AFRICAN MERCANTILE AGENCIES, Appellant, *v.* JOSEPH Z. BONNAH, Appellee.

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

Argued March 22, 23, 24, 1977. Decided April 29, 1977.

1. An action of slander cannot succeed where the defamatory words are not clearly shown to be actionable per se or to have caused special damages.
2. The defamatory words or expression are defamatory per se if they have falsely imputed commission of a crime to the person allegedly defamed.
3. Words accusing the plaintiff of lying and cheating without imputing to him commission of a crime are not actionable per se.
4. The court will not uphold a judgment allowing recovery of damages for slander where allegations in the complaint of injury to plaintiff's reputation and social standing were unsupported by any evidence introduced at the trial.
5. All documentary evidence which is material to issues of fact raised in the pleadings and which is received and marked by the court should be presented to the jury.
6. A verdict awarding damages grossly in excess of the amount asked for in the complaint may be set aside by the court on appeal.
7. The statement in a pleading of several facts constituting together only one cause of action or one defense does not constitute duplicity.
8. An incorrect description of a cause of action in an affidavit verifying a pleading is a harmless error.
9. A circuit court judge who tries a case with a jury empanelled after the expiration of the statutory term time is without jurisdiction over the subject matter.
10. Jurisdiction of subject matter may be questioned at any time prior to final judgment.

This was an appeal to the Supreme Court from a judgment in an action of slander based on a verdict for plaintiff for $50,000. The Court considered at some length whether the allegedly slanderous words were actionable per se. Having concluded that they were not, and that plaintiff had not proved any resulting injury to his reputation, the Court held that the judgment of the lower court could not be sustained. Several other considerations also led the Court to decide for appellant, principally the ex-

cessiveness of the verdict and the lack of jurisdiction of the trial court over the subject matter. The *judgment* was *reversed.*

Joseph Williamson, Christian Maxwell, and *D. Caesar Harris* for appellant. *O. Natty B. Davis* for appellee.

MR. CHIEF JUSTICE PIERRE delivered the opinion of the Court.

The records in this case reveal that on March 27, 1976, Joseph Z. Bonnah, the appellee herein, filed a suit of damages for slander against African Mercantile Agencies, an Indian firm doing business in the City of Monrovia and elsewhere within the Republic of Liberia. The suit was brought by attachment, the defendant company answered, and pleadings rested with the plaintiff's reply.

In a four-count complaint the plaintiff alleged that he is a good law-abiding Liberian citizen, and has never been found guilty of any of the things the defendant charged him with. He complained that in the course of business transactions between himself and the defendant company, he had deposited certain sums of money in the Chase Manhattan Bank against which he had issued checks in favor of the defendant, and that he had also paid to the defendant other sums in cash against his indebtedness. These several amounts he claims the defendant received, but notwithstanding this fact, the defendant "with a mind criminally bent" denied ever receiving the said payments.

Counts 3 and 4 of the complaint read as follows:

> "3. And plaintiff further complains that the said defendant knowing the premises, but contriving and maliciously intending to injure, defame and slander plaintiff in his name, fame and business reputation which he has enjoyed over the past thirty (30) years, on the 12th day of August, 1975, in a certain oral state-

ment which the said defendant then and there at his store on Benson Street, in the City of Monrovia, uttered in the presence and hearing of plaintiff's counsel, Counsellor James Doe Gibson, and certain good, worthy and reputable persons, namely: Gabriel B. Johnson, Schnitzer Lewis and others, of and concerning the said plaintiff, in the following scandalous and defamatory words did speak and declared to wit: 'You are a damn liar, you never paid me any cash and check in the amount of $402.70; you are just saying this to cheat me.'

"4. And the said plaintiff further complains that the said scandalous and defamatory (words) spoken by the defendant against plaintiff impute to him the plaintiff the commission of the criminal charge of defrauding and cheating punishable by law, and debase character, having tendency of causing people to lessen their confidence in him, thereby bringing him into ridicule, public scandal, infamy and disgrace, and causing him to be shunned and avoided by his friends, neighbors and customers, to his injury and damage."

He then prayed that in view of the foregoing, judgment should be rendered against the defendant company, awarding plaintiff a sufficient sum as damages for the injury he is alleged to have sustained by the unlawful and unjustifiable act of the defendant.

Just at this point we might mention that although no specific sum of money was asked to compensate for the alleged damage the plaintiff claims to have sustained by virtue of the scandalous words he says the defendant used of and concerning him, the attachment bond which he annexed to his complaint shows in its body and on its face that he had fixed the penalty of the bond at $15,000, and the judge had approved it for this sum. Now the law controlling attachment bonds states:

"Bond by plaintiff. On an application for an order

of attachment, the plaintiff shall give a bond in an amount equal to one and one-half times the amount demanded in the complaint that the plaintiff shall pay to the defendant all legal costs and damages which may be sustained by reason of the attachment if the plaintiff fails to prosecute the case successfully or if it is finally decided that the plaintiff was not entitled to an attachment of the defendant's property, and that the plaintiff shall pay to the sheriff all of his allowable fees." Civil Procedure Law, Rev. Code 1:7:15(2).

Although the law frowns upon arrest in civil cases, in attachment proceedings it is allowed; and, therefore, since arrest threatens the liberty of the defendant, or the security of his property if he is able to file a bond, every phase of the proceedings should be strictly interpreted with due regard to fairness on both sides. Law writers have claimed attachment to be a harsh proceeding; harsh it is, since "a man's liberty is too sacred to be wantonly restrained" in cases where arrest is demanded. *Thomas* v. *Dennis,* 5 LLR 92, 104 (1936).

The protection of personal property is an inherent right of every party, and when a court proceeding threatens the security of that property, the court should look with disfavor upon anything in the proceeding which does not seem absolutely fair to the party whose property is thereby threatened. But we shall say more about this later in this opinion.

In the answer which the defendant filed, the following defenses were advanced:

1. Defendant denied that plaintiff had paid $120 in cash and $282.70 by check, making a total of $402.70 against his indebtedness as the complaint had claimed; and, as evidence of the correctness of his contention, the plaintiff had not been able to produce a receipt for payment against account and file same with his complaint as should have been done, had such payment against account

been actually made. He explained that this amount was paid over the counter for goods which the plaintiff bought during a regular sales transaction.

2. The defendant denied "making any oral or written statement intended to injure or defame and slander plaintiff's name" as had been alleged in the complaint.

3. The defendant denied that the words alleged to have been used of and concerning the plaintiff are actionable per se, and contends that words not actionable per se cannot support actions for slander without proof of special damages.

Other issues raised in the answer we do not consider of sufficient importance to the case, so have not mentioned them. As shown by the records, this answer was dismissed, and the defendant was ruled to a bare denial of the facts contained in the complaint, which facts went to the jury for their deliberation and judgment thereon. Trial of the case was commenced with the empanelling of the jury on May 13, 1976. Judge John A. Dennis who had been assigned to hold and preside over the March 1976 Term of the Civil Law Court was presiding.

Witnesses for both sides testified and were cross-examined, and the court heard arguments of counsel for both parties. The trial judge charged the jury and sent them to their room of deliberation, from whence they returned a verdict for the plaintiff, awarding him damages in the sum of $50,000. Motion for new trial was heard and denied, and judgment was rendered affirming the jury's verdict. To this judgment the defendant took exceptions, and announced appeal from it to the Supreme Court. Hence the matter has come up before us on regular appeal for final review.

The bill of exceptions filed by appellant company contains twelve counts, in which the following issues among others have been raised:

1. That Judge John A. Dennis, having been assigned to preside over the March 1976 Term of the Sixth Judicial Circuit Court, was without jurisdiction over the cause

when he empanelled a jury to try the same after the end of the term time for which he was assigned, without special assignment from the Chief Justice.

2. That the plaintiff's reply was improperly verified, in that whereas the reply was filed in an action of damages for slander, the affidavit was sworn to in an action of damages for breach of contract. It was therefore error for the judge to have entertained the reply, improperly verified.

3. That the defendant had excepted to the judge's dismissing count 1 of his answer on the ground of duplicity, when indeed and in truth only one issue had been raised and insisted upon in the said count 1 of the answer. It was therefore error for the judge to have dismissed the count on that ground.

4. That the judge erred in overruling objection of defendant's counsel to the question: "Is it not a fact that you as manager of your establishment were sued by the plaintiff in an action of damages for slander and executed a check in the amount of $15,000 indemnifying the plaintiff from all loss and damage he may sustain by reason of the attachment proceedings?"

5. That the judge also erred in denying admission into evidence of the defendant's passport which had been testified to, duly identified, marked D/1 by the court, and which mark had been confirmed. Evidence sought to be advanced by the passport being, that on August 12, 1975, the day on which defendant was alleged to have made the slanderous remarks, he, the defendant, was out of the country.

6. That the defendant had excepted to the verdict of $50,000 returned by the jury as damages plus costs awarded the plaintiff in the case.

Beginning with count 6 above, we will discuss each of these points of the bill of exceptions.

Damages for slander will not be allowed where special damages were not sought, and where the defamatory words are not clearly shown to be actionable per se.

Kennedy v. *Morris* 2 LLR 134 (1913). The question then arises: Are the words, "You are a damn liar, you never paid me any cash and check in the amount of $402.70; you are just saying this to cheat me," words which could be regarded as being actionable *per se?* Let us look at the context in which these words were used.

According to the record in this case, the plaintiff's complaint grew out of his claim to have paid to the defendant the sum of $402.70 against a check which he had issued in favor of defendant, and which had been dishonored by the bank; defendant denied that he had received this sum against the dishonored check, and made the denial in the words which plaintiff claims to be slanderous, and for which he demands damages. In support of this allegation, he made profert of a letter with his answer which his counsel had written to plaintiff. The letter reads:

"July 22, 1975

"Dear Mr. Bonnah:

"Our client, African Mercantile Agencies, has presented to us your check dated June 12, 1975, issued in their favor for $1,700 covering the cost of merchandise supplied to you. The check has been dishonored upon presentation to the Chase Manhattan Bank by our client.

"We are demanding the payment of the value of the aforesaid check to our client through this office with 10% interest on or about the 12th instant. Your failure to make payment of the check will compel us to apply to the Ministry of Justice for a warrant for your arrest without further notice.

"Please save yourself the embarrassment and other inconveniences which such action will entail.

"Very truly yours,
"MORGAN, GRIMES AND HARMON LAW FIRM
"[Sgd.] D. CAESAR HARRIS,
Counsellor at Law."

Plaintiff's answer to this letter, found in the record, reads as follows:

"July 23, 1975

"Dear Counsellor Harris:

"Your letter dated July 22, 1975, addressed to my client Joseph Z. Bonnah has been handed me for the necessary reaction.

"In reply I wish to mention that my client has made part payment of $400 in cash and checks against the $1,700 which your client accepted, with the understanding that the balance would be paid by installments.

"I shall be infinitely obliged were you to be kind enough to indulge my client to make the installment payments through your office and I can assure you that this amount will be settled within a reasonable time.

"You will agree with me since Mr. Bonnah made part payment against the amount, it automatically vitiates the criminal aspect of the matter.

"Kindest personal regards,

"Very truly yours,
"[Sgd.] JAMES DOE GIBSON,
Counsellor at law."

In the context of these two letters, and relating this context to the words alleged to have been uttered with respect to other payments against this same amount, one wonders how much damage could have been done to have warranted the jury awarding such a large sum of money—$50,000.

But aside from whether or not the defendant did indeed utter these words—since he has denied doing so in his answer and in his testimony in court—could the words spoken under the circumstances be regarded as being actionable per se?

To render the words used actionable *per se* according to the rule controlling in defamation cases, the offensive words or expression must be criminally indictable; they must have *falsely* imputed crime to the person allegedly defamed, according to AMERICAN LAW INSTITUTE, *Restatement of the Law of Torts* 2d, §§ 570, 571 (1977). Can it be said that this is the circumstance in this case, considering the context of these two letters recited hereinabove? Let us assume that the particular words deemed to be slanderous in the expression used, are: "You are just saying this to cheat"; would these words in the light of the two letters and according to the definition for defrauding and cheating found in our penal statute constitute a false imputation of crime? Here is the definition for defrauding and cheating in our statute:

> *"Defrauding and cheating.* A person who: . . . (b) Willfully and deceitfully defrauds another out of his rights, money or produce, by drawing and giving in exchange therefor a check or draft, payable by some company, firm, bank or business house abroad, knowing at the time that he has no balance in the hands of such company, firm, bank or business house, and that such check or draft will not be paid." 1956 Code 27:300.

In our view, issuing a check of this kind on a bank abroad is no more criminal in intent than it is when the check is issued on a bank in Liberia; but this is said in passing. We do not find that the words are either false, or that they falsely impute crime to the plaintiff/appellee; therefore they could not be used as a basis for slander, nor to claim damages because of their use.

BOUVIER'S LAW DICTIONARY has defined slander to be, "words falsely spoken, which are injurious to the reputation of another." (8th ed., 1914.) Certainly, "You are a damn liar," cannot be slander, since the Bible claims that all men are liars. Psalm 116:11. We are not convinced that the qualifying adjective "damn" hurts the

reputation of the party any more than it might have been hurt had the adjective not been used.

We have not been able to find anything in the expression to which plaintiff/appellee has taken offense which accused him of having committed a criminal act for which he could be charged. In *Bakeh* v. *Greene,* 14 LLR 204 (1960), this Court laid down the principle that to support an action for slander the offensive words or expression must have falsely accused the defamed person of having committed a criminal act. Perhaps our interpretation of the expression might have been different had it charged the defendant with having positively accused the plaintiff of having cheated in some certain one of their business transactions.

In order that damages may lie, it is not sufficient that an injury must be alleged, but the alleged injury must be proved at the trial. The complaint alleges in counts 3 and 4 that the defendant, intending to injure, defame, and slander plaintiff in his name, fame, and business reputation which he had enjoyed for over thirty years, on August 12, 1975, did utter in the presence and hearing of certain persons who were named, the said defamatory words, and thereby imputed to him the commission of the crime of defrauding and cheating, which had a tendency to "cause people to lessen their confidence in him, thereby bringing him into ridicule, public scandal, infamy and disgrace, and causing him to be shunned and avoided by his friends, neighbors and customers, to his injury and damage." We have searched the records through, and we have examined the testimony of each witness who testified, and have not been able to find any support for the allegation that as a result of the words alleged to have been used by the defendant/appellant, plaintiff/appellee suffered ridicule, public scandal, infamy, or disgrace; or that he thereby has been shunned and avoided by his friends, neighbors, and business customers; or that public confidence in him has in any way lessened.

This allegation in the complaint is one of the issues upon which the case rests, and therefore effort should have been made to prove it, or some part of it at the trial, to have justified damages in any sum. Failure to have had any witness testify to this important part of the complaint destroyed plaintiff's case. But significantly, although the plaintiff took the stand in his own behalf, he did not testify to this part of the complaint. This leaves us without any way of knowing whether the complaint was true or false. How then, without evidence to support it, could the jury have returned a verdict awarding $50,000?

In a similar case of damages, *Levin* v. *Juvico Supermarket,* 24 LLR 187, 193–194 (1975) where circumstances were almost identical with those in this case, our distinguished colleague, Mr. Justice Henries, speaking for a unanimous bench, had this to say in passing on the absence of relevant testimony in such cases:

> "There was no evidence from customers who ceased to patronize the supermarket because of the defective freezer, or from anyone as to what effect the closing down of the business had on the good name and reputation of the supermarket or its manager. Neither was any evidence introduced as to the loss of profits or business, or what percentage of the business dealt with frozen foods. In *Jogensen* v. *Knowland,* 1 LLR 267 (1895), this Court said: 'The want of proof must defeat the best laid action.' Similarly in *Houston* v. *Fischer and Lemeke,* 1 LLR 434, 436 (1904), we said: 'A fundamental rule of pleading and practice is that evidence must support the allegations or averments. . . . In pleadings, allegations are intended only to set forth in a clear and logical manner the points constituting the offense complained of, and if not supported by evidence can in no case amount to proof. Evidence alone enables the court to pronounce with certainty concerning the matter in dispute.' "

We would therefore seem to be without legal authority to uphold the judgment in this case.

Another count of the bill of exceptions which we think necessary to pass upon in determining this case is the trial court's refusal to admit the defendant's passport into evidence, although it had been marked by the court and the mark had been confirmed. In *Walker* v. *Morris,* 15 LLR 424, 429 (1963), we said that "all documentary evidence which is material to issues of fact raised in the pleadings, and which is received and marked by the court, should be presented to the jury."

During the trial of this case the defendant in testifying on his own behalf, was examined as follows:

"Q. Please tell the court and jury all you know about this matter?

"A. I have never expressed [any] impression alleged. I could not have done so because I left Liberia approximately 29th of July, 1975, and returned to Liberia September 15th. When I was not here on August 12th (the day the defamatory words are alleged to have been used), how could I express something when I was not present in the country? And to prove this, here is my passport which has immigration entries: 30th of July, 1975, in London; August 9, 1975, in New York; August 18th, 1975, in Vancouver, Canada; and there is also an entry of Liberian immigration, showing my entry into the country on 15th September, 1975."

Upon request of the defendant's counsel the passport was marked by the court "D/1." We think that the evidence shown on the face of this passport was too important to the issues of fact heard by the jury for the court to have ignored it; and therefore refusing to have had it sent to the jury for their deliberation thereon was reversible error.

Coming back to the question of the bond which was given by the parties in this case in the amount of $15,000

by the plaintiff to indemnify the defendant from loss growing out of the attachment, and a like sum by the defendant to cover costs and damages which may be adjudged in favor of the plaintiff, the statute requires that the attachment bond shall be equal to one and one-half times the damages demanded plus costs. Civil Procedure Law, Rev. Code 1:7.15(2). The penalty of the bond was set by the plaintiff at $15,000, and the bond was approved by the judge for this sum, thereby fixing the monetary extent of the damage plaintiff claimed he had suffered by reason of the slanderous words he alleged defendant had uttered concerning him. Naturally the like sum paid by the defendant to and held by the sheriff to secure the rights of the plaintiff should the complaint be upheld, thereby obligated the defendant to satisfy any damages and costs the jury might award for the plaintiff.

It is our view that the jury could not have awarded more than the plaintiff claimed to have suffered plus costs, in view of the fact that the defendant's bond could not have been foreclosed for more than its face value, especially since no specific sum was testified to at the trial. The jury's verdict awarding $50,000 to plaintiff is guaranteed satisfaction by the defendant's bond of only $15,000, which the plaintiff had accepted and which the judge had approved. Evidence of plaintiff's acceptance is shown by the absence of any proceedings questioning the sufficiency of the defendant's bond.

What should be the measure of damages awarded is in most cases within the discretion of the jury, governed, of course, by the court's charge. But courts have always frowned upon excessive sums awarded by the jury in cases of damages and especially general damages.

> "The general rule on this point as expressed by Judge Story is 'that a verdict will not be set aside in a case of tort for excessive damages, unless the court can clearly see that the jury have committed some very gross and palpable error, or have acted under some

improper bias, influence, or prejudice, or have totally mistaken the rules of law, by which the damages are to be regulated.' In such cases the court should merely consider whether the verdict is fair and reasonable, and in the exercise of sound discretion, under all the circumstances of the case; and it will be so presumed, unless the verdict is so excessive or outrageous with reference to those circumstances as to demonstrate that the jury have acted against the rules of law or have suffered their passions, their prejudices, or their perverse disregard of justice to mislead them. . . . While the general rule is as stated above, the courts must be governed in a measure by the circumstances of the particular case, presented for their consideration; yet where the circumstances of the case or the evidence produced indicate that the verdict has been the result of bias, prejudice, or gross overestimate, they have not hesitated to set it aside." 13 CYC, *Damages,* 121–124 (1904).

Another authority states:

"In actions sounding in damages merely, where the law furnishes no legal rule for measuring them, the amount to be awarded rests largely in the discretion of the jury, and with their verdict the courts are reluctant to interfere. As shown elsewhere, a verdict may be set aside as excessive by the trial court or on appeal when, and not unless, it is so clearly excessive as to indicate that it was the result of passion, prejudice, or corruption or it is clear that the jury disregarded the evidence or the rules of law." 15 AM. JUR., *Damages,* § 205 (1938).

In *Wright* v. *Tay,* 12 LLR 223 (1955), this Court laid down the rule that a verdict awarding damages in a sum above what was asked for in the complaint is excessive. In this case no specific sum was asked for in the complaint, but the plaintiff had set the extent of the damage he suffered at less than $15,000 in his attachment bond

which he annexed to his complaint, and we are of the opinion that the principle which applied in the *Wright* case should also govern in this case.

Appellant has contended that the judge was in error when he dismissed count 1 of his answer on the ground of duplicity. We have not been able to find count 1 of the defendant's answer duplicitous; but for the benefit of this opinion we will quote the said count 1:

> "Because defendant says that count 2 of plaintiff's complaint is false, untrue, and misleading, in that the amount of $120 in cash and check in the sum of $282.70 were never received by defendant against any indebtedness of plaintiff as alleged. Defendant makes over-the-counter purchases from his store time and again, and it was during this type of business transaction that plaintiff paid the cash and check and received goods in the amount of $402.70 from defendant; otherwise, the plaintiff would have made profert of a receipt to substantiate his averment contained in said count 2 of the complaint."

Duplicity, as we understand it, and as the Supreme Court has stated and held in several cases, is a blending of more than one cause of action in the same suit, or more than one defense in the same count of a pleading. In support of the former we cite the case *Henrichsen* v. *Moore,* 6 LLR 351 (1939); and in support of the latter, *Anderson* v. *Anderson* 9 LLR 301 (1947). The Court has in every case ruled against duplicity, whenever it has been established in review of a case on appeal. Duplicity is ground for dismissal of an action or a pleading. "Duplicity" has been defined as follows: "The union of more than one cause of action in one count in a writ, or more than one defense in one plea, or more than a single breach in a replication." BOUVIER'S LAW DICTIONARY (8th ed., 1914).

In this count of the defendant's answer he has denied that a sum of money was paid to him against account due

by plaintiff, but that the same amount had been received in the course of an over-the-counter business transaction. These are not two separate defenses, but one position which challenged the correctness or truthfulness of the manner stated by plaintiff in which defendant had received the amount in question. On this point Bouvier has said that, "the union of several facts constituting together but one cause of action, or one defense, or one breach, does not constitute duplicity."

The bill of exceptions also attacks the reply of the plaintiff for being improperly verified in that, whereas the reply was in a case of damages for slander, the affidavit in support thereof called for a case of damages for breach of contract. It must be remembered that since the judge had dismissed the defendant's answer, the defendant was therefore on a bare denial of the facts contained in the complaint. As such, a defective reply of his adversary could not have improved his trial position, since with or without the reply, he is still on a bare denial of the complaint.

However, in resistance to this count of the bill of exceptions, the appellee questions the appellate court's jurisdiction over the issue, since it was not raised in the court below. Judge Bouvier says that "an affidavit must intelligibly refer to the cause in which it is made. The strict rule of the common law is that it must contain the exact title of the cause. This, however, is not absolutely essential." BOUVIER'S LAW DICTIONARY, *Affidavit* (8th ed., 1914). In *Johns* v. *Witherspoon,* 8 LLR 462 (1944), the Court said that affidavits in common law pleadings are unnecessary and, if attached and defective, should be rejected as surplusage. It is our opinion that the wrong title appearing on the face of the affidavit to the reply in this case is a harmless error and should not affect the merit of the proceedings.

We come now to consider the trial court's alleged lack of jurisdiction over the cause, as has been raised in ap-

pellant's bill of exceptions. Appellee in resisting this count has argued that no motion was filed below to question the jurisdiction of the trial court, and therefore the issue should not be raised in the Supreme Court for the first time. We find ourselves unable to agree with this argument.

Pleadings found in the records certified to us show that this case was filed for the June 1976 Term, and therefore should not have been called for hearing before the third Monday in June, when that term legally commenced. The March 1976 Term, which immediately preceded the June Term, was by assignment presided over by Judge John A. Dennis; and according to law the term time within which a jury could have been empanelled was for only 42 days. The authorizing statute reads: "No jury shall be empanelled after the forty-second day of any quarterly trial session as provided in paragraph 2 of section 3.8, but a jury once empanelled in any case in accordance therewith shall continue until the case is determined." Judiciary Law approved May 1971, § 3.12. The second paragraph of section 3.8 of that statute reads as follows:

> "2. *Duration.* Ten days before the opening of each quarterly session, there shall be a pre-trial chamber session to be held by the circuit judge assigned to sit during the quarterly session, which shall immediately be followed by a trial session beginning with the opening of each quarterly session and continuing for forty-two consecutive days not including Sundays and legal holidays, unless sooner terminated because all business before the court is disposed of before the expiration of that period. Immediately following the close of the trial session there shall be a ten-day closing chamber session to be held by the judge assigned to sit for the quarterly session and any judge concurrently assigned to the circuit."

The March 1976 Term of the Sixth Judicial Circuit began on March 15, and continued for 42 consecutive days

up to and including May 3, 1976; and excluding the seven Sundays and one holiday, March 15, which occurred within that period, the forty-second legal trial day was May 3, 1976. According to the statute quoted above, no jury could have been empanelled after May 3 without violating that law, except where the term-time had been extended by the Chief Justice, who alone has legal authority to assign circuit judges. Judiciary Law, § 3.9.

According to the certified records sent up with the appeal, trial of this case commenced with the empanelling of a jury on May 13, 1976, quite ten days after the legal jury session had ended, and without any extension of time by the Chief Justice. Moreover, the term-time according to law should have ended ten days after the jury session, that is to say on May 13, 1976; yet the judge in flagrant disregard of the law continued to preside in that circuit without any legal authority to do so. Hence he arbitrarily and illegally assumed jurisdiction over the circuit and over the case, which he heard after the end of the March term-time.

As resident judge of another circuit, his every act in this circuit where he was merely presiding for that particular term had to be authorized by his assignment; and where his assignment was for the March Term only, anything he did beyond the duration of the March Term was illegal and void. Jurisdiction was not within the judge's competence to take, unless the taking had support in law. In *Benwein* v. *Whea,* 14 LLR 445 (1961), this Court held that after a circuit judge's assignment has expired, the judge lacks jurisdiction to try an action in the assigned circuit unless the assignment has been renewed.

In considering jurisdiction of the Supreme Court over this issue, in the context of appellee's contention that it cannot be raised here for the first time, we would like to refer to the case *Compagnie des Cables Sud-Americaine* v. *Johnson,* 11 LLR 264 (1952). In that case the Labor Court had heard and determined a matter beyond its

statutory jurisdiction; on appeal the Circuit Court had upheld the judgment. Although the question of lack of jurisdiction was raised in the Supreme Court for the first time, we held then that jurisdiction of the subject matter may be questioned at any time prior to final judgment. We so hold in this case. In that case the judgment was reversed, and we also reverse it in this case with costs against the appellee.

Judgment reversed.