CAVALLA RIVER COMPANY, LTD., Appellant, *v.* E. S. PRINCE PEPPLE, Appellee.

MOTION FOR REARGUMENT AND COUNTER MOTION FOR ENFORCEMENT OF JUDGMENT.

Argued January 9, 10, 11, 1934. Decided January 26, 1934.

1. According to the Constitutional amendment of 1927–8, the Supreme Court of Liberia is composed of one Chief Justice and four Associate Justices, any three of whom may legally and constitutionally transact business.
2. According to said amendment, the Chief Justice need not be of the quorum as was the case under the Act of 1875.
3. Claims of a private citizen against a foreign government are either contractual or tortious.
4. In the latter class of cases the government of the injured party is morally bound to assert the rights of its citizen.
5. The same moral obligation of interposition does not exist in claims founded on contract.
6. As a general rule claims will not be asserted by a government in behalf of its citizens where a remedy exists in the courts of the offending country until every judicial remedy open to the claimant is exhausted.
7. When a motion is made to the court for the reargument of a cause, the party opposing the granting of same cannot consistently contend that said motion has not been granted where the record shows that at least one count therein has been carefully considered and judicially determined.
8. Personal actions are of two general divisions; viz., actions *ex contractu* and actions *ex delicto*.
9. Even with the modification of the common law forms of action, and the introduction of code pleading, the fundamental distinction between actions *ex contractu* and those *ex delicto* remained except in a few jurisdictions.
10. Except where said distinctions are expressly abolished by code, the plaintiff had always to be careful to select the proper form of action under penalty of being non-suited, even though he might have, on the facts, a good cause of action.
11. In Liberia there has always been a clear-cut distinction between actions founded on contract and those founded on tort.
12. In Liberia a party is permitted either to demur or to plead to the same complaint as well as to do both in the same answer, provided each such demurrer or pleading is contained in a different count (plea) of said answer; and in every such case the demurrers shall first be disposed of.

Appellant moved for a reargument of a case decided against him in the Circuit Court of the First Judicial Circuit and affirmed by a majority of this Court. The second count of the motion for reargument has already

been overruled; on consideration of the first count, *re-argument granted, and case dismissed* without prejudice to appellee to institute the correct form of action.

H. Lafayette Harmon for appellant. *A. B. Ricks* and *William S. Tubman* for appellee.

MR. CHIEF JUSTICE GRIMES delivered the opinion of the Court.

On the 9th of February, 1933, Mr. Justice Beysolow, acting for Mr. Justice Karnga and Mr. Justice Grigsby, two of his colleagues constituting the majority of the Supreme Court, filed an Opinion to the effect that the judgment rendered in the Circuit Court of the First Judicial Circuit, on the 22nd day of August, 1932, by his Honor Martin Nemle Russell, Judge presiding by assignment, in favor of E. S. Prince Pepple, appellee (plaintiff in the court below), against the Cavalla River Company, Limited, appellant (defendant in the court below), in an "action of damages to personal property," should be affirmed. There was filed on the same day by Mr. Justice Page, in behalf of himself and of the late ex-Chief Justice Johnson, a rather strongly worded dissenting opinion in which they expressed the view that the judgment of the court below was fundamentally wrong because the appellants had by an answer and by motions to the jurisdiction of the trial court filed at succeeding terms and before different trial judges, raised the point that the form of action laid in the complaint was not suited to the substance of the facts therein alleged, since an "action of damages to personal property" did not lie to recover a sum of money certain, nor for the recovery of a sum of money which plaintiff in his complaint alleged was placed by plaintiff on deposit with defendants, and which they further alleged defendant refused to return upon demand; that His Honor Aaron J. George, Resident Circuit Judge, who, by virtue of his office as Resident Judge,

heard and disposed of the pleadings in the case had, on the 26th of January, 1932, dismissed the amended answer of the defendants, and sustained the complaint of the plaintiff; and that neither he, nor the other Circuit Judges who had presided over the trial, had ever settled the legal question thrice raised whether or not an action of damages to personal property could be successfully maintained upon evidence adduced tending to support an action for the violation of a contract.

Reviewing the records on this point the Court finds that His Honor E. Himie Shannon, the Judge who presided at the May term, 1932, of the Circuit Court of the First Judicial Circuit, impliedly expressed his disagreement with His Honor Judge George, for after the answer had been dismissed, the first motion objecting to the court's jurisdiction to try said cause was argued before him, and he, on May 8th, gave the following ruling thereon:

> "It is evident that this case is surrounded by a certain amount of intricacies which the court is not in a position to unravel, as an effort to do so could not but lead in a measure to a reviewal of the actions of one of his colleagues. However well founded, as is apparent, the motion of the defendant's counsel may be, the court cannot sustain it, and the refusal to do so is not to be interpreted as the court's opinion of the unworthiness of said motion. The record of this court does show further that the answer of the defendants in this court was dismissed, and the plaintiff's complaint sustained, which in the mind of the court simply indicates the legal sufficiency of the said complaint and not evidently a decision on the facts therein contained. The said ruling further shows that the said cause was ordered transferred to a trial docket to be tried by a jury, to carry out which order the court feels under the circumstances bound."

However, when the jury brought in a verdict in favor of the plaintiff, said judge, on the motion of defendants, set

the said verdict aside and awarded a new trial upon grounds substantially the same as those upon which he had been asked to dismiss the case at the outset.

The new trial awarded was had at the August (1932) term of said court with Judge Russell, now Mr. Justice Russell, presiding; and it is worthy of note that he appeared to have held the same views as His Honor Judge Shannon, save that no formal request having been submitted to him, he was deprived of the opportunity of setting the verdict aside as his colleague, Judge Shannon, had done.

On the 11th of February, 1933, Counsellor H. L. Harmon, attorney for appellants, filed a motion to suspend judgment and grant a reargument of the case based upon two grounds: (1) that the majority opinion of the court had neglected to "settle the principle of law whether or not An Action of Damages to Personal Property will lie for the recovery of a sum of money certain due upon a written obligation, which is the legal foundation of this case"; and (2) because there had been filed "a dissenting opinion by a part of the Supreme Court in said case," he stressing the point that the Chief Justice was one of those whose opinion was in the minority.

On the 14th of February, 1933, the three Justices who had concurred in the majority opinion filed a further opinion overruling the second count of Mr. Harmon's motion for a reargument upon the ground that his contention in that count did not take account of a constitutional amendment found in the Acts approved December 8, 1926, chapter XVI, section 4, and Act of 1927–28, chapter III, pages 4–5. On the first count of the motion the Court gave no ruling, but simply made this statement: "With respect to the other point raised in the motion of appellants, owing to certain matters brought to the attention of the Court otherwise the Court decides to suspend the enforcement of its judgment until further orders." Thus the motion for reargument was but partly disposed

of, the Court having suspended its ruling on count 1 thereof, and having ruled out count 2 as previously pointed out, with which opinion we are fully in accord; for section 4 of chapter XVI of the Acts of 1926, page 23 of the compilation for that session provides that Article IV, Section 3, of the Constitution of Liberia,

> "be made to read, the number of Justices of the Supreme Court of the Republic of Liberia shall be limited to One Chief Justice and Four Associate Justices, and a majority of whom shall be deemed competent to transact the business of the Supreme Court and from whose Judgment there shall be no appeal."

This proposed constitutional amendment was submitted to the qualified electors of the Republic at the quadrennial election of the Republic held on the 3rd of May, 1927, and the ballots cast at said election having been carefully counted by both branches of the Legislature of Liberia at its session of 1927–28, they found that said proposal had been adopted by a two-thirds vote of all the electors who voted at the said election, and therefore on the 31st day of December, 1927, said amendment was one of those duly proclaimed as having been incorporated in the Constitution of this Republic. L. 1927–28, ch. III.

This constitutional amendment was not only intended to add two additional Associate Justices to the personnel of the Supreme Court, but also to set at rest the moot question whether or not the quorum of the Court established by Act of 1874–75, page 13, section 2, was or was not altered by the constitutional amendment of 1907–8, which made the Associate Justices constitutional, rather than statutory, officials, and leaving it now definitely settled that the Chief Justice need not be of the quorum.

Based upon a complaint of the Cavalla River Company, Limited, appellant in the above entitled cause, Mr. A. C. Routh, in charge of the British Legation in Monrovia, on the 10th day of February, 1933, made a *démarche* towards the Government of Liberia with respect to the

disposition of said case in the Supreme Court, in the course of which he cast certain imputations upon the conduct of some of the Justices then upon this bench. It appears that he was subsequently informed by his nationals that a motion for reargument had been filed and granted, whereupon he intimated that official propriety would not permit further interposition from him at the time. Hence, when on the 12th of April he presented sundry formal complaints against the action of this Court toward certain other of his nationals, the case under consideration was not included save by an informal inquiry as to the progress of the new proceedings.

There are two observations that the Court in passing will make upon this *démarche*. First, according to the well established principles of international law:

> "Claims of a private citizen against a foreign government are in their nature either contractual or tortious. Where the claim is founded on a tort committed by a foreign government, if the wrong committed is grievous in its nature, and especially if it is the result of animosity against the injured party on account of his nationality, the government of the injured party is morally bound to assert the rights of its citizen. . . . It is different, however, with claims founded on contract, for, while the government of the injured citizen may endeavor to obtain redress for its citizen in such case, the same moral obligation does not exist as in case of tort, because the elements of national honour are not involved to such a great extent, and the citizen is merely sustaining the same loss in a business risk that he might have sustained had he embarked his capital in a private enterprise and suffered loss as the result of individual delinquency or ordinary mercantile misfortune." 22 Cyc. 1734–5.
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> "As a general rule claims will not be asserted by a government in behalf of its citizen where a remedy

exists in the courts of the offending country until every judicial remedy is exhausted which is open to claimant. And if the claim is not allowed by the courts, the government of the aggrieved citizen will not interfere unless there has been a substantial denial of justice, or such that makes it apparent that the judgment was influenced by the nationality of or prejudice against the citizen aggrieved." *Id.* at 1710.

The other observation which the Court is constrained to make at this time is that that was not the first time that cases decided in this Court have been subsequently made the subject of diplomatic inquisition. For after the decision had been rendered in this Court in January, 1904, in the case *Houston Brothers & Co.* v. *Fischer & Lemcke,* bill in equity for a dissolution of partnership, 1 L.L.R. 434, the then Imperial German Government very strongly contested the justice of said decision. But His Excellency H. W. Travis, then Secretary of State, was able to defend at Berlin the position taken by our courts so successfully that the claim of the German Government for an indemnity had to be waived.

More recently the Government of the Netherlands protested against the decision given at the November term, 1922, of this Court in the case *Walker* v. *The Oost Afrikaansche Compagnie,* in an action of damages for the violation of a contract, and in that case His Excellency Edwin Barclay, then Secretary of State, was able to irrefutably reply to their protest.

In neither of those cases, however, was any imputation made, or attempted to be made, against the conduct of any member of the Court.

This Court will not then allow itself to be influenced by any existing, or threatened, attacks upon it. Our effort will be so to demean ourselves that our personal characters will be above reproach; and then to endeavor by hard study and careful research so to pass upon the principles

of law that from time to time may be presented for our consideration, as to reduce any errors of judgment to the lowest possible minimum.

But to return to the case at bar, what, in the meantime, had become of the first count of Mr. Harmon's motion for a reargument of the case under consideration? That is one of the points that was argued before this Court as presently constituted on the 9th, 10th and 11th days of January, 1934, Messrs. Ricks and Tubman, attorneys for E. S. Prince Pepple, appellee, contending that said count of the motion was subsequently overruled because the Court on the 12th of April, 1933, ordered an execution to issue; and Mr. Harmon, on the other hand, contending that no ruling was ever given on that count, but that the Court suspended a ruling on said count based upon the motion filed, a copy of which motion was on the 11th of February, 1933, sent to each Justice then on the bench and produced at the bar of this Court while the matter was pending, showing additional reasons why the reargument should be held. The facts set out in said letter as ancillary to those set out in the motion are, Mr. Harmon contends, those "certain matters brought to the Court otherwise" which led the Court on the 14th of February to suspend execution of the judgment, as well as its ruling on the first count of the motion filed.

We cannot agree with the contention of Messrs. Ricks and Tubman that the said motion was not granted, because, as has already been shown *supra* and admitted by all parties, the Court did in fact carefully consider and judicially pass upon the second count in the said motion at the same time it suspended its ruling on the first count, and we have the authority of Mr. Justice Grigsby, one of the Justices who rendered the majority opinion, and now the only one of said Justices associated with us on this bench, for taking the position that never was the first count of the motion considered by the former bench. Moreover, during the argument at this bar, he

severely rebuked Counsellor A. B. Ricks, because on a certain day as he was about to step into a boat to embark for Sinoe, he discovered that the said Counsellor Ricks had chased him to the water front with an order issued by Mr. Justice Beysolow, a pen and a bottle of ink in his hand, requesting his signature to an order Mr. Justice Beysolow had prepared for an enforcement of the judgment, which is placed in the record dated "14th instant," but erased and written over the 12th April, 1933.

The Court refrains for the moment from commenting further upon this misconduct of Counsellor Ricks which drew from Mr. Justice Grigsby the strong expressions of indignation hereinbefore referred to, and upon which the rest of the Court fully commented at the time.

In view of all these facts, it was the view of the Court that the reargument had actually been commenced; and the second count of the motion having been fully disposed of, we shall now proceed to consider and settle the first count in said motion.

In this count, as aforesaid, Mr. Harmon states that His Honor Aaron J. George failed to make a legal ruling upon the first and second counts in defendant's amended answer. Referring to the records we find that E. S. Prince Pepple, plaintiff in the court below, filed an "action of damages to personal property" in which he complained that defendant refused and neglected to deliver to the plaintiff an amount of seventy pounds sterling together with nine pounds one shilling and eight pence accrued interest at 5 per cent which plaintiff had voluntarily entrusted on an interest bearing deposit with the defendant's company. That defendant in its amended answer contended that the complaint of the plaintiff was not within the "scope of the form of action chosen" since there was no effort made to "show any injury done to any personal property of the plaintiff but tends only to show a purported refusal and neglect of the defendant to deliver up a certain sum of money charged in said com-

plaint to be the property of the plaintiff, which, if true, makes the defendant only liable in debt for its recovery." Count two of the amended answer further attacks the complaint on the grounds that "no action of damages can be [*sic*] against [*sic*] the recovery of a sum certain due on a written obligation or on a deposit account of this kind as will appear on the receipt marked exhibit 'A' and made a part of said complaint, as the relation of the depositor and depositary is that of a debtor and creditor, and the legal remedy is a suit at law for debt and not damage." His Honor Aaron J. George, the Circuit Judge who heard and disposed of the pleadings, ruled out the answer of the defendants and ordered the case to be tried by a jury; which, in our opinion, was a serious legal blunder, and the cause of all the difficulties that have arisen in this case.

According to the old common law:

> "Personal actions, speaking generally, were actions founded either on *contracts* or on *torts;* torts denoting generally all wrongs independent of contract, and being often considered as of three kinds, viz.: (1) *nonfeasances,* or the omission of acts which a man was by law bound to do; (2) *misfeasances,* being the improper performance of lawful acts; or (3) *malfeasances,* being the commission of acts which were within themselves unlawful; and personal actions [not damages to personal property] when founded on contract, are described as actions *ex contractu* and those on tort, as actions *ex delicto.* And the forms of personal actions which were latterly recognized were eight, viz.: *debt, covenant, assumpsit, detinue, trespass, trover, trespass on the case,* and *replevin,*—the three first being founded on contract, and the remaining five on tort." 3 Stephen's Commentaries 401; *cf.* 3 Blackstone's Commentaries *117.

These common law forms of action have been considerably modified in modern days, first, by the Judicature Act

of 1873 on forms of action in law and in equity, and then by code pleading which had its origin in the United States of America; but except in some of the code states:

> "Although the form of all actions at law and suits in equity, and all the forms of pleading existing before the Codes, were thereby abolished, and it is sufficient to state in a plain and concise manner the facts constituting the cause of action, yet the substantive distinctions between actions on contract and those founded in tort still exist." 1 Encyclopaedia of Pleading and Practice 147; *cf.* 3 Stephen's Commentaries, 402 *et seq.*

In all those jurisdictions where the codes do not expressly make provision to the contrary:

> "The plaintiff had to be careful to select the proper form of action; because if he chose the wrong one, he would be non-suited and have to pay the defendant's costs, even though he had on the facts a good cause of action." 3 Blackstone's Commentaries *116, § 135, bottom page 1642 of the 1916 ed., historical note under the effect of Judicature Act of 1873.

In Liberia the distinctions between actions *ex contractu* and *ex delicto* were always carefully maintained from the very foundation of this Republic, and still exist. The first compilation of the Acts of the Legislature in 1856, commonly known as the Old Blue Book, chapter 1, page 30, section 3 reads:

> "Actions are divided into three general classes,— where the injury for which redress is sought is a breach of contract, the action is said to be an action growing out of contract; where it is an injury of any other description, the action is said to grow out of a wrong. The third class consists of actions growing out of judgments in former actions."

Section 4 of said statute states that:

> "Actions growing out of contracts, are subdivided into those in which a specific performance of the contract

> is sought,—and those which are intended to recover damages for the non-performance of the contract."

According to section 11:

> "There are three actions growing out of wrongs,—replevin,—ejectment—and the action to recover damages for a wrong." See also Rev. Stat. 414–415, §§ 253, 254, 255.

By further reference to the Revised Statutes of Liberia, we find that a complaint for the violation of a contract must

> "state the contract and the violation thereof; and the fact that the plaintiff has sustained damage by reason of such violation; but it shall not be necessary to specify any amount of damages. If the contract be one merely implied by law, the complaint must state the fact from which the law will imply it." 1 Rev. Stat. 429, § 287 (1).

On the other hand:

> "In claiming damages for injury to personal property [as is the action under consideration] the complaint must state that the plaintiff was the proprietor of the goods which were injured, or that he was possessed of them; and it shall also state the nature of such injury, which may consist in taking, using, damaging, destroying, selling, or detaining such goods, or any act, which may diminish the value of them, or render their possession insecure." *Id.* at 430, § 287 (2b).

When comparing said provisions of the statute law with the citations from the common law hereinbefore quoted and the allegations set forth in the complaint of the plaintiff, it seems clear to the mind of this Court that the counsel for appellee did not thoroughly understand the principles herein explained, and that the judge of the trial court neglected himself to study the principles of law involved, having been carried away by the oratory and persuasive eloquence of Counsellor Ricks.

Or perhaps the resident judge was misled by the other

unfounded theory that Counsellors Tubman and Ricks eloquently urged before this tribunal; namely, that an answer which contains in different counts (more correctly pleas), demurrers, pleas in abatement, pleas in confession and avoidance, and traverses, is an evasive and contradictory answer which should, like what is technically called a departure in pleading, be visited by the trial court with the dismissal of all the pleadings of the defendant. Let us therefore address ourselves to a consideration of this theory advanced by the counsellors for appellee.

Under the old common law rule, upon the filing of the declaration (complaint) in a suit:

> "The parties must at each stage demur, or plead by way of traverse, or by way of confession and avoidance. This rule has two branches:—(1) The party must *demur,* or *plead.* One or other of these courses he is bound to take . . . until issue be tendered. . . . (2) If the party *pleads,* it must either be by way of *traverse,* or of *confession and avoidance.*" Heard, Civil Pleadings 104–105, Rule 1.
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> "With respect to the *effect* of a demurrer, it is, first, a rule, *that a demurrer admits all such matters of fact as are sufficiently pleaded.* The meaning of this rule is, that the party, having had his option whether to *plead* or *demur,* shall be taken, in adopting the latter alternative, to admit that he has no ground for denial or traverse, which is one of the kinds of *pleading.*" *Id.* at 108.

Such was the rule under the old common law. But it does not seem to have obtained long in the United States where code pleading began to develop at an early stage. Nor was it ever adopted in Liberia where from the compilation of 1856, above referred to as the Old Blue Book, the following rules were laid down:

> "The defendant may either deny the truth of the facts stated in the complaint [*traverse*], or he may

deny that they are sufficient in law to maintain an action [*demur*], or he may do both [*demur* and *plead*], and in so doing he is not confined to any form." ch. V, § 1.

"If the defendant deny both the facts and the law [*demur* and *plead*], the question of law [*demurrer*] shall first be disposed of." § 2.

"The defendant may file an answer to the complaint, setting forth new facts to excuse or justify his conduct [*confess* and *avoid*], every such answer must be in writing, and must contain a distinct, intelligible and sufficient answer to the complaint, or to such parts thereof, as it professes to answer, or judgment shall be given for the plaintiff." § 3.

This would seem to be universally true, for whether under the old common law or under the Statutes of Liberia, in case of a plea by way of confession and avoidance badly pleaded, judgment should still be given for the plaintiff.

"If the defendant have really several answers to the complaint, he may avail himself of them all, separating them by commencing each new answer with the words, 'And also because.'" Old Blue Book, ch. V, p. 44, § 7.

". . . The fundamental principle upon which all complaints, answers or replies shall be constructed, shall be that of *giving notice to the other party, of all new facts* which it is intended to prove, *whether they are consistent with the facts already stated* to the Court, *or being inconsistent* with the present existence of such facts, *admit or imply their former existence, or show that existing, they can have no legal effect.*" * *Id.* § 8; 1 Rev. Stat. 433, § 289 (2), (3), (4), (5); *id.* at 435, §§ 291, 292, 293.

Thus as will be seen from the citations referred to *supra,* our statutes permit a party to file several demur-

* Italics added by the Chief Justice.

rers and several pleas; subject, nevertheless, to the limitation that the several pleas in the pleadings should be pled in due order, which order of pleading may be found, for example, in Heard's *Civil Pleading,* pages 314–15.

From the foregoing it is the opinion of this Court that the case at bar has never been legally tried, for the judge erroneously dismissed the demurrers of defendant, and permitted evidence to be introduced tending to support a contract when the case at bar was filed as one of tort. The only conclusion then to which we can logically come is that the case should be dismissed, and the plaintiff ruled to pay all costs; after which he will be at liberty to institute the correct action for the injury which he claims was done him by the alleged breach of contract; and it is so ordered.

Reversed and dismissed.

MR. JUSTICE RUSSELL, being disqualified, took no part in the consideration or the decision of this case.