defendant, now appellee, the court should have so instructed the jury. In this respect the court erred, in that after the arguments in the case it was submitted by the court to the jury for a verdict, which verdict was found in favor of the defendant, now appellee, exonerating him of the debt claimed by plaintiff below. The plaintiff, now appellant, thereupon motioned the court for a new trial, which the court granted after hearing the arguments pro and con.

On the 7th of July, 19o5, the new trial of the case began, but no written pleadings were allowed to be offered in the case by the court, upon the ground that the court had already passed on those pleadings in the first trial. That meant that the defendant's answer and demurrer were still held as ruled out, and the imperfect judgment, based upon the ruling out of the defendant's answer, still held good in the new trial. The defendant offered in evidence the contract between himself and the plaintiff, also his receipts for various

amounts paid, that it might be proven that there was no specific debt otherwise than that growing out of the contract, and also to prove that the amount claimed by the plaintiff had been paid by him, the defendant; which evidence the court rejected, upon the ground that defendant was barred from introducing any new evidence which had not been previously introduced in the case. This Supreme Court says was error. (II Bouv. Law Dict. under the head of "New Trial.") The arguments by the respective attorneys being concluded, the court submitted the case to the jury for verdict, when a second verdict was found for defendant; whereupon the plaintiff excepted and prayed an appeal to the Supreme Court.

Now, then, this court says that it is most difficult to understand how the two juries could find two verdicts for the defendant, seeing that all of the rulings of the court on the written pleadings of the case, and on the evidence, were in favor of the plaintiff. The defendant, as the record shows, was allowed to put in only one receipt as evidence, and that having no money value.

A careful review of the whole case, in all its parts, as it was before the court below, has certainly perplexed this court no little. Throwing upon it all the light possible, the irregularities are of such a nature that this court would not be able to give equitable justice in the premises, but would have been compelled to remand the case for a new trial, had not the counsel for both parties mutually agreed to submit all of the evidence of every nature—contracts, receipts and book accounts— that had been previously offered in the court below as evidence, and rejected, that we might be satisfied as to the nature and justness of the claim. The counsel on both sides made the following motion :

Whereas, it appears from the record in the above entitled cause (J. W. West, appellant, vs. J. G. Montgomery, appellee) the copy of the agreement, receipts and book-account were offered in the lower court as evidence and were not transmitted to the honorable Supreme Court with the record in the said case, and wishing substantial justice done to all, the attorneys at law for and on behalf of the appellant and appellee joined in tendering the above referred to agreement, receipts and book-account to your honors, for your review, in connection with other records in said case.

Respectfully submitted, F. E. R. JOHNSON and S. A. Ross, Counsellors for Appellant.
CHAS. B. DUNBAR, Counsellor at Law, for Appellee.

Reviewing the evidence as tendered by the mutual consent of the parties, the court discovers the following legal facts:

1. That appellant contracted with appellee to do mercantile business for him as a factor or agent, and that he should receive five per cent on all produce bought, and twenty-five dollars per month for every four hundred dollars bought for the month.

2. It is further discovered that in the event that appellee proving a defaulter, action against him could be brought by appellant on book-account, or on note of hand, or for damages for violation of contract; and that each would be a bar to the other.

3. It is further discovered that appellee had the right to return all goods, in good condition, not sold, which were to be put to his credit.

4. It is further discovered that appellee should sign notes of hand for all amounts received; but said transactions or amounts should be kept in a ledger, or any other book used in the book-keeping of the said firm, that the debits or credits could be fairly seen.

5. It is further discovered from book-accounts that appellee's indebtedness was $3,239.73. The receipts, return of goods, five percentage and remuneration show as follows to his credit: Receipts, $208.26; return of goods, $441.82; percentage, $104.13; reward for produce bought in June and July, 1903, each exceeding four hundred dollars, according to the contract, $50.00; amount put against note, $296.37; total amount paid, $2,974.98. Balance due, to close the account under the contract, $264.78.

Now, then, from the record of the case, which this court has carefully examined, there is no evidence found to prove that appellee owed appellant the amount claimed in the declaration, previous to the making of the contract between them, that the appellee should give a note of hand for the security of

that amount; but the contract does show that the amount charged appellee in the book-account is the same for which appellee gave a note of hand, and that there was no separate account from the book-account.

And this court further says that the action as brought is wrong and illegal, for the reason that appellant and appellee were transacting business under a mutual contract, which contract created appellee a factor or agent; hence, he could not be considered an ordinary debtor. Consequently there is no debt except under the contract. The action brought should have been for fraud or embezzlement. (Bouv. Law Dict. under the heads of "Contract," and "Fraud and Embezzlement.")

The court further says that the decisions of the Supreme Court cited by appellant's counsel in his brief are not applicable to the case now before the court, the nature and circumstances surrounding those cases being altogether different in law.

Under the circumstances of the present case, and viewing it from every legal and equitable standpoint and according to the evidence submitted, this court is compelled to reverse the judgment of the court below, and to give such decisions as the court below should have given.

This court therefore adjudges that from the evidence produced the appellee is not indebted to appellant for the amount claimed by appellant; but there does appear from the evidence submitted, on the whole transaction, as agent or factor for appellant, that he, appellee, owes appellant the sum of two hundred and sixty-four dollars and seventy-eight cents, according to the contract, and this the court adjudges that he shall pay to appellant and costs accruing from this action. The clerk of the Supreme Court is hereby commanded or authorized to inform, by a mandate, the judge of the court below, of the force and effect of this judgment.