H. ARRIVETS, Agent for C. F. A. O., a French Firm doing mercantile Business in Monrovia and elsewhere in Liberia, Appellant, *v.* ROBERT A. BARCLAY, Appellee.

APPEAL IN ACTION OF DEBT.

Argued November 21, 25, 26, 1946. Decided January 31, 1947.

1. An answer cannot deny a debt and plead a setoff.
2. Where an answer denies a debt and pleads a setoff the defendant is confined in his defense to a denial of the allegations of fact in the complaint and cannot prove the setoff at a trial.

Plaintiff sued defendant in debt. Defendant denied the debt and pleaded a setoff. Defendant was permitted to prove his setoff. On appeal from verdict and judgment for plaintiff minus setoff proved by defendant, *judgment affirmed and modified* by disallowing defendant's setoff.

MR. JUSTICE SHANNON delivered the opinion of the Court.*

From the records certified to this Court from the trial court below the following has been culled: On June 21, 1945 Compagnie Française de l'Afrique Occidentale, through its agent, H. Arrivets, commenced an action of debt with attachment proceedings against Robert A. Barclay by virtue of a promissory note issued by the latter to the former which reads in words and figures as follows:

> "MONROVIA, *September 23, 1944*
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> "For value received, I promise to pay to the Compagnie Francaise de l'Afrique Occidentale, Monrovia, or order the sum of eight hundred dollars ($800.00) in cash without interest, or, failing which, in goods at

* Mr. Justice Reeves, having been of counsel for one of the parties prior to his elevation to the Bench, recused himself.

Liberian Government ceiling price less fifteen per cent. discount in three instalments out of consignments of goods which I may have come from England and America expected now or within the next three to six months.

"ROBERT A. BARCLAY

"Witnesses:
MAC. M. PERRY
ANTHONY BARCLAY."

The said Robert A. Barclay appeared and in an answer duly filed contested the legal propriety and sufficiency of the proceedings in attachment. But he seemed to have fallen into an abyss of legal confusion when, in count six of his answer, he sought both to deny the debt and to plead a setoff or counterclaim, which said count reads as follows:

"And also because defendant denies that he owes the Company the amount of eight hundred dollars ($800.00), because defendant says that the Compagnie F. A. O., Monrovia, is indebted to him in the sum of three hundred and eleven dollars and sixty cents ($311.60) being for sundry services performed by defendant for said Company in the amount of two hundred and forty nine dollars ($249.00), and sixty two dollars and sixty cents ($62.60) for sundry articles which defendant supplied said Company; making a total of three hundred and eleven dollars and sixty cents ($311.60) which said Company has failed to pay defendant on repeated demands so to do; as will more fully appear by statements hereto attached and forming part of this Answer."

The plaintiff below, now appellant, strongly resisted and countered this method of pleading, emphasizing its legal weakness as is shown in counts eight to eleven of his reply wherein he submits that it is legally inconsistent to both deny owing a debt claimed and to plead a setoff, suggesting that, to avail defendant of the plea of setoff,

he ought first to have admitted the debt. The trial judge made the following ruling on the legal pleadings:

> "Count six of the Answer denies that defendant owes the plaintiff eight hundred dollars, but avers that the plaintiff owes him $311.60. Plaintiff counters this in his Reply by alleging that if defendant intended to charge plaintiff with owing him then the said defendant's plea would be in the nature of a set off or affirmative plea, which could not be pleaded after defendant had denied the indebtedness. . . . The court could not at first understand what the defendant in this count of the Answer intended, but during his argument the court discovered that the $311.60 was intended by the defendant as a set off to the debt. The court therefore rules that this case be sent to the petit jury for trial in order that the defendant might prove that the plaintiff owes him $311.60 which should be deducted from the plaintiff's debt of $800.00, or the plaintiff prove that this allegation is not true."

As a result of this peculiar ruling on the legal pleadings, which we consider legally unsound in that under the circumstances defendant should have been made to rest his defense on a bare denial of the alleged facts set out in plaintiff's complaint, the case came up for trial before a jury empanelled on the issue as submitted by the trial judge in his ruling, which jury, after hearing the evidence, brought in a verdict for the plaintiff awarding him his debt less the amount of the setoff. Plaintiff excepted to this verdict and, after filing a motion for a new trial which was subsequently withdrawn, judgment was entered upon said verdict. It is from this judgment that the appeal is before us for review of the trial thus had.

It appears from the bill of exceptions of the appellant that the primary point submitted is the legal propriety of the trial judge's ruling allowing the defendant the privilege of proving his plea of setoff in face of its having been improperly and illegally pleaded; and in this the

plaintiff, now appellant, vigorously insists that the verdict of the jury allowing the setoff or counterclaim was obviously influenced by the erroneous ruling of said judge. This seems to us to be the only point that is properly before us and which we can consistently consider in the disposition of the matter, notwithstanding appellee's rigorous effort in his brief to submit for our consideration also the issue of an alleged defectiveness in the attachment proceedings as raised in his answer and subsequent pleadings in the court below, since indeed there appears before us nothing in the nature of a cross bill of exceptions embodying this issue filed by the appellee, defendant in the court below.

It is difficult to understand and appreciate the trial judge's position in allowing the issue raised by said plea of setoff to go to the jury. It is an elementary principle of pleading that nothing is to be taken by intendment, and this Court of *dernier ressort,* in support of said principle, has in many instances substantially held that matters of defense not specifically raised in the pleadings cannot be taken cognizance of by the appellate court. *Clark* v. *Barbour,* 2 L.L.R. 15, 1 Lib. Ann. Ser. (1909); *Massaquoi* v. *Lowndes,* 4 L.L.R. 260, 2 New Ann. Ser. 96 (1935). This attitude of the trial judge is very peculiar, especially since taken by a man for whom this Court holds high respect and esteem, so that we are quoting the appellant's position on this point as is shown in his brief:

> "The paradox of the defendant's denying the debt and at the same time offering a counter-claim was brought to a head when the counsel for the defendant, whom the judge was apparently all along trying to help embarrassed the court during the production of evidence to the extent of denying for the first time the genuineness of the promissory note, the basis of the action, although such issue was never raised in the pleadings. The trial judge, by way of either repent-

ance or out of anger rescinded his ruling allowing the set off to be considered and adjourned court.

"Notwithstanding this reversion of position just above mentioned, the judge again, showing himself more sympathetic to the defendant than he ought to be, on the following day being the 10th October, reversed the position taking by him the previous day and allowing a counterclaim to a debt denied in his Answer, ever owing, and which debt was based upon a note the genuiness of which was drawn into question.

"As a result of this contradictory position taken by the court below during the trial of the case, a verdict which ran true to the stage set by the trial judge eventuated."

Now we are brought to consider what a setoff is and how it is to be pleaded. A setoff is described in its broadest sense as,

"[T]he discharge or reduction of one demand by an opposite one, and it has frequently been defined as a cross claim, for which an action might be maintained against the plaintiff, or as a counter demand which a defendant holds against a plaintiff, arising out of a transaction extrinsic to the plaintiff's cause of action. A definition which is perhaps more comprehensive and more accurate than those just given is that set-off, both at law and in equity, must be understood as that right which exists between two parties, each of whom, under an independent contract, owes an ascertained amount to the other, to set off their respective debts by way of mutual deduction, so that, in any action brought for the larger debt, the residue only, after such deduction, shall be recovered. A set-off has also been defined as a mode of defense whereby the defendant acknowledges the justice of the plaintiff's demand, on the one hand, but, on the other, sets up a demand of his own to counterbalance it, either in whole or in

> part. . . ." 24 R.C.L. *Set-off and Counterclaim* § 2, at 792 (1919).
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> "A set-off is a counter demand which a defendant holds against a plaintiff, arising out of a transaction extrinsic of plaintiff's cause of action, the object of which is to liquidate the whole or a part of plaintiff's demand, according to the amount of the set-off, and like the modern recoupment is in the nature of a cross action." 34 Cyc. of Law & Proc. *Recoupment, Set-off, and Counterclaim* 625 (1910).

And now we must consider how a setoff is to be pleaded. It is in the nature of a counterclaim which must be raised with distinctness and without uncertainty or ambiguity so that it may properly advise the opponent of the precise grounds relied upon. It must first admit the debt claimed, as its very name imports, before the counterclaim is made, since it is ordinarily not reasonable to raise or plead a setoff against a debt not admitted or acknowledged as existing. We quote the following from *Ruling Case Law:*

> "Under the codes the defendant may set forth by answer as many counterclaims as he may have. They must, however, each be separately stated, and refer to the causes of action which they are intended to answer, in such manner that they may be intelligibly distinguished. Set-off, recoupment, or counterclaim, being in the nature of a cross action, the plea thereof must be as distinct and unambiguous as if the defendant were suing directly on the claim alleged; the defendant must advise his opponent of the precise grounds relied upon. . . ." 24 R.C.L. *Id.* § 82, at 875.

In view of the above we are of the opinion that the trial judge erred in admitting to proof the setoff or counterclaim so improperly and illegally pleaded. Said plea should have been dismissed and the defendant made to rest his defense on a bare denial of the facts stated in plain-

tiff's complaint. Since this erroneous ruling of the judge accounted for the improper admission of evidence to prove the defendant's alleged setoff, which naturally influenced the verdict of the jury upon which verdict the judgment of the court was based, we are also of the opinion that the said judgment of the trial court should be so amended or altered as to disallow said setoff, because of the legal reasons already stated in this opinion, and to adjudge the plaintiff, now appellant, entitled to recover from the defendant, now appellee, the full sum of eight hundred dollars, the amount sued for, together with all costs of this action, and this without prejudice to the said defendant's right to claim his alleged debt if he so elects and feels himself entitled; and it is hereby so ordered.

Affirmed as modified.