

JAMES S. WILES, Appellant, *v.* WALTER PETERS,
Agent for MESSRS. WEST & COMPANY, Monrovia,
Appellee.

APPEAL IN AN ACTION OF DEBT.

Argued March 23, April 9, 10, 1946. Decided May 10, 1946.

1. An appellate court cannot legally pass upon questions of law not raised in the court below.
2. A consul is a commercial agent with public functions accredited to the national government by a foreign power.
3. In general a consul is not liable personally on a contract made in his official capacity on account of his government.
4. Where the accounts of a consular officer show a deficit, since said officer is a bonded officer the Government is assured of the refund of such deficit by a proper procedure.

On appeal to this Court from a lower court judgment wherein the defendant was adjudged liable in an action of debt, *judgment reversed.*

A. B. Ricks for appellant. *H. Lafayette Harmon*, on behalf of the Enemy Property Liquidation Commission, for appellee.

MR. JUSTICE REEVES delivered the opinion of the Court.

This case having been assigned was called for hearing on April 9, when the counsellors for appellant and for appellee requested permission of the Court to prepare and file for the consideration of the Court a submission of the salient issues of law upon which, in their opinion, the case hinged. Said request was granted and the case suspended.

Counsellors for appellant and for appellee in accordance with the permission granted filed on April 10 their submission containing two counts, to wit:

“Submission of counsels for appellant and appellee

in the above entitled cause for consideration by this Honourable Court, and upon which the briefs of the parties will be based; and respectfully submit and request the court to consider and pass upon:

“(1) Whether or not James S. Wiles, the appellant, having contracted the debt in question in his capacity as Consul General for Liberia at Hamburg, Germany, he is entitled or legally obliged to pay said debt in his private capacity, or should same be a charge upon the Republic of Liberia.

“(2) Has the firm of West & Company, Limited etc., the plaintiff now appellee, the legal right to bring this action for and on behalf of J. W. West of Hamburg, without first obtaining a power of attorney, authorizing West & Company, Limited, so to do, duly probated and registered in the courts of Liberia.”

After the filing of said submission, counsellors for the parties submitted the case on the said two issues raised therein and requested the Court to hand down its opinion thereon.

In passing upon the issues of law submitted by the counsel for the parties, we shall consider them in reverse order, that is to say, count two shall be taken up first.

It is an elementary principle of law that an appellate court cannot legally consider and pass upon questions of law unless they have first been raised in the court below. We were therefore compelled to peruse the records as sent up to this Court to satisfy ourselves as to whether or not said issue of law contained in count two of the submission had been raised in the lower court. We found that appellant raised said issue in count three of his answer in the following manner:

“And also because defendant says that the action ought further to be dismissed since the former mercantile organization of J. W. West of Liberia no longer

exists as such, having been absorbed and replaced by the present mercantile firm known as West & Company Limited; the said West & Company Limited cannot legally claim to constitute itself a branch house of the mercantile firm of J. W. West of Hamburg, Germany, for the purpose of operation in Liberia, for and on behalf of said J. W. West of Hamburg, Germany, they must be clothed with legal power of attorney [which] after duly probating and registering should be made profert in the proceedings. This not having been done defendant prays that the action of plaintiff be dismissed with costs against plaintiff."

The admission of appellant, then defendant, in said count of his answer, that the firm of West & Company, Limited, the appellee, had absorbed and replaced the former mercantile organization of J. W. West in Liberia or, in words equivalent thereto, that the firm of West & Company, Limited, had incorporated the firm of J. W. West within its organization, took the place thereof, and served as its substitute, certainly supported the position taken by appellee in bringing the suit. The logical deduction from such an admission could only be that since the firm of West & Company, Limited, had absorbed and replaced J. W. West of Liberia said firm evidently was a branch house of J. W. West of Hamburg, Germany, and as such was legally entitled to institute this or any other action for amounts due the firm of J. W. West aforesaid.

Let us elaborate a little more on this point. Here is an action of debt filed by Walter Peters, director of West & Company, Limited, Liberia, a branch house of the mercantile firm of J. W. West of Hamburg, Germany, plaintiff, now appellee, against James S. Wiles, defendant, in his official capacity as consul general during his stay in Hamburg. Defendant in his answer in count two of the submission pleaded that said action should be dismissed because the former mercantile organization of J. W. West in Liberia no longer existed as such, having

been absorbed and replaced by the present mercantile firm known as West & Company, Limited. But defendant contended further that the said West & Company, Limited, could not constitute itself a branch house of J. W. West of Hamburg, Germany, and therefore could not bring said action for and on behalf of J. W. West of Hamburg without a legal power of attorney. This to the mind of the Court is contradictory and inconsistent, for assuming the fact that the firm of West & Company, Limited, absorbed and replaced the mercantile organization of J. W. West, and this we must accept as true since said averment was nowhere in the records denied but was supported by the appellee when describing himself as the plaintiff in the court below, we are led then to ask, under what theory could West & Company, Limited, not discharge the duties of the firm of J. W. West in Liberia, except by power of attorney? Reason being the soul of the law, we find ourselves not in agreement with appellant's contention, and consequently affirm the ruling of the court below in this connection.

We now proceed to consider count one of the submission. As this is the first case of its kind that has come before this Court, we take the liberty of quoting the following citation of law defining the position of a consul general, to wit:

"A consul has been defined as a commercial agent, with public functions, accredited to the national government by a foreign power, a mercantile agent of the sovereignty by which he is appointed, or as an officer of a commercial character, appointed by the different states to watch over the mercantile interests of the appointing state and of its subjects in foreign countries.

"Consular officers include the principal 'consul' or 'consul general,' the 'vice consul' who takes charge in his absence, and the subordinate 'consular agent' who

serves at a place different from that at which the 'consul' or 'consul general' is located. The term 'consular officer' includes all the foregoing and also interpreters employed in the consular service." 3 C.J.S. §§ 1, 2, at 1016 (1936).

Such an officer is usually appointed in Liberia by the President with the advice and consent of the Senate. He takes an oath, files a bond, and then letters patent are given to him. With such letters the said officer proceeds to the country to which he is sent, and upon arrival presents said letters to the authorities of said country, who in return grant him an exequatur, thereby recognizing him as a consul and authorizing him to exercise his official functions within the territory of said country. In the exercise of his duties he represents his government, and the citizens of said foreign states where he functions accord him respect and courtesies not in his private, but in his official, capacity. This is clearly borne out by paragraphs two and three of the written evidence marked "D," a letter from appellee to the Secretary of State of Liberia, which reads as follows:

"The contention of Mr. Cooper was rather strange to us from a legal and business principle. It may be true that Mr. Wiles acted without authority from the Liberian Government, but since he contracted the debt in the name of the Liberian Government or Consulate, we feel that it is a liability of the Liberian Government. It must be remembered that Mr. Wiles in his official capacity was the official agent of the Liberian Government at Hamburg, and we dealt with him as such. Now if Mr. Wiles acted beyond the scope of his authority, it is with the Liberian Government to hold him to accountability. But to disclaim responsibility will mean that in the future we will be skeptical in dealing with the Liberian Officials stationed abroad, as we will not know when they have authority and when they do not have. You will agree

that it would have been belittling the Consul General of Liberia who came to deal with us if we requested him to present to us a special authority for every transaction. We took the view that his presence as an accredited representative was sufficient for us to believe that his country had confidence in his integrity and ability to act wisely and honestly. In the light of the above circumstances, I feel confident that Your Excellency [will] not support the contention of Mr. Cooper; but that the Liberian Government will make payment of the amount in question with accrued interest, and if the retired Consul General acted without authority will hold him to account for any unauthorized acts of his while serving as Consul General in Hamburg.”

The contention of appellee in said written evidence was very equitable and legally correct and has its support in law:

“A consul is not responsible for the mistaken exercise of his actual powers, nor may he be held personally liable on his official contracts. But he may not use his authority to excuse action which it does not justify, and may be held personally liable for damages resulting from a wrongful act or omission arising from his misconception of the limits of his consular powers.

“Generally speaking, a consul is not responsible personally for contracts made in his official capacity on account of the government he represents.” *Id.* § 16, at 1029.

This authority, continuing, declared:

“Although a consular officer is not chargeable for the mistaken exercise of his actual powers, he is responsible for keeping within them, and as consul may be held liable for willful neglect of duty where he is guilty of a wrongful act or omission arising from an error in understanding the character of his official duties,”

and cited in support *American Surety Co. of New York v. Sullivan*, 7 F. 2d 605 (2d Cir. 1925).

The same principles are supported by Judge Bouvier in the following language:

"A consul is liable for negligence or omission to perform seasonably the duties imposed upon him, or for any malversation or abuse of power, to any injured person, for all damages occasioned thereby; and for all malversation and corrupt conduct in office a consul is liable to indictment.

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"In general a consul is not liable personally on a contract made in his official capacity on account of his government. . . ." 1 Bouvier, *Law Dictionary Consul* 648 (Rawle's 3d rev. 1914).

We quote here the note, written evidence "A," to satisfy ourselves as to its tenor:

"CONSULATE GENERAL OF REPUBLIC
OF LIBERIA.

"Received from J. W. West, Hamburg 1, Speersort 8/14 which amount this Consulate promise to pay back on Sept. 30th 1937. 6% interest per annum being charged.

(Seal) "[Sgd.] WILES
Consul General.

"HAMBURG, 30th December, 1936."

There exists no doubt that the above note or receipt falls within the category of a contract made by appellant in his official capacity on account of the Liberian Government at Hamburg, Germany. As such, the law prohibits him being made personally liable for the payment of same.

In the year 1909 before the Government of Liberia initiated the idea of appointing Liberians as consuls general to represent the Government in foreign countries, the Legislature passed a joint resolution regulating the

disbursement of public moneys, section one of which reads as follows:

“That from and immediately after the passage of this joint resolution, it shall be unlawful for any official of Government other than the Secretary of the Treasury (or the Superintendents of the several Counties, districts or Territorys [*sic*] by order of the Secretary of the Treasury) to issue or draw orders upon any mercantile firm or firms, banks [*sic*] or banks doing business within or beyond the territorial limits of the Republic for the payment of any sum of money in behalf of the Government of the Republic. And any such official of Government found violating the provisions of this section shall be deemed guilty of High misdemeanor, and be subjected to impeachment and criminal prosecution in any Court of competent jurisdiction.” L. 1908-09, 32 (2d).

At some subsequent time the Government of Liberia through the Department of State formulated and circularized consular regulations in which fifty percent of the intake of a consulate was placed under the immediate control and disbursement of the consul to liquidate the expenses of said consulate. With such a privilege why should the act of a consul general in taking a loan of money, whenever he found said fifty percent of the intake or fees inadequate to pay off the liabilities of the consulate, with the view to liquidating said loan by installment payments or by paying the whole from the future intake of said consulate as appears by the note executed in this case, be considered an unauthorized act and a violation of the Joint Resolution of 1909 cited *supra*? We fail to see the sound reason for such a proposition. It would be inequitable and inconsistent to deny a consul general the exercise of such a discretionary act, especially so where he does it to maintain the credit, honor, and respect of the consulate in a foreign country.

Further to this, the records sent forward show that for-

mer Consul General Wiles, the appellant, handed to his successors the accounts of the consulate when he turned same over, in which accounts this disbursement of said amount was carried. We quote hereunder from the last paragraph of a letter dated December 6, 1937, which appears also in the records of the case, from former Consul General Wiles addressed to the Secretary of State of Liberia:

"The question of authority would seem to me to be unimportant, if there was an honest intention to pay. The only important fact to be established is, does the consulate owe for maintenance, or not? If so, then the justification for any action in a foreign country is evidently obvious. Further, an examination of the accounts, and various government commitments, should disclose and settle this point. I am sure to West & Co., it would be unimportant, whether the money was paid to me for them, or whether it be paid direct."

There was a direct challenge made requesting the examination or, as we would say, the auditing of the accounts to ascertain whether or not appellant's action was justified. What became of said accounts? Were they audited and, if so, were there any disallowances made by the auditor? The records are silent in this respect. This, nevertheless, was the proper procedure which should have been adopted since former Consul General Wiles, the appellant, was a bonded official whose bond secured to the Government the refund of any deficit occurring in said accounts.

In the light of the above, we are of the opinion that appellant cannot legally be held personally responsible to make payment of said amount contracted, but that his principal, the Government on behalf of its consulate in whose interest said amount was contracted, should make payment of said amount and thereby maintain said consulate's credit and, in the course of procedure as above