SAMUEL B. COLE, Appellant, *v.* ROBERT A. PHILIPS, Appellee.

APPEAL FROM THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Heard: June 1, 1981. Decided: July 29, 1981.

1. Courts will only pass upon issues initially joined between the parties and specifically set forth in their pleadings. Matters of defense not set up in defendant's pleadings shall not be considered by the appellate court.
2. Where motion papers served on the adversary are signed, the omission to sign the original filed with the court constitutes a harmless error and does not warrant a dismissal of the motion.
3. Whatever defense a party may have to a pleading or motion, it should initially be interposed in the trial court and passed upon thereat in order to legally enable the appellate court to examine the same, otherwise it will not be entertained on appeal.
4. Although damages may be awarded by the jury in an action of ejectment for wrongful detention and possession, there, however, can be no damages for wrongful withholding in the absence of an award of possession of the land sued for.
5. Where evidence of title is insufficient in an ejectment action to support a finding, the Court will order the case remanded for an accurate survey by a board of arbitrators.
6. Where the jury in an ejectment action awards damages, without any mention of the land sued for, it is impossible to issue and serve a writ of possession because of uncertainty, and the court shall appoint a board of arbitration to survey the disputed land.

In an action of ejectment instituted by appellee, the jury returned a verdict awarding appellee $4,500.00 as general damages, but the verdict made no mention of the property sued for. A motion for a new trial was filed, but only the copy served on the appellee was signed by counsel for appellant. The original papers filed with the court was inadvertently not signed. Appellee failed to interpose a resistance to the motion. Not-withstanding, the court denied the motion; whereupon, a final judgment confirming the verdict was rendered, and a writ of possession ordered issued. It is from this final judgment that appellant announced an appeal to the Supreme Court.

The Supreme Court held that even though general damages may, in proper cases in ejectment, be awarded for wrongful

withholding of the property, the general damages awarded in the instant case was unreasonable, especially in the absence of the award of the property sued for. The Supreme Court held that it is impossible to issue and serve a writ of possession in a case where there is no certainty on the property sued for. Accordingly, the Supreme Court remanded the case to the trial court with instructions to appoint a board of arbitration to make an on-the-spot impartial survey of the area in dispute to determine: (1) whether appellant is occupying appellee's land sued for; and (2) whether appellant had encroached upon a portion of appellee's land, and if so, to what extent.

MacDonald Krakue appeared for appellant. *Stephen Dunbar, Sr.* appeared for appellee.

MR. JUSTICE YANGBE delivered the opinion of the Court.

Appellee sued out an action of ejectment against appellant in the Civil Law Court, Sixth Judicial Circuit, Montserrado County, to recover one town lot. Appellant filed an answer claiming ownership to two town lots with different numbers and different metes and bounds, apparently located in the same area. After issues of law were decided, the case was ruled to trial by a jury under the direction of the court. The trial was concluded with a verdict for appellee.

A motion for a new trial was filed, and although no resistance was interposed thereto by the appellee, the trial court *sua sponte* rejected it because the original was not signed. Thereafter, final judgment was rendered confirming the verdict. The appellant, not being satisfied with the judgment, perfected an appeal therefrom and the case is now before this forum for review and final adjudication.

In counts one, two and three of the brief of appellant, which are the amplifications of counts one, two and three of the bill of exceptions, appellant contended that the trial court failed to comprehensively pass upon the issues of law raised in the answer and the reply. In these counts, appellant claimed that the issue of older title and statute of limitations were

raised, but when we were about to focus our attention on the contentions, they were waived by counsel for appellant during the arguments before this Bench. However, our comments in this opinion on those waived three counts of the bill of exceptions are mere *dictum.*

According to the testimony of appellant, which was corroborated by Mrs. Elizabeth Barclay Cooper, the grantor of the appellee and Mrs. Georgia Manley Cole, the wife of appellant, when the grantor of appellee approached appellant about appellant's alleged ownership to the property in dispute, appellant offered the sum of $1,500.00 representing the amount appellee paid to his grantor for the land. The grantor of appellee, Mrs. Elizabeth Barclay Cooper, accepted the amount with the understanding that it was o refund the money that appellee had paid to her for the one town lot in question. However, appellee refused to accept the money. The offer made by appellant had been emphasized during the trial of this case by the trial judge as well as the jury; we will therefore consider whether it has any legal significance in this case.

There are two reasons why we cannot consider the offer as our guide in the determination of this case; namely (1) Mrs. Elizabeth Barclay Cooper is not a party to this action and (2) the amount of $1,500.00 offered by appellant in order to settle the matter out of court was not accepted by appellee, therefore, the offer has no legal importance, nor is it binding on either party. 15 C.J.S., § 6 and 7, pp. 716 and 717

According to count five of the bill of exceptions, the trial judge is quoted as saying in his charge to the jury:

> "Each of them (the parties) is bound to show the title of the one from whom it was purchased and right until it gets to the Republic."

Appellant claimed that under the law, it is the plaintiff who must recover upon the strength of his own title and not upon the weakness of that of the defendant. Generally, this contention is legally sound, but we wish to mention that the trial judge made no mention about any defect in the title of either party. However, we will quote the relevant portion of the charge:

"In ejectment action, the parties must necessarily rely

upon title, and the best title is that given by the Republic with reference according to the date of issuance, the older being preferred. This, in our opinion, is the principle of law which might assist you in determining the owner of this disputed land."

The portion of the charge complained against and quoted hereinabove, is entirely different from what is quoted in count five of the bill of exceptions. Further, in count two of his answer, appellant did aver the issue of older title and relied upon his deed; therefore, count five of the bill of exceptions is not supported by the records; and it was the statutory duty of the judge to sum up the evidence and instruct the jury on law applicable to the case before its retirement to consider the facts and render a verdict. BLACK'S LAW DICTIONARY 241, 293, 295, (4th ed.); and Civil Procedure Law, Rev. Code 1: 22.9. Count five of the bill of exceptions is therefore not sustained.

Appellant raised the contention in count six of the bill of exceptions that he filed a motion for a new trial on the 4th of February 1980, and signed the copy of the motion that was served on counsel for appellee, but inadvertently omitted to sign the original thereof filed in the office of the clerk of court. He claimed that because the signed copy was served on counsel for appellee, there was no resistance interposed by him. However, the trial judge *sua sponte* refused to entertain the motion. The records in this case shows that the only stage at which reference was made to the motion for a new trial was in the final judgment, which gives color to what is complained of by the appellant.

Furthermore, there is no denial in the records of the truthfulness of the averment stated in count six of the bill of exceptions; hence, in the absence of a denial, expressly or by necessary implication, the contention is taken as admitted. *Ibid.*, 1: 9.8 (3); and *Cavalla River Company, Ltd. v. Pepple,* 3 LLR 436 (1933). Courts of justice will only pass upon issues joined between the parties and specifically set forth in their pleadings. Matters of defense not set up in defendant's pleadings shall not be allowed. Notice should be given by one party to the other of all matters of facts or law relied upon in

prosecuting an action. *Clark v. Barbour,* 2 LLR 15 (1909).

The omission on the part of appellant to sign the original copy of the motion for a new trial should have been regarded by the trial judge as harmless error which does not affect the rights of either party. Civil Procedure Law, Rev. Code, 1: 1.5. Therefore, the trial court was in error as a matter of law by *sua sponte* rejecting the motion for a new trial. Consequently, count six of the bill of exceptions is well taken; hence, same is sustained.

These are the summaries of the contentions raised in the motion for a new trial: (1) dissimilarities of land described in the respective deeds of the parties; (2) older title; (3) lack of proof of the $4,500.00 damages awarded (4) that plaintiff now appellee, was attacked for not proferting his grantor's title and that it was only at the trial, and in the absence of counsel for defendant, now appellant, that the title of appellee's grantor was introduced at the trial, and marked by court as P/2; (5) in ejectment, plaintiff must rely upon the strength of his own title and not upon the weakness of his adversary; (6) the verdict is indefinite as to the quantity of land awarded. Appellant submitted that a verdict must be certain as to what land was awarded as a writ of possession cannot be uncertain.

We have already passed upon the effect of failure to deny the salient points tendered in the motion for a new trial, therefore, we will now address ourselves to count eight of the brief of appellant in which he attempted to traverse count six of the bill of exceptions:

> "Appellee says further that the judge committed no reversible error in denying the motion for a new trial on the ground of which he did. It is mandatorily required that verification and/or signing is required in every pleading by a party himself or his attorney. The purpose of said representation constitutes a certificate that the document is not properly verified, and that it may be stricken as though the document had not been served."

We wonder what effect count eight of the brief has on the motion for a new trial at this level, in the absence of a resistance filed to the motion in the trial court?

Appellee, in support of count eight of his brief, quoted

above, cited *Knowlden v. Reeves et. al.*, 12 LLR 103, 107 (1954). In that case the trial court gave an oral charge which in count five of the bill of exceptions was considered as adverse to the appellant. Therefore, this Court in passing upon count five of the bill of exceptions in that case held that:

> "This Court cannot adequately review the issues raised in count "five" in the absence of a written charge, which plaintiff had a right to apply for, and which would have enabled us to pass upon the said issue....."

In the case at bar, the issues summarized above were raised in a written motion and counsel for appellee had every opportunity to have resisted in the trial court in the light of count eight of the brief.

In our opinion, whatever defense a party may have to a pleading or motion, it should initially be interposed in the trial court and passed upon thereat in order to legally enable the appellate court to examine the same; otherwise, it should not be entertained. *Clark v. Barbour,* 2 LLR 15 (1909). Appellee should have resisted the motion for a new trial, and, having failed so to do, in the proper time, any contention by appellee at this level which tends to oppose the issues raised in the motion for a new trial will not be considered by the appellate court for the first time. This Tribunal can only exercise appellate jurisdiction in all matters of law and facts raised in the trial court. PRC DECREE NO. 3.

Appellant contended that the verdict is uncertain as to what lands were awarded.

In order to resolve this contention, it is necessary to quote pertinent portions of the verdict and it reads:

> "We, the petty jurors to whom the case *Robert A. Philips Plaintiff, v. Samuel B. Cole,* defendant, action of ejectment, was submitted, after a careful consideration of the evidence adduced at the trial of said case, we do unanimously agree that "the plaintiff is entitled to recover four thousand five hundred dollars damages ($4,500.00).
>
> Respectfully submitted."

Although this is an action of ejectment and, in keeping with law, damages may be awarded by jury in a proper case for wrongful detention and possession of the realty, yet, there

is absolutely no mention in the verdict of the one town lot claimed by appellee in the complaint, or any portion thereof, and in the absence of any award of possession of the land sued for, it is legal and logical that no damages for wrongfully withholding the property can be assessed against the defendant, now appellant.

The award of damages was unreasonable and therefore not justified by law. In the case *Duncan v. Perry,* 13 LLR 510 (1960), cited by counsel for appellant, the relevant portion of the judgment in that case reads:

> "It is therefore adjudged that the plaintiff recover the said piece of land, being lot number 112."

In the instant case, as we have said earlier, no mention was made in the verdict of any land whatsoever, say nothing about lot number and/or quantity of land; notwithstanding, the trial court in confirming the verdict in the final judgment, ordered that appellant be evicted and appellee put in possession of land which was not awarded by the jury in the verdict.

In *Duncan v. Perry*, cited *supra,* it is quoted:

> "The land should be designated or described with certainty sufficient to enable a writ of possession to be executed, and it has been held that the particular estate or interest should be designated."

There is no evidence in the records as to whether appellant occupies and withholds from appellee the one town lot sued for or any portion of it. It is therefore impossible to issue and serve a writ of possession in this case because of uncertainty. Where evidence of title is insufficient in an ejectment action to support a finding, the Court will order the case remanded for an accurate survey by a board of arbitrators. *Addo v. Jackson,* 24 LLR 306 (1975) .

In *Duncan v. Perry*, cited *supra*, and in *Wolo v. Samobollah*, 22 LLR 22 (1972), this Court was faced with similar situation; consequently, the two cases were remanded with instructions to submit each to a board of arbitrators.

Therefore, we have no choice but to invoke the doctrine of *stare decisis* by ordering the trial court to resume jurisdiction over the case with instructions that a board of arbitration consisting of competent legally qualified surveyors be appointed

to make an on the spot impartial survey of the area in dispute to determine whether appellant is occupying appellee's one town lot sued for, or whether appellant had encroached upon a portion thereof, and to what extent? This must be done within a specified time in the presence of the interested parties on whom notice must be served for their participation in the survey. Costs to abide final decision. And it is so ordered.

Judgment reversed; case remanded.