ELLEN G. COOPER, Executrix of the Will of JAMES F. COOPER, JESSE R. COOPER, AUGUSTUS W. COOPER, EMMA COOPER, MARTHA COOPER-SHERMAN, by and through her Husband, ARTHUR SHERMAN, ARMENA COOPER, EDWARD COOPER, et al., Heirs of JAMES F. COOPER, Appellants, *v.* SELENA MALINDA JACKSON-PARKER, Appellee.

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

Argued May 3, 4, 5, 1966. Decided June 30, 1966.

1. When a writ of summons is returned showing that only one of the several defendants has been served, the court acquires *in personam* jurisdiction over the remaining defendants who, although referred to in the writ of summons only as "et al." filed a formal appearance and answer.
2. A law firm is not a legal entity but an aggregate of individuals; and in ordinary circumstances any act authorized and executed in the name of the firm binds the firm.
3. An answer not filed within the statutory time is properly dismissed. 1956 CODE 6:297.
4. A party ruled only to a bare denial of the facts for failure to file a timely answer is nevertheless entitled to introduce testimony in rebuttal of evidence introduced by the plaintiff.

On appeal in an ejectment action, a *judgment* for the plaintiff below was *reversed.*

Barclay Law Firm for appellants. *Beysolow & Cooper Law Firm* for appellee.

MR. JUSTICE SIMPSON delivered the opinion of the Court.

This is an appeal from a final judgment handed down in the Circuit Court of the Sixth Judicial Circuit, Montserrado County, sitting in its law division during the Sep-

tember 1965 term and presided over by His Honor, Joseph P. Findley, Assigned Circuit Judge.

The action of ejectment was filed by the present appellee as plaintiff against the present appellants as defendants. The written directions filed wth the complaint requested the clerk of court to issue a writ of summons directed to the sheriff to summon Ellen G. Cooper et al. to appear and defend the action. On March 22, 1962, the sheriff filed his returns to the writ as follows:

> "On the 22nd day of March, 1962, I duly summoned the within named defendant, Ellen G. Cooper, widow and sole executrix et al; and I gave her a copy of the within writ as well as a copy of the complaint; and I notified her to file her formal appearance in the clerk's office on or before the 26th day of March, 1963. I now make this as my official returns to the clerk's office dated this 22nd day of March, 1962."

Subsequently, on the 26th day of March of the same year, a formal appearance was filed by the Barclay and Witherspoon Law Firm. Appended thereto was the signature of Counsellor William N. Witherspoon, presumably on behalf of all the defendants named in the title of the case. As a sequel to said appearance an answer was filed by the same law firm on the 3rd day of April, 1962, this time over the signature of Counsellor Anthony Barclay. It should be noted here that the affidavit attached to the answer was taken on the 2nd of April, the very date that the said answer carried. Additionally, the affidavit was taken by Raymond A. Hoggard as justice of the peace. It should here be noted that the same Raymond Hoggard was then clerk of the court in which the pleading was filed. However, from the record to us, we are requested to believe that the eminent counsellor, Anthony Barclay, proceeded to the clerk's office on the last day for filing the answer, swore to an affidavit at the said clerk's office, and thereafter returned to his answer out of court. According to the records, it was not until the following day,

which was without statutory time, that the answer was filed. In any event, let us proceed with the facts.

The reply as filed exhibited a certificate of the clerk of court to the effect that the answer had been filed after the period allowed by law. Pleadings finally rested at the rebutter filed by defendants on the 2nd day of May, 1962. Thereafter nothing further was heard of this case until this September 1964 term when a motion to dismiss for want of jurisdiction was filed by all of the defendants named in the complaint after their pleadings had been ruled out on October 6, 1962. This motion paper alleged that only Ellen G. Cooper had been served with process, whereas the other named defendants were never brought under the jurisdiction of the court by regular writ of summons as required by law. The defendants further contended that jurisdiction over the subject matter had not been acquired by the court because "the fee to Lot No. 326, if same be the property owned and occupied by the defendants, is vested in Jesse R. Cooper, August W. Cooper, and Edward Cooper and their lawful heirs by marriage."

Lastly the defendants contended that the absence of jurisdiction over the subject matter in litigation legally precluded the court from acquiring jurisdiction over the persons of the defendants even though there had been a prior appearance and a pleading on the merits of the cause.

In resisting the motion, plaintiff contended that submission to the jurisdiction of the court over the person cannot be subsequently made null and void predicated upon the dismissal of the answer and other pleadings of the defendants. Plaintiff, now appellee, further maintained that in prior pleadings the defendants had not questioned the jurisdiction of the court over their persons; therefore they could not, at the eleventh hour, be heard to raise any contention in that regard.

The evidence brought out at the trial shows that on the

26th day of November, 1896, one Joseph J. Sharp of the settlement of New York, Montserrado County, executed a warranty deed in favor of Randolph H. Jackson of Louisiana, county aforesaid, for the eastern half of Lot No. 326 situated on Randall Street in the City of Monrovia.

Randolph Jackson subsequently died leaving a will dated April 18, 1910. This testamentary instrument dealt in particularity with the several holdings of the testator; however there was an omission to include Lot No. 326. This holds true irrespective of the salient fact referred to by the appellee in her complaint that her grandfather's will "jointly bequeathed" the subject property to her mother, S. Malinda Jackson-Parker, and her aunts, Jessena A. Jackson-Hill and Eliza R. Jackson. Strangely enough, the testator gave to his three daughters all his real estate not disposed of during his lifetime. Notwithstanding this provision, the succeeding clauses of the will proceeded to set forth specific devises of realty to the children individually. Quite a paradoxical situation.

The trial concluded with a judgment in favor of the present appellee as plaintiff, on a verdict returned by the jury. A motion in arrest of judgment was denied. Thereupon a bill of exceptions containing 29 counts was presented to the trial judge for approval. After such approval had been obtained, the other statutory requirements to bring the case for appellate review were completed. Although the appellants filed an elaborate bill of exceptions comprising 29 counts, only the following issues are necessary for determination of this case.

The first issue to which we shall advert involves the question of whether, when a writ of summons is returned showing that only one of several named defendants had been served, the court acquires *in personam* jurisdiction over the remaining defendants who, although referred to in the writ of summons only as "et al.," filed a formal appearance and answer. Earlier in this opinion, we men-

tioned that the writ of summons, together with the written directions, mentioned defendant, Ellen G. Cooper as sole executrix of the last will and testament of James F. Cooper. The returns of the sheriff, although the same included the words "et al.," never mentioned that the other defendants named in the complaint had been served and required to be present in court to defend their interests. Quite peculiarly, irrespective of the above facts, the defendants retained the services of the Barclay and Witherspoon Law Firm which filed a formal appearance over the signature of Counsellor William M. Witherspoon. This formal appearance ostensibly represented all the defendants in the title to the case as found in the complaint. Subsequently Counsellor Anthony Barclay, of counsel for defendants, filed an answer in court, not one count of which contested the jurisdiction of the court over possible defendants who had been designated by the use of the phrase, "et al.," but not named in the complaint as defendants. In other words, the answer did not contest the court's jurisdiction over any of the named defendants but solely queried the use of the words "et al." which implied the existence of unnamed defendants.

In *Young* v. *Embree*, 5 L.L.R. 242, 244 (1936), this Court said:

> "The Court will remark in passing that it is unable to consider the '*et al* whose names to the plaintiff are at present unknown,' complained against by said appellee because in legal proceedings every party thereto should be designated by his proper name and title, and should legally be made a party either by joining in the suit as plaintiff, or by being brought under the jurisdiction of the court by the service of process, or the voluntary and express waiver of service of process, as defendant."

Although it is our determination that the above-quoted opinion in the *Young* case is germane to the issue at bar, yet the facts in the present case were such that the rule of

the *Young* case cannot be applied here in its totality, predicated upon the fact that jurisdiction of the person may be conferred upon the court by consent of a party. In the present case, all named defendants subsequently submitted themselves to the jurisdiction of the court through their formal appearances. In the premises, the appellants herein may not avail themselves of the rule of the *Young* case.

In passing we should like to state that an argument was presented to us to the effect that the appearance by Counsellor Witherspoon for all the defendants save the sole executrix constituted an unauthorized act. This contention was argued in the motion to dismiss as referred to earlier in this opinion. As we view it, however, the same Counsellor Anthony Barclay who filed the motion had in effect previously appended his signature to the answer which raised no issue regarding the court's jurisdiction over the defendants named in the complaint. It has been argued that the motion to dismiss was filed by the Barclay Law Firm whereas the answer was filed by the Barclay and Witherspoon Law Firm. But a law firm is not a legal entity; it is an aggregate of individuals; and in ordinary circumstances any act authorized and executed in the name of the firm binds the firm. It follows that Counsellor Anthony Barclay cannot be heard to repudiate his own act. A party who has filed a plea or answer in bar cannot thereafter plead matters in abatement, not even with leave of court. *Kern* v. *Huidekoper*, 103 U.S. 485 (1880); 41 AM. JUR. 373–375 *Pleadings* § 123.

Let us now turn our attention to the second issue which we find it necessary to pass upon. Was the judge in ruling upon the issues of law correct in dismissing the answer and the subsequent pleadings for failure to file the answer within statutory time? The controlling statute provides as follows:

> "In an action in a court of record the defendant shall file and serve on the plaintiff his answer within

ten days after the service of the summons and complaint on him unless otherwise provided by law or ordered by the court. . . ." 1956 CODE 6:297.

Section 296 of the same title provides that if the defendant appears but fails to file and serve an answer, he is presumed to deny the truth of the facts in the complaint and to rest on that ground only. In the present case, the answer as filed by the several defendants was not presented in court within statutory time and therefore was dismissed. It has been contended by the appellants that there exists a contradiction in the rulings on the law issues by Judge Morris and the ruling on the motion to dismiss by Judge Weeks during a subsequent term of court. Appellants contended that Judge Morris held that only the executrix, Ellen G. Cooper, had been brought under the jurisdiction of the court. In our view, these rulings are in harmony. Judge Morris held only that parties who were never summoned or brought under the jurisdiction of the court could not be held answerable. The same judge held, however, that the action was not abated for failure to include other defendants who should have been named, since this was a dilatory plea that could be cured under the statute governing nonjoinder of necessary parties.

The next issue upon which we shall focus our attention has to do with the conduct of the trial of the case by the judge in the court below. The greatest amount of emphasis was placed upon the fact that the judge, in ruling on the law issues, had in accordance with Sections 296 and 297 of the Civil Procedure Law, placed the defendants upon the bare denial of the facts as stated in the complaint. In consequence of this ruling dismissing the answer, most questions to witnesses were disallowed. We should here remember that this is an action of ejectment and that one of the basic rules in ejectment actions is that the plaintiff must recover on the strength of his title and not the weakness or want of title of his adversary.

The complaint as filed stated that the appellee's maternal grandfather had acquired Lot No. 326 during the year 1896 by purchase from one Joseph J. Sharp of the settlement of New York in Montserrado County. The complaint further alleged that the subject property had been "jointly bequeathed" to the appellee's mother and aunts in accordance with the last will and testament of her aforementioned grandfather. A copy of said last will and testament was proferted with the complaint and subsequently introduced in evidence. Recourse to the contents of the will shows that the testator meticulously made a specific enumeration of the properties that he was seized of at the time of the execution of his last will and testament. Additionally, this document was written approximately 14 years after the testator had acquired title to Lot No. 326 from Joseph Sharp. Furthermore, in the third paragraph of the will, the testator made this testamentary expression: "I give and bequeath all my real estate not disposed of during my lifetime to my three (3) daughters. . . ." This clause, of itself, evidences or at least suggests that during the lifetime of Randolph Jackson he possessed certain properties which he alienated prior to his demise.

Now with these facts and pertinent law in the background, let us center our attention upon the several rulings of the trial judge in respect of matters of evidence and his subsequent charge to the jury. On cross-examination, the following question was put to witness Malinda Jackson-Parker:

> "I suggest to you that your grandfather disposed of his property before he made the will dated 18th April, 1919; and is that why it was not specifically mentioned in any clause of this will which you had made profert of?"

Counsel for the present appellee, plaintiff below, objected to the above question on the ground that it would elicit an answer material to an affirmative defense not-

withstanding the limitation of the defendants to a bare denial. Counsel cited *Massaquoi* v. *Lowndes*, 4 L.L.R. 260 (1935).

The court sustained the objection as made, citing the case of *Clark* v. *Barbour*, 2 L.L.R. 15 (1909). The appellant has strenuously argued that in *Bryant* v. *Bryant*, 4 L.L.R. 328 (1935), this Court held that rebutting evidence is always admissible even though the party producing or soliciting it has been ruled only to a bare denial of the facts in the complaint, it being a general rule that anything may be given as rebutting evidence which is a direct reply to that produced on the other side. The *Barbour* case cited by the trial judge is concerned primarily with the question of notice which constitutes a fundamental requirement in the law of pleadings. Here, however, a fact had been alleged in the complaint and the plaintiff had already been allowed to introduce evidence as proof of that fact. The defendant merely sought to introduce evidence in rebuttal. The plaintiff had alleged that her grandfather's will "jointly bequeathed" to her mother and aunts properties of their father which had not been disposed of during his lifetime. Was it then proper to disallow a question that sought to counteract the inference that this property had not been disposed of by Randolph Jackson prior to the coming into effect of his will which, as must be remembered, continues as an ambulatory and revocable instrument until the time of the testator's death. In our view, the trial judge erred and the objection should have been overruled rather than sustained.

Since much had been argued on the question of what constitutes an affirmative defense, or what is new matter that a party is precluded from introducing into evidence where he is ruled to the bare denial of the facts alleged in the complaint, we deem it necessary to include the following quotations.

> "Evidence will generally be excluded which relates to a defense not pleaded and which is not covered by

the general issue or general denial. The rule in this respect is founded upon principles of justice and propriety, for where a defense is made in appropriate season, the opposing party may prepare to meet it and to explain and remove whatever may be prejudicial to his case; but when the defense is made at an unsuitable time, it may surprise, and, if recorded, do injury and injustice. However, a defense allowed not for the sake of the defendant but of the law itself and the purity of its administration cannot be waived by pleading of failure to plead." 41 AM. JUR. 370–371 *Pleading* § 117.

"A defendant is not confined to a mere denial of the allegations of the plaintiff's declaration or complaint. He is entitled to set up new matter on which to predicate affirmative relief, or to meet and avoid the cause of action relied upon by the plaintiff. Where such affirmative or new matter is of a character such as cannot be proved under a denial of the plaintiff's allegations, a defendant who wishes to avail himself of it must plead it specially. But no good reason exists for pleading affirmative defenses containing averments of facts that may be proved under the general issue or a general denial." 41 AM. JUR. 400–401 *Pleading* § 155.

"New matter as here intended is matter extrinsic to that set up in the complaint as the basis of the cause of action. It relates to acts, transactions, or happenings which have occurred subsequent to the acts complained of by the plaintiff and which do not form a part of the original contract or transaction but are independent of it; occurrences, in other words, which have arisen since the cause of action came into existence, unless such subsequent occurrences are merely links in a connected and continuous chain of events tending to negative the existence of the cause of action. Whatever fact, if proved, would not tend to contra-

dict the plaintiff's first pleading, but would tend to establish some circumstance, transaction or conclusion of fact not inconsistent with the truth of all of those allegations is new matter. Otherwise stated, it is any matter which avoids the action and which the plaintiff is not bound to prove in the first instance in support of it, but which under the rules of evidence the defendant must affirmatively establish. If what is alleged amounts to a denial, it is not new matter; nor is it a new matter if the facts alleged might have been proved under a denial. A defense that concedes that the plaintiff once had a good cause of action, but insists that it no longer exists, involves new matter. If no cause of action ever had a legal existence, the proper answer is a denial, and the defendant may show thereunder any legal evidence going to show the nonexistence of the cause of action. Nothing need be pleaded as new matter in such case." 41 AM. JUR. 401–402 *Pleading* § 156.

Documentary evidence and oral testimony were offered to prove that Randolph Jackson had sold Lot No. 326 prior to his death and that W. E. Lomax and Sarah J. Moort, W. D. Coleman & Brothers, and Solomon B. Mensah were subsequent owners of the property. The testimony of both Dupigny Leigh and Anthony Barclay tended to establish that the selfsame Lot. No. 326 was a part of the estate of the late Solomon B. Mensah. In addition, through the testimony of witnesses, the appellants endeavored to establish that James F. Cooper never owned Lot No. 326. Yet and still, the trial judge disallowed the introduction into evidence of the city plan of the City of Monrovia which would have established that James F. Cooper never owned Lot No. 326. Quite strangely however, the trial judge permitted one J. B. K. Anderson, a professional surveyor, to present a chart that he had made showing what he considered as constituting the proper delimitation of properties in the particular area; and this

evidence alone in respect of the technical determination of the surveyed plot was permitted to go before the jury. This we consider grossly unjust and prejudicial, especially since the testimony of the appellants as defendants in the court below tended to show that they did not own the property sued for and that hence it would be impossible for them to deliver the same unto the present appellee.

In view of the above, it is our determination that the trial court erred in the exclusion of rebutting evidence to the prejudice of the present appellants. Therefore in pursuance of the law controlling, this Court has no alternative but to reverse the judgment of the court below with costs against appellee. And it is hereby so ordered.

Judgment reversed.