DECISIONS AND OPINIONS

OF THE

SUPREME COURT

OF THE

REPUBLIC OF LIBERIA

OCTOBER TERM, A. D. 1916.

R. R. APPLEBY, Manager at Monrovia of the Bank of British West Africa, Appellant, *v.* THOMAS FREEMAN & SON, Appellees.

HEARD OCTOBER 18, 1916. DECIDED NOVEMBER 1, 1916.

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

1. A motion for continuance, because of the absence of a material witness, when properly supported by an affidavit should be granted by the court, unless it appears to the court that the motion was offered for the mere purpose of baffling the suit, and delaying the trial.
2. The court may however require the party offering the motion, to state what he intends to prove by the witness, and if the facts are admitted by the opposite party the trial may be had.
3. Trover is an action which lies to recover damages against one who has without legal right converted to his own use, goods or personal chattels in which the owner has a general or special use; either by appropriating the property to his own use or by intermeddling with it beyond the extent of authority conferred in case a limited authority over it has been given, with intent so to apply or dispose of it as to alter its condition, or interfere with the owner's dominion.
4. The holder of a bill of lading made out in his name or the legitimate endorsee is deemed to be legally entitled to the possession of goods deposited in the customs.
5. Where special damage is relied on, it must be laid in the complaint and proven. *Judgment reversed.*

Mr. Justice Johnson delivered the opinion of the court:

Damages. This is an appeal from a judgment of the Circuit Court for the first judicial circuit, Montserrado County, in an action

of damages for trover brought in said court by appellees against appellant in which action judgment was entered in favor of appellees.

The facts that need to be stated are as follows: The firm of Pickering and Berthoud, transacting mercantile business at Freetown, Sierra Leone, shipped to Monrovia in the month of February last by the S. S. "Montenegro" three packages of goods of the value of fourteen pounds sterling, five shillings and nine pence (£14. 5. 9), the goods being consigned to order to be delivered to Thomas Freeman and Son, Monrovia, the appellees in this case, on the payment by letter, of a balance of seventy-four pounds sterling (£74. —. —). The appellees were informed by the shippers that the bills of lading were in possession of the Bank of British West Africa, limited. On the arrival of the goods at Monrovia where they were deposited in the customs warehouse, appellees applied to the Bank of British West Africa, limited, for the delivery of the goods, and paid in at the suggestion of the cashier a deposit of forty-eight pounds sterling (£48. —. —), and were given a receipt for said sum, across which was written "Bill not arr." Subsequently, after an altercation between appellant and D. D. Freeman of the firm of Thomas Freeman and Son, appellant declined to issue an order for the delivery of the goods to appellees, on the ground that the documents for said goods had not arrived. Whereupon appellees paid the customs duties on the goods which were deposited in a "Want of Entry Warehouse."

An attempt was made by appellees to obtain possession of the goods by an action of replevin, but appellees failed in the action; an attempt was subsequently made by Messrs. W. D. Woodin and Company, limited, to reship the goods to Sierra Leone, but this was prevented by appellees, who entered an action of injunction against said firm and the Collector of Customs. In the meantime the case at bar was filed. On the trial of the case, in the court below, a verdict was returned in favor of appellees, awarding them the three packages of goods or their value, and the sum of two hundred and fifty dollars ($250.00) damages; and judgment was thereupon entered in favor of appellees in accordance with said verdict.

Appellees contended subsequently as follows: (a) that the bargain was concluded, and that the goods were shipped on the S. S. "Montenegro" by Messrs. Pickering Berthoud, with intent that

they should be delivered to appellees, on the payment by them to the Bank of British West Africa, limited of forty-seven pounds sterling, five shillings and two pence (£47. 5. 2); (b) that said firm wrote a letter to appellees informing them that the shipping documents were in possession of the bank; (c) that goods could only be legally obtained from the customs warehouse on presentation of the shipping documents, or a delivery order signed by a European official of the bank; (d) that a delivery order for said goods was made out by such an official, on the payment by appellees of forty-eight pounds sterling (£48. —. —); an amount in excess of the amount they were required to pay, and that said order would have been delivered to appellees, but for the interference of appellant, on the grounds, as he alleged, that the goods were intended for Germans, and who remarked at the time that he would have them re-shipped to Sierra Leone; (e) that appellant advised the Steamship Company not to deliver the goods until the freight note or bill of lading was presented; (f) that subsequently, that is to say about nine weeks thereafter, the shippers informed appellees, that the Sierra Leone Government had been informed by cable that said goods would pass into German hands, asked that no obstacles be put by appellees in the way of their re-shipment; (g) that an attempt was actually made to re-ship said goods; whereupon appellees prayed for and were granted an injunction in the premises. Appellees therefore submit, that the foregoing statement of facts, shows that the contract of sale between themselves and the sellers was executed and not executory merely; that the title had vested in them, the buyers; that appellant induced shippers to endeavor to rescind the sale in a manner unwarranted by law; that under such circumstances they could legally bring and maintain this suit; and that therefore the judgment and verdict were supported by the law and evidence and the court was perfectly right to refuse appellant's motion for a new trial. On the other hand, appellant's counsel contended that the goods were never in possession of the appellant; that appellant, not being in possession of the shipping documents, was right in refusing to issue a delivery order, and therefore the verdict of the jury was contrary to law and evidence.

The points in the bill of exceptions, submitted for our consideration are:

1. The denial by the court below of appellant's motion for a continuation until the August term of the court, because, of the absence of R. R. Appleby a material witness in the case.
2. The denial by the court below of appellant's motion, praying the court to set aside the verdict of the jury and grant him a new trial, because, as he alleged, said verdict is manifestly contrary to and against law and evidence; and
3. The judgment of the court below, which is based upon said verdict.

And these points we will now proceed to consider.

When the case was called for hearing in the court below, counsel for appellant offered a motion to continue the case until the August term of said court, because of the absence of a material witness in the person of R. R. Appleby, manager of the Bank of British West Africa, limited, the defendant in the suit, now appellant, who was on his way to England having been called home by his principals. Appellees' counsel opposed the motion because the witness had been summoned. After hearing arguments, the court denied the motion.

A motion to continue a case based upon the absence of a material witness or other cause is addressed to the discretion of the court, but an improper and unjust abuse of such discretion may be remedied by the superior court. In the practice of some states, the party making the application may be required by the court to state what he expects to prove by the witness; and the opposite party may oppose or prevent it by admitting the facts which the applicant intends to prove. It seems also that the court is justified in denying a motion for a continuance if it appears that the motion is not offered in good faith, but was offered merely for the purpose of baffling the suit and delaying the trial. The practice in Liberia is to grant the continuance for one term at least, unless the opposite party will admit the facts to be proved by the witness. This point was not however raised in the court below. In this case the court below seemed to have based the ruling on the fact that applicant's counsel declined to guarantee the production of the witness at the ensuing term of court.

In the case *Wright v. Bacon* (I Lib. L. R. 477) this court in ruling on a similar motion made the following observations: "We would observe that an application for a continuance is addressed to the discretion of the court to which it is made. There are, however, certain legal grounds laid down as good causes for the post-

poning of a trial, and we are of the opinion that if the motion is founded upon one of the said legal reasons, and is well supported by affidavit, the court, in the furtherance of justice, should allow a postponement; unless it should come to its notice that the application is made solely with the view to baffle the suit or defeat justice."

Following the above reasoning we are led to the conclusion:

1. That a motion for continuance, because of the absence of a material witness, when properly supported by an affidavit, should be granted by the court, unless it appears to the court that the motion was offered for the purpose of baffling the suit and delaying the trial.
2. The court may however require the party offering the motion to state what he intends to prove by the witness, and if the facts are admitted by the opposite party the trial may be had.

In the case at bar, we are of the opinion that the action of the court, in denying the motion without stating the grounds on which he based his ruling, was arbitrary and improper.

We come now to a consideration of the verdict of the petty jury in which is involved the issue between the parties.

The action of trover is defined as an action which lies to recover damages against one who has, without legal right, converted to his own use, goods or personal chattels in which the owner has a general or special use, either by appropriating the property to his own use, or by intermeddling with it beyond the extent of authority conferred, in case a limited authority over it has been given with interest so to apply or dispose of it, as to alter its condition or interfere with the owner's dominion. It seems that the plaintiff must be entitled to immediate possession, or right of possession, at the time that the action is filed.

The principles upon which the decision of this case must be predicated are entirely familiar.

There are two main questions which present themselves for our consideration, the solution of which will lead to all legal determination of the case, viz.:

1. Were appellees entitled to immediate possession? and
2. Did appellant improperly interfere with appellees' right of possession in such a manner as to amount to a conversion of the goods?

By the custom of merchants shipping goods to Liberia, goods which are consigned to order, and are to be delivered to some person,

or firm on the payment of the value of the invoice, or an unpaid balance, are generally deposited in the customs warehouse on being landed at the port of entry until a bill of lading or a delivery order is presented by the consignee. The rightful holder of a bill of lading or the endorsee is deemed to be legally entitled to the possession of the goods deposited as aforesaid. If, as very often happens, the goods arrive before the shipping documents, the goods are either retained in the customs or in the warehouse of the bank or other agent of the shipper; sometimes an order for the delivery of the goods is issued by the said agent on the deposit by the consignee of a sum in excess of the unpaid balance due to the shippers by the consignee.

The answer of Goodliffe, a witness for plaintiff in the court below, to the question asked by plaintiff's counsel—

> Ques.—"Is it not a fact that delivery orders have been given persons for goods when the shipping documents have not arrived?"

was as follows:

> "Yes, but it is not the rule of the bank."

He also said in giving his evidence:

> "It is not customary, but we do it under exceptional circumstances; furthermore, it is against the rule of the bank to make any delivery without documents."

The contention of appellees, therefore, that the bank had been in the habit of allowing him delivery of goods in similar cases, by the payment of a deposit, and it is bound to follow a similar course in this case, can not be seriously considered, for what is granted as a favor may be withheld. It follows then that appellees were not entitled to the immediate possession of the goods, although the actual ownership was vested in him.

The evidence offered by plaintiff was, in our opinion, not sufficiently strong to support the claim of appellees, that appellant converted the goods to his own use nor is there evidence to show that appellant exceeded his authority, and interferred with appellees' right of possession to such an extent as that his action amounted to a conversion.

The belief or opinion expressed by appellees that the bank was in possession of the shipping documents does not seem to us to be

well founded. It is absurd to suppose that the documents were in the possession of the bank at Monrovia at the time the goods were shipped at Sierra Leone, and this belief is shattered by witness Goodliffe who asserted that the shipping documents never were in possession of the bank at Monrovia. A reasonable construction to put upon the shipper's letter of the 29th January is, that they intended to deposit the documents in the bank but omitted to so do. And this supposition is borne out by a letter written by the shippers on the 14th April last and offered in evidence by the appellees, which contains, *inter alia,* the following: "When the cottons ordered by you arrived at Monrovia the Sierra Leone Colonial Government was advised by cable that these cottons were going to pass into German hands. The Sierra Leone Government thereupon called upon us to stop delivery and to have the cottons returned to Sierra Leone, the steamship receipt is still in our possession, and we ask you to kindly place no obstacle in the way of the re-shipment of the cottons to us."

The definition of the word "still" in Webster's Unabridged Dictionary and other standard works is "continual."

We may reasonably conclude therefore that the documents never left the possession of the shippers.

We must here remark that in order to fix the responsibility for the non-delivery of goods consigned to a consignee through the medium of the bank, which acting as agent for the shippers is to deliver documents entitling consignee to possession of goods upon payment of a sum balance due on an invoice, it is essentially necessary that the party should prove that the documents were in the possession of the bank at the time payment was tendered and delivery demanded, and that the bank unlawfully refused to deliver the documents to enable them to procure possession of the goods.

On the whole, we are of the opinion that the verdict was contrary to law and evidence:

1. In rendering a verdict against appellant awarding appellees the goods in question, or their value, against the weight of evidence; and furthermore by awarding special damages to appellees although no evidence was produced to show that appellees sustained special damages. Special damage is any loss or inconvenience which can be specially traced to the conduct of the defendant. When special damages are relied upon they must be stated in the complaint and

proven. (Lib. Stat., Chapter on Injuries, p. 27, sec. 37.)

2. In the case *Lackman v. Johns* (I Lib. L. R. 455) the court in giving judgment against appellee, plaintiff in the court below, remarked as follows: "It is a settled principle of law, that special damages when relied on must be specially pleaded and proved. The mere fact of alleging a sum in the complaint as requisite to satisfy the injury complained of will not warrant a jury to take cognizance thereof unless it is proven by unimpeachable testimony at the trial." In the case *Crain v. Petrie* (Smith's Leading Cases, vol. 2, p. 494) it was held "that to maintain a claim for special damages, they must appear to be the legal and natural consequences arising from the tort, and not from the wrongful act of a third party remotely induced thereby." In other words, the damages must proceed wholly and exclusively from the injury complained of. (See also *Haller v. Miller,* and *Harrison v. Beverly. Ibid.*)

From these considerations it results that the judgment of the court below be reversed; and it is so ordered.

C. B. Dunbar, for appellant.

L. A. Grimes, for appellees.

GARSWAR, Appellant, *v.* REPUBLIC OF LIBERIA, Appellee.

HEARD OCTOBER 19, 1916. DECIDED NOVEMBER 1, 1916.

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

1. The evidence of one witness, supported by the voluntary confession of a prisoner, is sufficient to find a conviction for homicide.
2. The plea *se defendendo* will bar a conviction for murder when substantially proved by preponderating evidence.
3. Under this plea the onus shifts upon the defendant, and he must prove the legal elements of the plea by preponderating evidence. He must prove first that before the mortal stroke was given he declined any further combat and secondly that he then killed his adversary through mere necessity.
4. When a defendant claims that the killing was done in self-defense he must satisfy the jury by a preponderance of evidence. It is not sufficient for him to raise a reasonable doubt, nor need he establish his defense beyond a reasonable doubt. *Judgment affirmed.*

Mr. Chief Justice Dossen delivered the opinion of the court:

Murder. This case comes up before us upon an appeal from