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

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

Argued October 30, 1958. Decided December 19, 1958.

An unliquidated setoff or counterclaim cannot be successfully interposed in an action of debt.

On appeal from a judgment upon a jury verdict in an action of debt, *judgment affirmed.*

Beysolow and Cooper Law Firm for appellant. *R. F. D. Smallwood Law Association* for appellee.

MR. JUSTICE HARRIS delivered the opinion of the Court.

This is an action of debt instituted against Peter Shaheen, the appellant in this case, by the Compagnie Francaise de L'Afrique Occidentale, Monrovia, by and through its agent, Marcel Ricaud, for the recovery of the sum of $10,444.50 alleged to be due said company. The said appellant, defendant below, appeared and filed an answer in which he admitted owing the debt, but pleaded a setoff or counterclaim in the sum of $48,800. Plaintiffs denied owing the appellant said sum of money. The case was heard by His Honor, Alfred L. Weeks during the June, 1957, term of the Circuit Court of the Sixth Judicial Circuit, Montserrado County. A verdict in favor of the plaintiff below, now appellee, was rendered by the petty jury. A motion for new trial was filed, resisted, and denied, and final judgment was rendered

awarding the plaintiff the sum of $10,358.90. To this judgment the defendant took exceptions and has brought the case before this Court for review and final determination upon a bill of exceptions containing two counts which read as follows:

"1. Because on the 18th day of July, 1957, Your Honor having heard arguments *pro et con,* denied defendant's motion for a new trial; to which defendant then and there excepted.

"2. And also because on the said 18th day of July, 1957, Your Honor rendered final judgment against defendant to the effect that the plaintiff is entitled to recover from the defendant $10,358.90, and upon failure of the defendant to pay to the plaintiff said amount, he is entitled to an execution against the defendant for the recovery of said amount. To which defendant then and there excepted and prayed an appeal to the Supreme Court of Liberia at its October, 1957, term."

The motion for new trial contains one count which we hereunder quote for the benefit of this opinion, as follows:

"1. Because defendant says that the verdict ought to be set aside and a new trial awarded because there is a material variance between the allegation of the plaintiff and the proof or evidence, in that, while plaintiff claimed the sum of $10,444.50, the evidence woefully failed to establish this claim. Hence the verdict which calls for $10,358.90 not being in support of the allegation made and contained in plaintiff's complaint, is and must be regarded a legal nullity by this Honorable Court; and this the defendant prays. All which defendant is ready to prove."

The appellant contends that the verdict of the petty jury should be set aside and a new trial awarded because of a variance between the amount laid in the complaint of the plaintiff below and that proved on the trial. From

the complaint, we find that the amount therein laid is $10,444.50. An inspection of the verdict shows that judgment was given for the sum of $10,358.90, which creates a slight variance. This Court is of the opinion that it is the amount proved during the trial for which judgment should be given, and not the exact amount laid in the complaint, if the amount proven is within the jurisdiction of the court to try, such variance being immaterial and not at all prejudicial to the interest or rights of the opposite party. The court correctly denied the motion for new trial; and Count "1" of the bill of exceptions is therefore overruled.

Coming now to Count "2" of the bill of exceptions which attacks the final judgment in the case to the effect that the plaintiff is entitled to recover from the defendant $10,358.90, this Court is of the opinion that the evidence adduced at the trial on part of the plaintiff below supports the judgment thus rendered; moreover, the appellee, in giving the history of the case before this Court stated the following:

> "On the 12th day of September, 1956, the C.F.A.O., appellee herein, commenced this action of debt to recover the sum of $10,444.50 from the appellant, who appeared and filed answer in which he did not deny owing the debt, but admitted same, and informed the court that the plaintiff owed him the sum of $48,800, and that he had written the said plaintiff to deduct his debt from the said sum of money without resorting to court. During the trial below, the appellant admitted the debt, that is the sum of $10,358.90, according to the evidence adduced at the said trial, and asked the trial court to take notice of same. The Judge, in his final judgment, ignored this point in the case and rendered judgment against the appellant to the effect that said amount be paid forthwith or execution should issue against him. Moreover the debt was never denied in the answer of the appellant, defendant below.

From an inspection of the records it will be found that the appellant, defendant below, never filed along with his answer a bill of particulars setting forth the alleged counterclaim or setoff; nor did he produce any evidence to prove that the setoff, although being litigated in a separate and distinct action, is a liquidated debt. This Court, is therefore of the opinion that the court below had no alternative but to ignore the setoff or counterclaim of the defendant and affirm the verdict of the petty jury and render judgment in favor of the plaintiff below.

Mr. Justice Dixon, speaking for this Court in *Watson* v. *Kromah,* 4 L.L.R. 147, 149 (1934), said:

> "The defendant is generally permitted in actions of contract to set up a counter demand, if liquidated, as an offset, to defeat plaintiff's recovery in whole or in part."

If, in an action of debt, as in this case, the setoff or counterclaim is to be accepted by the court, it must be shown to be a liquidated one. The judgment of the lower court is therefore hereby affirmed with costs against the appellant. And it is hereby so ordered.

Judgment affirmed.