CASES ADJUDGED

IN THE

SUPREME COURT OF THE REPUBLIC OF LIBERIA

AT

NOVEMBER TERM, 1929.

WEST AND COMPANY, Appellants, *v.* THOMAS C. LOMAX, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Decided January 14, 1930.

No general denial, whether expressed or implied, shall ever be construed in an answer or reply to be any affirmation of any fact such as time or other affirmative matter of the intention to prove which the other party ought in fairness to have notice. The fundamental principle upon which all complaints, answers or replies shall be constructed shall be that of giving notice to the other party.

In an action of debt, the Municipal Court of the Commonwealth District of Monrovia gave judgment for plaintiff, which was affirmed by the Circuit Court. On appeal to this Court, *affirmed.*

Barclay & Barclay for appellants. *S. David Coleman* for appellee.

MR. JUSTICE GRIGSBY delivered the opinion of the Court.

This case originated in the Municipal Court of the Commonwealth District of Monrovia and has found its way to judicature by a regular bill of exceptions taken

to the several rulings, opinions and final judgment of the resident Judge of the First Judicial Circuit, Montserrado County, sitting in its chamber session, November term, 1929.

The counts raised in appellant's bill of exceptions are manifestly against the position taken by said resident Circuit Judge in support of the judgment rendered by the magistrate of the Municipal Court of the Commonwealth District, which resulted in favor of the appellee in the said Court.

From perusal of the records in the case, appellants were returned duly summoned. The case was called and defendant recorded as a defense a plea of general denial and rested his cause upon that plea only.

The code which regulates the mode of procedure in the justice of the peace and magistrate courts declares that at the appearance of the defendant he may answer plaintiff in the following manner, to wit:

1. By verifying that the complaint is insufficient in law to maintain the action, or
2. By contesting the truth of the facts stated in the complaint, or
3. He may present as a setoff a counterclaim against plaintiff; but the counterclaim must be germane to the action. The justice or magistrate shall thereupon enter the substance of defendant's answer on the writ and shall write his judgment thereunder.

It is an indispensable duty of every court to keep before it the pleadings of litigants, as they alone will enable it to guide itself aright throughout the trial and ultimately arrive at transparent justice to all concerned.

The appellants in the face of the foregoing legal requirements having recorded in the court below a plea of bare denial, their only privilege under the said plea from the beginning to the end by a preponderance of evidence was to prove to the court that they had made tender of the balance of plaintiff's amount deposited, and to rest

upon that defense only. But what is strange and unfair, appellants, unmindful of their responsibility to surround their case with the prerequisites of the law and in the face of their bare denial, indicated an effort to produce evidence to prove that appellee was indebted to them in the sum of £6:19:10 without pleading the same in their answer to plaintiff's complaints, which negligence was tantamount to a waiver, and the doctrine of estoppel operates against them.

Whenever litigation exists as a matter of fact, somebody must go forward with it. The plaintiff is the first to begin; if he does nothing, then he fails. If he makes a prima facie case and nothing is done to answer it, the defendant fails. To disprove the allegation set forth by plaintiff in the case is the indispensable duty of the defendant.

It now becomes our duty to consider whether or not the appellee has made a prima facie case in law and facts in the court below.

On the 28th of March, 1929, Thomas C. Lomax sued West and Company for the sum of $33.56. They having promised to pay the said amount failed to do so which resulted in this action.

From an inspection of the records it appears that Mr. Lomax asked Mr. Eirnpaker who was at the time agent for West and Company to import some zinc at the rate of one pound eight shillings per bundle, to which he agreed and Lomax made a deposit of ten pounds sterling and obtained a receipt therefor under the signature of Mr. Willi, the chief clerk of the business. After waiting for a considerable time for the arrival of the zinc, he inquired the reason for the delay. They asked him whether he was in possession of the receipt, to which he answered in the negative and called attention to their book account as he could not find the receipt then and there. Finally, they were advised to pay the sum of three pounds twopence against the said ten pounds and to withhold

the residue until Mr. Lomax produced a receipted voucher for indebtedness with their Du Number 1 Factory. Lomax denied this claim of West and Company and stated that the business transaction at Du had finally been settled and full payment made. But notwithstanding this fact West and Company continued to withhold the balance of this deposit contrary to his will and consent.

Witness Lewis McCauley stated that he accompanied Lomax by his request into the business house of the said company in connection with the amount which he claims was due him by the firm and asked him to wait there, as he had carried a receipt which had been given him by the said West and Company for the amount he had given as a deposit for some zinc, and that he had presented the note to the chief clerk and he had taken it to the office upstairs. After waiting for the space of half an hour, Mr. Willi returned and Lomax asked for the ten pounds paid for the zinc. He replied that he could not deliver it as Mr. Frank was absent from the store. Lomax asked if he was the gentleman who signed the note and he replied in the affirmative, but had forgotten the date of the receipt of the amount and when it was entered in the book; he therefore asked for a copy of the said note and Lomax gave it to him. The said receipt which is the foundation of this action reads as follows: "Received from Mr. Lomax the amount of ten pounds sterling—West and Company; For West and Company. Sgd. Ernest Willi January 16, 1928."

This Court observes that although West and Company had absolutely refused to make payment on this receipt to Thomas Lomax the plaintiff in this case until the settlement of the amount of six pounds nineteen shillings and tenpence claimed by the sub-agent of said firm at Du Factory against the said plaintiff, yet Counsellor T. O. Collins advised them to make partial payment of the same

in the sum of three pounds twopence which was noted on the back of the receipt.

It is the opinion of the Court that the advice given by Counsellor Collins to his client was not legally sound and by such actions he has precluded the Court from considering the matter otherwise. Lomax, however, reluctantly received the amount ordered paid and when he made further demand for the balance of the amount deposited, the firm having refused to make further payment, plaintiff brought this action of debt.

During the progress of this trial it does not appear from the records that defendant in the court below, now appellant, offered any specie of evidence tending to disprove the allegations set forth in plaintiff's complaint but rather sought to establish by oral testimony a counterclaim which was not pleaded in his answer which in duty bound he should have done. This position under the rule of pleadings makes fatal and void of legal effect his effort at this stage of the case.

It is a settled principle of law that litigants cannot expect courts to do for them what they have failed to do for themselves. The only advantage he could enjoy under the plea of denial raised in their answer was to prove the non-existence of the debit balance in that he made tender of the said amount deposited by written or oral testimony.

It not appearing from the records that defendants, now appellants, exerted themselves to bring to the stand any evidence tending to support their said plea in the answer and this by their own voluntary conduct, this Court sees no reason why the counts raised in appellant's bill of exceptions should not crumble and fall for want of legal foundation on which to rest.

It is therefore the opinion of this Court that the judgment of the court below be and is hereby affirmed, and it is so ordered.

Affirmed.