PETER SHAHEEN, Appellant, *v.* COMPAGNIE FRANCAISE DE L'AFRIQUE OCCIDENTALE, a French Company Doing Business in Liberia, Appellee.

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

Argued October 21, 22, 23, 27, 28, 29, 1958. Decided December 19, 1958.

1. Issues not raised in the pleadings may not properly be raised on the trial of a case.
2. The fundamental purpose of pleadings is to provide notice to the parties of issues which are to be raised on trial.
3. The best evidence which a case admits of must always be produced.
4. An answer which both denies and avoids is dismissable for inconsistency.
5. Where an answer both denies and avoids, the defendant will be ruled to a general denial of the allegations contained in the complaint.
6. A general denial cannot properly be construed as pleading affirmative defenses or special facts in confession and avoidance.
7. Courts cannot do for parties what the parties were legally obligated to do for themselves.
8. Where a verdict of a jury was influenced by entertainment provided by counsel for a party, a new trial will be granted.

On appeal from a judgment rendered upon a jury verdict in an action of debt, case *remanded for new trial.*

C. Abayomi Cassell and *Momolu S. Cooper* for appellant. *R. F. D. Smallwood* for appellees.

MR. JUSTICE PIERRE delivered the opinion of the Court.

Here is a case which has aroused a deal of public sentiment, a case in which firmly established principles of law, well laid and universally accepted, have been invoked in connection with the facts and circumstances appearing in the records before us. Courts of law should never concern themselves with public sentiment or propaganda; the determination of all judicial litigation should be impartially grounded upon the facts pleaded and appearing in

each case, and upon the law controlling as it applies to those facts. The facts and circumstances appearing in this case are as follows.

The appellant, Peter Shaheen, a Lebanese trader doing business in the City of Monrovia, was plaintiff in the court below in an action of debt entered against the above-named appellee, a French business concern. The complaint alleged that the plaintiff had deposited with this French firm for safe keeping the sum of $48,800; and that, upon his application for withdrawal of the amount, the company had failed and refused to pay. With his complaint he made profert of an official receipt issued to him by the company. This receipt was marked Exhibit "A," and made to form a part of the complaint as proof that the amount had been received by the company "on account."

The defendant company filed an answer raising several issues in addition to denying the receipt of the amount alleged to have been deposited. To state the several points of the answer succinctly, they are, in substance, as follows:

1. That the plaintiff had chosen the wrong form of action in bringing debt, since if an amount demanded had not been paid, the plaintiff should have complained to the State for a criminal action for embezzlement to have been instituted.
2. That the complaint was untrue when it alleged that the sum of money sued for had been deposited with the company, since the plaintiff, in truth, had never deposited a single cent with the defendants. They also averred in said answer that one George Azemard, the then agent of the company at the time that the alleged deposit is supposed to have been made, finding himself short in his accounts with the company, had ordered the cashier to issue this receipt for $48,800 in order to falsify certain bank deposits which he had fradulently embezzled.
3. That it is the company's policy that only the cashier

handle cash transactions upon authority of its agent but there was no bank statement to show what Azemard, their agent, had done with the $48,800 which the plaintiff's receipt covered.

4. That the receipt, as issued by the company's agent, was an unauthorized act of his own, and therefore was *ultra vires*.
5. That the company's books show that the amount of $48,800 sued for had already been withdrawn by the plaintiff, which amount shows no sign of settlement.
6. That the company's agent, George Azemard, had admitted, by written confession signed by him, that he falsified the accounts in the company's books after embezzling a large sum of the company's funds. This confession was filed with the company's answer, and is quoted word for word later in this opinion.
7. That the defendants deny that they ever received the amount sued for from the plaintiff, but that the issuing of the receipt upon which the plaintiff sued was for the purpose of correcting their then agent's shortage.

These points constitute the gist of the defendant's answer. The plaintiff filed a reply, and for the purpose of this opinion we think it proper to quote the important counts contained therein. They read as follows:

"1. Because the entire answer is patently evasive, inconsistent and contradictory, and therefore does not present a clear-cut triable issue; for, while defendant pleads that it received not a single cent from plaintiff, but that its duly authorized agent, George Azemard, merely ordered the cashier to issue a receipt in favor of plaintiff for $48,800, said defendants, in Count '5' of said answer, contend that the books of defendants' company show a withdrawal of the selfsame amount of $48,800

in favor of Peter Shaheen, the plaintiff. Wherefore plaintiff prays that the answer, being thus evasive and self-contradictory, be dismissed and the defendants ruled to the bare denial of the facts stated in the complaint.

"2. And also because plaintiff submits and contends that said answer is fatally defective and bad for pleading the negative pregnant in that, while the burden of defendants' answer is denial of the existence of liability, yet and still in Count '4' of said answer, defendants contend '. . . that the receipt, as issued to plaintiff, alleging the receipt of $48,800 was an unauthorized act of the then agent of defendants' business; his acts therefore are *ultra vires*. . . .' Plaintiff therefore submits and prays that the answer being thus dismissably defective and bad, be ruled out of court and the defendants ruled to the bare denial of the facts pleaded in plaintiff's complaint.

"3. And also because Count '1' of said answer is without foundation in law, plaintiff maintains that the correct form is an action of debt and not embezzlement as defendants erroneously contend in said Count '1' of the answer.

"4. And also because Count '1' of said answer should be overruled with costs against defendants, since therein the defendants plead, *inter alia* '. . . if where the amount deposited is denied, or is not received upon demand. . . .' which hypothetical method of pleading is improper. Wherefore plaintiff prays that the said Count '1' be overruled and the answer dismissed.

"5. And also because Count '6' of said answer is fatally defective and bad in that Exhibit 'C,' the foundation stone of said count, is irreceivable in any court of justice in this Republic; for said Exhibit 'C,' which purports to be an alleged voluntary confes-

sion written in French by defendants' former agent, George Azemard, shows that it was translated by the Ambassador of France near this Capital, who is alleged to have affixed the Seal of the French Embassy. Plaintiff submits that said Ambassador of France enjoys full diplomatic immunity, and could not be summoned by this Honorable Court to testify as to the authenticity of the alleged translation; hence plaintiff prays that Count '6' of the answer, being thus predicated upon an irreceivable document, be dismissed, and the defendants ruled to the bare denial of the facts pleaded in plaintiff's complaint.

"6. And also because, as to Count '2' of the answer, the plaintiff submits and contends that Exhibit 'A,' as therein made profert is irrelevant to plaintiff's claim, in that it does not in any shape or form disprove plaintiff's claim for $48,800, especially so since George Azemard, the duly authorized agent of the defendant company, during whose incumbency the subject transaction took place, admits falsifying his books in sundry specified amounts, details of which he carefully set forth. Because of this irrelevancy in said Exhibit 'A,' plaintiff prays that Count '2' of the answer be overruled and the defendants ruled to the bare denial of the facts pleaded in the plaintiff's complaint.

"7. And also because Count '3' of the answer is repugnant, for the receipt for $48,800 held by plaintiff and upon which this action is predicated was issued by the cashier who acted upon the orders of George Azemard, the agent of the defendants. Defendants admitted in Count '2' that this procedure was followed, and confirmed in Count '3' that the cashier handles cash transactions upon authority of the agent according to precedent of the company, but defendants repugnantly plead

that 'plaintiff never deposited a single cent with defendants, nor is there any bank statement to show what disposition defendants' then agent, George Azemard, made of said amount.' Because of this patent repugnancy and evasiveness, presenting no triable issue, plaintiff prays that the entire answer be dismissed and defendants ruled to rest on a bare denial of the facts stated in the complaint.

"8. And also because Counts '5' and '7' of the answer, and therefore the entire answer, are irreconcilably inconsistent, self-contradictory and repugnant one to the other, in that, whereas defendants contend in Count '5' that the amount of $48,800 was withdrawn in favor of the plaintiff, in Count '7' defendants shamelessly deny ever receiving such deposit from plaintiff either in cash or checks. Because of this unorthodox mode of pleading, born of a crafty design to evade clear responsibility on part of the defendants, the plaintiff prays that the entire answer be dismissed, and defendants ruled to rest on a bare denial of the facts stated in the complaint."

Although the defendants filed a rejoinder, the Judge in passing upon the issues of law dismissed the answer, and ruled the defendants to trial on the bare denial of the facts contained in the plaintiff's complaint. Thus the case went to trial on the averments contained in the complaint, and in keeping with the ruling, the defendants were restricted to a general denial of those averments. The plaintiff-appellant has contended, however, that in spite of the ruling of the judge, he defendants were permitted to testify to new and affirmative matter at the trial, contrary to the statute laws controlling a general denial. We will take up the controlling statutes in this opinion.

After carefully reading through the pleadings and other documents made profert therewith and appearing in the

records certified to us, and after going through the evidence produced on the trial, we find certain facts testified to on the trial, although not alleged in the pleadings, very strange and very unusual. The following questions of law are presented:

1. Who are agents, and what are their duties, and how do those duties relate to and affect their principals?
2. Will the acts of an agent whilst acting within the scope of his employment bind his principals to responsibility to third parties?
3. Can an agent legally repudiate and disavow his own official acts to the injury of another?
4. Should an agent be allowed to benefit by his own confessed acts of fraud, either against his principals or against his company's customers?
5. Should not the showing of fraud invalidate any transaction whereof it can be proved as a basis?

These important legal questions appear to be among the issues in this case; but, unfortunately, we have been prevented from reviewing them because of the absence of an answer.

It might well be asked whether it was customary or normal procedure of the company for customers to leave large sums of money with the cashier without obtaining an official receipt therefor immediately upon receipt of the money. The cashier testified that the plaintiff left a bundle of money with him to be delivered to the agent, and that the agent informed him later that the bundle had contained $15,000. Here is the cashier's testimony on the point:

> "Q. The plaintiff, Mr. Peter Shaheen, has instituted this action of debt against the . . . C.F.A.O., Monrovia, for the recovery of the sum of $48,800, which he deposited with the said firm. If there are any facts within your knowledge touching the said deposit, tell the court and jury what you know.

"A. Last year, Mr. Peter Shaheen brought some money to the office, and Mr. Azemard, the agent, was absent. He left the money with me. When Mr. Azemard came, I gave him the money, and Mr. Azemard gave me a temporary receipt for Mr. Peter Shaheen. It was for $15,000. Also, at the end of January, Mr. Azemard called me in his office and asked me to issue an official receipt for $48,800 in favor of Mr. Peter Shaheen. He told me that he had the money in the safe, that he would keep it, and that it was too much for me to keep in my safe, and also told me to keep the receipt; I secured it. Two or three days later, he told me that he had deposited the money at the Bank of Monrovia, and asked me to enter same in my book and to hand the receipt over to Mr. Peter Shaheen. These are the facts I know."

This is a strange procedure for a normal business transaction; and we wonder what was the purpose of the agent, and not the cashier, keeping the customer's money in his safe. We also wonder if it was normal procedure of the company for the agent, and not the cashier, to make deposits of money belonging to the company with the bank.

It might also be asked whether a customer with a deposit of $48,800 standing to his credit on the company's books would seek a loan from the company for $7,000, and as security therefor, pledge his personal effects? It appears in the records of the trial that, in spite of plaintiff's deposit with the company, he sought a loan from them to put up some buildings, and as guarantee to repay the amount by installments, pledged certain stocks, lease agreements and his furniture.

Even though there might be some explainable business reason for this act, it is still strange behavior. However, it was not raised in the pleadings, and we have only mentioned it because it appears in the records of the trial and seems peculiar.

A further question arises as to whether the issuing of temporary receipts for large sums of money constitutes regular and legitimate business procedure of the company with its customers. The evidence shows that Shaheen is supposed to have deposited the amount in litigation in five installments, for which temporary receipts were issued, which said receipts were later exchanged for the global receipt which now forms the basis of this suit. Again, this was brought out in evidence, but does not appear in the pleadings. So, in keeping with our trial procedure, even if the answer had not been dismissed, this very strange circumstance could not have been properly introduced in evidence.

> "It is error for the judge of a trial court to permit questions to be put to a witness the effect of which is to introduce issues not raised in the pleadings." *Holder* v. *Teoh,* 2 L.L.R. 391 (1920).

It may also be reasonably asked whether it is consistent bookkeeping practice to issue a receipt for an amount which was never received and pass the receipt through the books to correct a discrepancy already existing in the account. This procedure certainly does not seem to harmonize with the bookkeeping principles of debit and credit.

As we understand it, the passing of this receipt through the company's books was a debit to the agent's account; and if no money were received his shortage was increased. We cannot believe that any agent of a mercantile firm would not be conversant with this simple bookkeeping principle. These facts, in turn, pose a question: Is it true that the agent did not receive a single cent of the amount which the receipt covered? And can the agent's confessed acts of deceit, dishonesty and falsification inspire any belief in the truthfulness of his testimony on this point?

Why did Azemard, the company's agent, in his confession of falsification of his company's books, make no refer-

ence to the amount which the receipts he issued covered, and which is the subject of this suit? His confession reads as follows:

"I cannot live any longer like this; for since the visit of Mr. Gouty, last February, my conscience no longer gives me any peace. I do not sleep any more, and I cannot any longer do my work for thinking of one thing: the crime which I have committed against the company, and of which I wish to give a full explanation.

"At the end of February, 1955, I delivered a great quantity of goods to De Medeiros, and he paid me for a part in checks. So as to close the books, I made two fictitious receipts: No. 66659 for $30,000, and No. 66664 for $20,000.

"For the month of January, as I had three of his checks totalling $16,616.65, for which there were no funds, I falsified the account book, and falsified the payments to the bank for the same amounts, adding $30,000 each time.

"In April, I again falsified the bank account by $16,616.65. This brings to $76,616.65 the total of falsification I made, which sum represents the difference between our actual credit at the Bank of Monrovia and the amounts shown in our books.

"As regards the Bank of Liberia, there is a difference of $35,400, represented by two checks drawn by me on the Bank of Monrovia in order to try to adjust these accounts.

"I cannot explain these senseless actions other than by a fit of madness and nervous depression, and by the fact that I was unbalanced by the arrival of Mr. Gouty. I was afraid of his reactions, although now it is much worse, since I lost my position, the advantages of my twenty-seven years of good services, and ruined my reputation forever—and that in a few days.

"I must say that I would certainly not have done it

if De Medeiros had not sworn to me by everything holy that he would go to Lagos, where his wife's family live, who own property, and who had promised him that they would give him $100,000. He did indeed go there, but came back as he left. It was from that moment that I realized the importance of what I had done, and the inextricable situation in which I had put myself—I, in whom the company had reposed all its trust, which, moreover, I had always deserved till then.

"I made De Medeiros sign an admission of indebtedness of $113,688 to safeguard the interests of the company and to be able to sue him if necessary. I am nevertheless convinced that, despite the difficulties which he has at the present time, De Medeiros always has been able and will be able to meet this situation and to clear his obligations to the company.

"All this explains why Mr. Gouty saw me in this state, and why the work has suffered badly because of me.

"I know you are going to debit my account, but shall credit it with the following amounts:

"In France I have borrowed four million francs which I shall remit to you at once. In the bank I have a million which I shall remit to you also, plus a million deposited in the savings bank. I shall release all the valuables I own to reduce my debt as much as possible. I have bought an apartment in joint ownership, worth more than a million; I shall turn it over to you, or give you a first mortgage; for it is my mother who lives there.

"I have there $2,000 worth of furniture which could be credited to this account, since they are furnishings which would normally belong to the department of supplies and furniture of the French Company. Also I have a car, bought for $3,100, which I shall sell, and the proceeds will go to the credit of this account. In

addition I intend to go to Lagos in order to see the family of De Medeiros and explain to them the situation.

"Moreover, I have numerous debtors in Liberia who owe me privately a sum of $15,000. I am going to try to collect this amount, which will also go to the credit of this account. De Medeiros is ready to give personal guarantees. I know that I am liable for trial, and possibly even for imprisonment, and that I am dismissed, which is perfectly just. But I think it would be better not to make this affair public, in the interest of the company, so that I can help my successors in spite of everything. You know very well that I have not put a single penny in my pocket, and that it is in the company's interests that I have granted these credits. If my good faith has been imposed upon, I have, morally, paid very dearly for my dishonesty—I who have been an honest man all my life. At fifty I have nothing left. I have lost everything.

"In these circumstances you will understand that I cannot return to France until the situation has been settled, since my presence here is indispensable, and since I want at all costs to have this matter straightened out."

In Azemard's confession, as can be seen, he has offered security in cash and other items, to make good and settle discrepancies found in his account. Can it be that the company has recognized this confession as an assumption of responsibility on his part for the shortage appearing in their books, which has occasioned their having filed this document with their answer? It has never been shown, either in the pleadings or at the trial, why this confession was ever brought into this case, since the confession failed to mention any transaction between Azemard and Shaheen, or between Shaheen and the defendant company. What then was the intended purpose of bringing it into this case? To us, the entire document is irrelevant.

The appellees, defendants in the court below, have contended, in their argument at this bar, and it also appears in the testimony of their witnesses at the trial, that there are written instructions of the company, forbidding their agent to accept money for deposit except from their employees, or from those customers who desire to have them purchase goods abroad. It also came out in evidence that there are some such deposits made by certain of their customers. Could it then be presumed that Shaheen was not one of this class of customers? Nothing in the pleadings or in the records of the trial has clarified this important point.

It is an elementary principle of our practice, and is found in our statutes, that the fundamental principle of all pleading is the giving of notice of what a party intends to prove at the trial; and that the best evidence which a case admits of, must always be produced.

There is one phase of this case which we think it is necessary for us to comment upon before concluding this opinion. In Count "4" of the plaintiff's motion for new trial, filed after the jury had returned a verdict against him, it is alleged that the jury's verdict:

> "... is tainted with corruption and is the result of some hope of reward, since defendants' counsel invited the foreman of the petty jury, and some of his colleagues of said jury, to his home, where they went during the night of May 9, 1958, a few hours after the jury had returned its said verdict, where said counsel entertained them; which tends to show that it was upon promise of some reward that the jury rendered the verdict in favor of the defendants."

Plaintiff then prayed that the verdict be set aside and a new trial awarded. This accusation was answered by a denial in the defendants' resistance; but in the same count in which the denial appears, we find the following:

> "Defendants further submit that the oath of the jury stated that 'you and each of you do solemnly swear that

you will well and faithfully try the cause now before this court, and a true verdict tender according to law and evidence, so help you God.' Hence, the jury having rendered the verdict in keeping with the said oath, and having been discharged by the court and returned among their fellow citizens, no obligation or restraint is imposed on them as to their movements."

This peculiar position adopted by the defendants falls short, in our opinion, of a satisfactory explanation of the circumstances, or a proper denial of the allegation. There are many more points of interest which we could review and which, although known to the parties during preparation of the documents in the case, are not raised in the pleadings, but nevertheless appear to us important. Such points include the alleged discussion in the meeting of June 8, 1956, which has been branded as evidence prearranged and untrue, and the testimony of witness Hansford, who claims that the appellant sought his aid upon a promise to pay $5,000 for him to stand Azemard's bond when he was arrested and imprisoned on two criminal charges. These questions, like some of those we have already mentioned in this opinion, have been rendered useless to the determination of this case in view of the ruling dismissing the defendants' answer, and confining the defendants to a bare denial of the facts contained in the complaint. But even if the answer had not been dismissed, could we have passed upon these important points when they had never been raised in the pleadings?

Although we feel that the legal issues mentioned herein, as well as the other points we have just referred to should have been taken into consideration in determining this case, we find ourselves unable to rest our decision upon these grounds in view of the statute controlling a general denial, referred to earlier in this opinion. This brings us to passing upon the merits or demerits of the ruling dismissing the answer, and ordering the defendants to rest their case upon a bare denial. For the purpose of passing

upon that ruling, we think it is necessary to quote its relevant portions. They read as follows:

> "With respect to Count '1' of defendants' answer, an action of debt, according to our statutes, is an action in which plaintiff seeks to recover an amount from the defendant. To the mind of the court, and upon inspection of plaintiff's complaint, Count '1' of defendants' answer is without foundation, and is therefore overruled.
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> "With respect to Counts '2,' '3,' '4,' '5,' '6' and '7' of said answer, the court says that, in an action of debt, the defendant must make definite his plea. If he admits the debt he cannot deny same. Upon inspection of the plea raised in the entire answer, defendants declare that their books show that they have paid the $48,800 to plaintiff. In the selfsame count, they deny ever receiving a deposit from plaintiff in this amount.
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> "The Supreme Court in *Cooper* v. *Cooper,* 11 L.L.R. 262 (1952) has indicated that, however technically a complaint or answer is framed, it surely must crumble before subsequent pleading which successfully attacks it.
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> "Count '1' of plaintiff's reply is hereby sustained, and the case is hereby ruled to trial on the bare denial of the defendants. The other counts and subsequent pleadings not herein referred to are not pertinent and important in the decision of the law issues in this case, as they have not presented any new matter of fact or law."

To state this ruling concisely, the answer was dismissed upon the strength of the reply which attacked it as being evasive, inconsistent, contradictory and not presenting a clear-cut, triable issue. The reply makes reference to the defendants' denial of having received from plaintiff a single cent of the amount sued for, and avers that the company's books show that the amount had been withdrawn by the plaintiff.

> "Every answer and reply, must contain a distinct, intelligible and sufficient answer in writing, to the complaint, answer or reply to which it purports to be an answer or reply, or to such parts thereof as it professes to answer, and must not depart from the grounds taken by the former answers or replied to the same party, or judgment shall be given for the other party." 1841 Digest, pt. 2, tit. I, ch. VI, sec. 5; 2 Hub. 1542.

We are of the opinion that an answer which, in its several counts, both denies and avoids, is bad for contradiction and inconsistency, and cannot be taken to be sufficiently distinct or intelligible to constitute a proper answer to specific allegations of facts contained in a complaint, since the two positions are contradictory and inconsistent. In this case, the plaintiff alleged that he had deposited with defendants a sum of money for safekeeping. The defendants appeared and filed an answer in which they categorically denied ever having received a single cent of the amount in question, and, in the same answer implied that the amount had been received, but that their books showed that it had been withdrawn by the plaintiff. One of these positions must be definitely false, since it would have been impossible for the plaintiff to have withdrawn a deposit which he had never made. We feel that such a position left the Judge no other legal or reasonable alternative, than to have dismissed the entire answer as contradictory and inconsistent; thereby placing the defendants on a general denial of the averments contained in the complaint.

> "A defendant shall state in short and plain terms his defenses to each claim asserted by the plaintiff in his complaint and shall admit or deny the averments on which the plaintiff relies. . . . If he intends to controvert all the averments of the complaint he may do so by a general denial." 1956 Code, tit. 6, § 292.

But he cannot both categorically deny the allegations in the complaint, and at the same time, impliedly admit them

and then seek to avoid them. That is sufficient ground to warrant dismissal of the answer; therefore the Judge did not err in ruling out the defendants' answer for evasiveness and contradiction. We have wondered why such a faulty answer was not withdrawn and refiled as was the statutory right of each of the parties. It was held in Syllabus "1" of *Ditchfield* v. *Dossen,* 1 L.L.R. 492 (1907):

> "When an answer both denies the truthfulness of the complaint and sets up the plea of justification, it is evasive and contradictory, and is properly ruled out by the trial court."

And in the body of the *Ditchfield* decision, *supra,* this Court held as follows at 1 L.L.R. 496:

> "It is alleged that the court erred in ruling out the defendant's answer because of its insufficiency. This leads us to consider the statute laws governing complaints, answers and replies. Carefully examining the answer in this case, it is clear to the mind of the court that the answer is not a sufficient answer to the plaintiffs' complaint; because an answer should contain a distinct and triable issue and should not be so evasive as to furnish no triable issue. For this reason the court below did not err in ruling out said answer, and hence with it all subsequent pleadings of the defendant. And such rulings are in harmony with the statute laws of this Republic, a citation from which, bearing on the point in issue, we quote: 'The defendant may file an answer to the complaint, setting forth new facts to justify or excuse his conduct. Every such answer must be in writing and must contain a distinct, intelligent and sufficient answer to the complaint or to such parts thereof as it professes to answer, or judgment shall be given for the plaintiff.' (Lib. Stat. Bk. 1, p. 44, secs. 3 and 4.)
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> "In this case the answer is evasive and contradictory, in that it denies the truthfulness of the complaint and

at the same time sets up the plea of justification, which is a plea in bar. Hence it was the duty of the court below to rule out the answer and subsequent pleadings of the defendant and submit the questions of fact to the determination of the jury."

The appellant has contended, in his bill of exceptions as well as in his brief, and has argued before this bar, that the trial Judge erred in permitting testimony on new and affirmative matter, not properly and previously pleaded by the defendants who had been ruled to a general denial. This brings us to consider what is affirmative matter.

"In general, special matters of defense should be specially pleaded; but a defendant cannot be required to plead specially facts which amount to no more than a denial of the plaintiff's averments; or facts which it will only become material for the defendant to prove for the purpose of rebutting evidence introduced by the plaintiff; or that which is but evidenced of a material issuable fact. Affirmative defenses are required to be specially pleaded, being new matter within the meaning of that term. The reason for this rule is that such defenses are not embraced within the ordinary scope of a denial of the material averments of the complaint and hence it is that a plea of such defenses is necessary to advise the opposing party as to the nature and scope of the defense. Matters to be specially pleaded within the rule above stated vary, of course, with the nature of action and the scope of the pleadings; but, in general, the principle stated will be found to be the one that marks the propriety, and very often the necessity, for special pleading. Following the rule, affirmative matters required to be specially pleaded may include defenses of estoppel, contributory negligence, assumption of risk, fraud when set up as matter in avoidance, mistake, alteration of contract, that the plaintiff is not the real party in interest, excuse for the nonperformance of a covenant, justification for

an alleged tortious act, unavoidable accident or the act of God, license to enter on and occupy land, the statute of limitations, title by prescription, and contractual limitations on the time within which suit may be brought. While the custom of a particular place and local commercial usages must be pleaded, a general usage or custom need not be pleaded but may be given in evidence under the general denial. On the question as to whether payment may be shown without specially pleading it, there is variance between the authorities, one line following the common law rule that payment may be shown under the general issue, or general denial; while another line of authority holds to the usual rule under the code that payment as a defense should be specially pleaded, and it cannot be shown (either in bar or mitigation of recovery) under a general denial. A similar rule has developed in reference to pleading fraud. In general it must be specially pleaded under the code, although at common law it could be given in evidence under the general issue. While it is required that all matters which show the transaction to be void or voidable in point of law on the ground of fraud, or otherwise, shall be specially pleaded, it is not always necessary to plead specially the defense of illegality, for, when this defect is made to appear to the court at any stage of the case, it becomes the duty of the court to refuse to entertain the action. Where a defense must be pleaded specially the omission to plead it is not cured by the introduction, without objection, of evidence in support of it, and the finding of the facts in relation to it by the court. No good reason exists for filing special pleas containing averments of facts that may be proved under the general issue. It is a common law rule that a special plea amounting to a general issue is bad. But where the defendant elects to plead specially defenses in confession and avoidance which would be admissible in evidence under the general issue, the fact that

they are admissible under the general issue does not make his special plea bad. Though a rule of court may make a general denial a sufficient denial of the averments of the petition, it cannot extend further than as a denial of the petition, and cannot open the door to special defenses and matter in avoidance." 21 R.C.L. 568–71 *Pleading* § 25.

Our statutes are definite on the point of how much latitude is given a defendant who allows himself to be placed on a general denial; and no matter how unfortunate the circumstances in which he will then find himself, or the extent of the interest that might be involved in litigation, it is not within the province of any Judge to alter the specific requirements of our statutes to suit any given case.

"A failure to file an answer to the declaration places the defendant upon a denial of the facts only." *Solomon* v. *Sherman,* 1 L.L.R. 317 (1897).

The defendants' answer having been ruled out, the law presumes that there was no answer at all in court; hence they were correctly ruled to rest their defense on a denial of the truthfulness of the complaint only. In that position, the statutes have laid down how far they could go in the defense of their side of the case. Here is the statute on the point:

"No general denial, whether expressed or implied, shall ever be construed, in an answer or reply, to amount to an affirmation of any fact, such as payment, performance of a contract, inability of a defendant to contract, illegality of consideration, permission of the plaintiff, lapse of 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, 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." 1841 Digest, pt. II, tit. I, ch. V, sec. 8; 2 Hub. 1541.

However much we would have liked to pass upon the several issues of law referred to hereinbefore and to have been able to review the many strange and questionable circumstances which seem to abound on both sides in this case, we have been prevented from doing so by the unfortunate situation of the absence of an answer in court. Counsel representing litigants should give to their clients' cases the very best professional attention, so as to prevent the necessity for rulings of this kind, brought about by professional negligence. We are sworn to uphold the statutes which control the determination of cases in our courts. Acting within the specific terms of those statutes is our legal duty. We cannot legally do for the parties, what it was their legal duty to have done for themselves.

Under ordinary circumstances, we would have determined this case at this point; but for one reason which we feel to be in the best interest of justice, we have decided to remand the case. It is our opinion that there was merit in the plaintiff's motion for new trial, based upon the contention that the decision of the jury was shown to have been influenced by the entertainment given them by the defendant's counsel immediately after return to their verdict. Whilst it could be that this might not have been so, the defendants' evasive and inconsistent resistance to this allegation weighs strongly on the side of its truthfulness. In every such instance, the ethics of the legal profession frown upon this behavior, and the law makes it mandatory for a new trial to be granted.

This case is therefore remanded without prejudice to the plaintiff's claim, or to the defendants' right to contest the said claim. Costs in these proceedings are to await final determination of the case.

Remanded.