

SIM BURNEY, Appellant, v. C. F. WILHELM
JANTZEN, by and through his Agent, W. FRITZ,
Appellee.

APPEAL FROM CIRCUIT COURT, FIRST JUDICIAL CIRCUIT,
MONTERRADO COUNTY.

Argued January 24, 28, 29, 1935. Decided February 1, 1935.

1. The enactment of the Legislature which abolished the Monthly and Probate Courts of this Republic transferred the jurisdiction and terms of said courts to the Circuit Courts.
2. There has now been given Circuit Judges both the jurisdiction which was previously theirs, as well as that which had previously been that of a Judge of the Monthly and Probate Court.
3. When in the middle of a trial the leading attorney is taken ill and becomes thereby incapacitated to proceed further, the trial judge should, upon application, grant a continuance.
4. Although a party may, upon request, voluntarily take the witness stand and testify, yet he is not compelled so to do unless he had previously been served with a writ of summons to testify in said cause.

On appeal from a judgment for the appellee in an action of debt, *judgment reversed* and *case remanded* for new trial.

P. Gbe Wolo and *E. W. Williams* for appellant. *T. Gibli Collins* for appellee.

MR. JUSTICE RUSSELL delivered the opinion of the Court.

This case is before this Court on an appeal upon a bill of exceptions from the Circuit Court of the First Judicial Circuit, in its Monthly and Probate Division, sitting in Law.

On the 15th day of April, 1933, C. F. Wilhelm Jantzen, through their agent W. Fritz, instituted an action of debt against Sim Burney, defendant in the court below, now appellant, for the sum of forty-two pounds thirteen shil-

lings and eleven pence sterling, which claim the defendant, now appellant, denied in his answer.

On the 14th day of June, 1934, when the case was called for hearing, the appellant submitted a motion for continuance of the case because His Honor Edward J. Summerville, who had been his counsel prior to his elevation to the bench of the Circuit Court and had all of his written pleadings and other private documents pertaining to the case, was out of the jurisdiction of the court, which motion the court sustained for reasons assigned, as well as upon the verbal application of Counsellor Collins who alleged that his client, Mr. Fritz, the agent for the firm, was sick.

On the 19th day of July, 1934, the case was again called for hearing upon its merits in keeping with the mandate of this Court given in proceedings for a writ of error prayed for by the appellee, which application had been heard by this Court and the case remanded for a new trial. *Jantzen v. Burney*, 4 L.L.R. 119, 1 Lib. New Ann. Ser. 121 (1934).

All parties being then present, appellant who had filed a motion to dismiss this action, gave notice that he withdrew the said motion, whereupon witnesses for the plaintiff were duly qualified and deposed. (See minutes of the 19th day's session.) The plaintiff thereupon gave notice that he rested evidence. When the case was resumed on the 20th day of July, 1934, the defendant submitted a motion objecting to the court's jurisdiction over the case, which motion reads as follows:

"Count 1. Because defendant says, that the division of court designated in the venue is not a division of any court in the Republic, there being no probate division and monthly session of the circuit court of the land. And this the defendant is ready to prove.

"Count 2. And also because defendant further says, that this action being an action of debt can only be brought and tried in the law division of the Circuit

Court, and not in the probate division, which has been created to perform certain and definite duties defined by statutes. And this the defendant is ready to prove.”

The court in its ruling on the motion observed, “that the motion did not contain any jurisdictional grounds, but rather dilatory pleas as to venue only, which pleas should have been raised during the course of the regular pleadings. This not having been done at the stage of the case previous to the remanding of said case by the Honourable Supreme Court for trial on its merits, it cannot be raised now, and denied the motion, to which the defendant, now appellant, excepted.”

Appellant's witnesses were then qualified, after which the appellant's counsel instead of proceeding with the direct examination of witnesses objected to the proceeding in the case on the grounds, 1) That a case in law cannot be tried in this court; and 2) That the court had no power to try the case without a jury from the fact that the Court of Monthly and Probate sessions over which he is now presiding, has no power to try this case in debt at this time. The Legislature abolished the Monthly and Probate Court, and transferred its jurisdiction to the Circuit Court. It is true that the Court of Monthly and Probate Sessions had jurisdiction in cases of debt up to three hundred dollars, but incorrect that the reestablishment did not give that court jurisdiction in debt but only in probate matters, etc., and counsel cited as his authority Acts of the Legislature for 1931-32, chapter XIV. The court also overruled this objection and ordered that the trial should be proceeded with, to which ruling the appellant also excepted.

The records further show that after this, counsel for appellant refused to go any further with the trial of the case because Counsellor Wolo the leading counsel was ill, and asked that the case be postponed for at least a day, or until he regained his health. This request the

court denied and urged that Counsellor Williams, the junior counsel, should proceed with the case.

This grave responsibility he refused to assume, and this position of Counsellor Williams the court construed, and interpreted as an abandonment of the defense of the defendant, now appellant, in the case. The records show further that Sim Burney, the appellant, who was defendant in the court below was in court the whole morning during the trial of the case in which he was the defendant, and refused to take the stand as a witness in his own behalf, therefore, upon the request of the plaintiff's counsel, the court rendered final judgment against the defendant, to the effect that the plaintiff should recover from him the amount of debt sued for, and all legal costs of the action. To this final judgment of the trial court, the defendant, now appellant, excepted, and has brought this case before this Court upon a bill of exceptions composed of eleven counts. The appellant in count one of his aforesaid bill of exceptions sets out, "that Your Honour overruled defendant's motion to the jurisdiction of the Court." In considering this point raised by appellant's counsel we are of opinion that it is not supported by law, because the statute laws of the country which abolished the Monthly and Probate Courts transferred to the Judges of the Circuit Courts throughout this Republic all the powers of which the judges of the Monthly and Probate Court had been disposed; and thereby gave them two separate and distinct jurisdictions in actions of debt, viz.: Monthly Court jurisdiction in actions of debt between the amounts of one hundred dollars and three hundred dollars, as had been the jurisdictional amount of the Monthly Court Judges during the life of said Court, which they had exercised without a jury, and also the real Circuit Court jurisdiction in all actions of debt from three hundred dollars upwards to be tried with the assistance of a jury. Acts of 1931-2, ch. XIV, § 2.

Count two of said bill of exceptions reads as follows:

“And also because on the same 20th day of July A. D. 1934, Your Honour overruled defendant’s motion for a continuance growing out of the sudden attack of dysentery upon defendant’s leading counsel.”

Counts 3, 4, 6, 7 and 9 of said bill of exceptions treating on the same point laid in count two, we will therefore group them together and deal with them jointly.

The law governing “Continuances” as outlined by both criminal and civil law writers is plain and ought not to be misconstrued or misapplied. Among these grounds it is specifically stated that illness of counsel is good ground for “Continuance” of any cause. We fail to see the sense of justice in the trial judge when he proceeded with the trial of said case and rendered final judgment against the defendant, now appellant.

The counsel for the defense having given notice to the court that he was sick and therefore prayed for the continuance of the trial until the following day; under these uncontrollable circumstances, being the act of God, it is our opinion that the trial judge, in view of the law and of the fraternal feelings which should always exist between the bench and bar, should have granted the application and continued said case. *State of Rhode Island v. State of Massachusetts*, 11 Peters (U.S.) 226, 9 L. Ed. 697 (1837).

Counsellor Collins, in our opinion, acted very unprofessionally and against the fraternal relationship just referred to, in requesting the trial court to render judgment against appellee without hearing the evidence of his witnesses which, in our opinion, would have enabled him to render a judgment less liable to attack, and unquestionably based on the merits of the case, as he was commanded to do by the mandate of our Court under date of April 20, 1934.

By careful inspection of the records of this case we fail to find the authority on which the trial judge based his ruling that Mr. Sim Burney, the appellant, refused

to testify in his own behalf, when he was ordered to do so; because there is no precept in the records of the case to show that he was summoned as a witness for the defendant in the court below, now appellant, upon which the judge predicated his opinion that the defendant had abandoned the case and ordered the plaintiffs in the court below to make whatever record they desired in order that final judgment should be rendered. As there is no trace of any precept in the record in this case to show that the appellant was a witness, we are therefore of the opinion that the ruling of the judge on this point is not supported either by law or the records of the case, and it is therefore illegal.

Following the trial of this case step by step as it is presented from the records of said case, we have arrived at this conclusion: that the trial judge erred in proceeding with the trial of said case and in rendering final judgment against the appellant after the request by the appellant's counsel to continue the case on account of his illness. This action of the court to render final judgment in the case without hearing the evidence of appellant's witnesses is contrary to law and good judgment.

We are therefore of opinion that the judgment in this case is illegal and should be reversed, and the case be remanded to be tried upon its merits in keeping with the mandate of this Court; costs to abide final determination of the case; and it is so ordered.

Judgment reversed.